

TRADITION AND TRENDS IN PARENT/CHILD WAIVERS

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State court opinions and state laws cited below are representative of significant differences among jurisdictions regarding the validity of liability waivers in general and parent/child waivers in particular. In the following paragraphs, aspects of waiver validity in twelve jurisdictions are cited in the following order: Utah, Washington, Colorado, Alaska, California, Ohio, Massachusetts, New Jersey, Florida, Michigan, New York, and Virginia.

In a valid and enforceable waiver agreement, the participant agrees to forego any future claim for ordinary negligence, but not gross negligence, in exchange for the opportunity to participate. In so doing, the participant effectively consents to carelessness on the part of the provider, but not outrageous misconduct. While ordinary negligence generally includes unreasonable conduct which causes injury, gross negligence and willful/wanton misconduct require evidence of much more egregious behavior which demonstrates an utter disregard for the physical well being of others.

TRADITIONAL RULE

Children generally lack the legal capacity to enter into binding contracts, including waiver agreements. Further, in the absence of expressed statutory or judicial authorization to do so, parents traditionally have had no legal authority to waive, release, or compromise claims by or against their child. This general rule applies to a waiver, settlement, or release of the child's right of action for a personal injury. See 67A C.J.S. Parent and Child 114, at 469 (1978).

For example, in *Hawkins v. Peart*, 37 P.3d 1062 433 (Utah 10/30/2001), a parent signed a waiver on behalf of his minor daughter releasing liability for future negligence concerning horseback riding. The Utah supreme court voided that agreement, noting that "[a] clear majority of courts treating the issue have held that a parent may not release a minor's prospective claim for negligence." Similarly, in *Scott v. Pacific West Mountain Resort*, 834 P.2d 6 (Wash. 7/30/1992), the Washington state supreme court noted "it is settled law in many jurisdictions that, absent judicial or statutory authority, parents have no authority to release a cause of action belonging to their child.

Numerous cases in other jurisdictions have considered the validity of preinjury releases signed by a parent and concluded that such releases do not bar the child's cause of action for personal injuries. We agree with this view.

Similarly, in the case of *Cooper v. Aspen Skiing Company*, 48 P.3d 1229 (Colo. 2002), the Colorado state supreme court reiterated this traditional principle, holding "the public policy of Colorado affords minors significant protections that preclude a parent or guardian from releasing a minor's own prospective claim for negligence."

To allow a parent or guardian to execute exculpatory provisions on his minor child's behalf would render meaningless for all practical purposes the special

protections historically accorded minors. In the tort context especially, a minor should be afforded protection not only from his own improvident decision to release his possible prospective claims for injury based on another's negligence, but also from unwise decisions made on his behalf by parents who are routinely asked to release their child's claims for liability.

Moreover, the state supreme court noted "[o]ur holding that parents may not release a minor's prospective claim for negligence comports with the vast majority of courts that have decided the issue." In so doing, however, the Colorado supreme court noted that "this question is a matter of legislative prerogative, and, of course, the General Assembly could choose to address it differently."

COLORADO STATUTE

On May 14, 2003, the Colorado general assembly did in fact choose to address the parent/child waiver question "differently," adding Section 13-22-107 to the Colorado Revised Statutes. In so doing, the state legislature expressly declared that "the Colorado supreme court's holding in [*Cooper v. Aspen Skiing Company*] case number 00SC885, 48 P.3d 1229 (Colo. 2002) has not been adopted by the general assembly and does not reflect the intent of the general assembly or the public policy of this state."

Indeed, in passing C.R.S. § 13-22-107 into law, the Colorado general assembly rejected the notion that children needed judicial protection from parent/child waivers. Instead, C.R.S. § 13-22-107, declares it to be "the public policy of this state" that "Children of this state should have the maximum opportunity to participate in sporting, recreational, educational, and other activities where certain risks may exist." Further, the general assembly found that "Public, private, and non-profit entities providing these essential activities to children in Colorado need a measure of protection against lawsuits, and without the measure of protection these entities may be unwilling or unable to provide the activities."

Accordingly, in order to "encourage the affordability and availability of youth activities in this state," the expressed legislative intent of the general assembly in C.R.S. § 13-22-107 is to permit "a parent of a child to release a prospective negligence claim of the child against certain persons and entities involved in providing the opportunity to participate in the activities." Specifically, C.R.S. § 13-22-107 provides that "[a] parent of a child may, on behalf of the child, release or waive the child's prospective claim for negligence."

As a matter of public policy, C.R.S. § 13-22-107 expressly acknowledges that "Parents have a fundamental right and responsibility to make decisions concerning the care, custody, and control of their children" including making "conscious choices every day on behalf of their children concerning the risks and benefits of participation in activities that may involve risk."

According to the general assembly, "[t]he law has long presumed that parents act in the best interest of their children" and, consequently, "proper parental choices on behalf of children that should not be ignored." As a result, assuming the decision is "voluntary and informed," C.R.S. § 13-22-107 states that a parent's decision to waive a child's prospective negligence claim "should

be given the same dignity as decisions regarding schooling, medical treatment, and religious education." (The statute defines a "child" as "a person under eighteen years of age.") Within the context of the statute, a "parent" would also include a legal guardian or any person with legal custody or responsibility for a child as defined in state law.)

While the statute authorizes a parent to release or waive a prospective claim for ordinary negligence on behalf of a child, C.R.S. § 13-22-107 would not "permit a parent acting on behalf of his or her child to waive the child's prospective claim against a person or entity for a willful and wanton act or omission, a reckless act or omission, or a grossly negligent act or omission."

ALASKA STATUTE

Alaska has enacted a similar state law (Alaska Stat. § 09.65.292) which authorizes a "Parental waiver of child's negligence claim against provider of sports or recreational activity" as follows:

a parent may, on behalf of the parent's child, release or waive the child's prospective claim for negligence against the provider of a sports or recreational activity in which the child participates to the extent that the activities to which the waiver applies are clearly and conspicuously set out in the written waiver and to the extent the waiver is otherwise valid.

Alaska Stat. § 09.65.292 applies "to acts or omissions that occur on or after September 14, 2004." The release or waiver must be in writing and shall be signed by the child's parent. Similar to the willful/wanton misconduct exception in the Colorado statute described above, Alaska Stat. § 09.65.292 states a parent "may not release or waive a child's prospective claim against a provider of a sports or recreational activity for reckless or intentional misconduct."

Within the context of Alaska Stat. § 09.65.292, a "sports or recreational activity" is "a commonly understood sporting activity, whether undertaken with or without permission," such as "baseball, softball, football, soccer, basketball, hockey, bungee jumping, parasailing, bicycling, hiking, swimming, and skateboarding."

MODERN TREND?

While acknowledging that it "represents a minority view," the California supreme court, in the case of *City of Santa Barbara v. Superior Court*, 41 Cal. 4th 747; 161 P.3d 1095; 62 Cal. Rptr. 3d 527 (7/16/2007), noted that "courts in California and a few other states have enforced agreements, signed by parents, releasing liability for future ordinary negligence committed against minor children in recreational and related settings." For example, in the case of *Zivich v. Mentor Soccer Club*, 82 Ohio St. 3d 367; 696 N.E.2d 201 (Ohio 6/29/1998), the Ohio state supreme court held that "parents have the authority to bind their minor children to exculpatory agreements in favor of volunteers and sponsors of nonprofit sport activities where the cause of action sounds in negligence."

Similarly, in the case of *Sharon v. City of Newton* (Mass. 6/10/2002), the Massachusetts state supreme court upheld "the validity of a release signed by the parent of a minor child for the

purpose of permitting her to engage in public school extra-curricular sports activities." In the opinion of the state supreme court, "[t]he enforcement of the release is consistent with the Commonwealth's policy of encouraging athletic programs for youth and does not contravene the responsibility that schools have to protect their students."

Our views with respect to the permissibility of requiring releases as a condition of voluntary participation in extracurricular sports activities, and the enforceability of releases signed by parents on behalf of their children for those purposes, are also consistent with and further the public policy of encouraging athletic programs for the Commonwealth's youth..

To hold that releases of the type in question here are unenforceable would expose public schools, who offer many of the extracurricular sports opportunities available to children, to financial costs and risks that will inevitably lead to the reduction of those programs.

Moreover, in the opinion of the court, "the fundamental liberty interest of parents in the rearing of their children" includes their making "judgments and decisions regarding risks to their children."

The above described statute in Colorado adopted similar reasoning in acknowledging a parent's fundamental right to make decisions on behalf of their children, including the authority "to release a prospective negligence claim of the child against certain persons and entities involved in providing the opportunity to participate in the activities."

FOR PROFIT?

Statutes and court decisions which uphold the validity of parent/child waivers recognize a public policy which favors a measure of protection to those providing youth with sport and recreation opportunities. In so doing, however, the courts tend to make a significant distinction between public or non-profit agencies and commercial providers. For example, state supreme courts in New Jersey, *Hojnowski v. Vans Skate Park*, 901 A.2d 381 (N.J. 7/17/2006), and Florida, *Kirton v. Fields*, 997 So. 2d 349 (Fla. 12/11/2008), have recently held waivers unenforceable when executed by a parent on behalf of a child participating in a commercial activity or using a commercial recreation facility.

Similarly, in the case of *Woodman v. Kera, L.L.C.*, 280 Mich.App. 125 (8/12/2008), given the for-profit nature of defendant's business," the Michigan appeals court reiterated the traditional rule and refused to find a waiver by a parent on behalf of their minor child valid. In the opinion of the court, "[t]he Michigan Legislature is the proper institution in which to make such public policy determinations, not the courts." Accordingly, the appeals court strongly encouraged the Michigan legislature "to evaluate this issue, including any distinctions to be acknowledged regarding treatment of pre-injury waivers involving for-profit versus nonprofit organizations or programs."

In New York, state law (NY CLS Gen Oblig § 5-326) provides that any agreement which exempt "pools, gymnasiums, places of public amusement or recreation and similar establishments from liability for negligence" are "void as against public policy and wholly unenforceable" when a facility operator receives a fee or compensation for use of the facility. Meanwhile, in Virginia, the state supreme court has held that any such liability waivers and releases are prohibited "universally" and void as against public policy, *Hiatt v. Lake Barcroft Community Association*, 418 S.E.2d 894 (Va. 1992).

The validity and enforceability of waivers in a particular jurisdiction, including parent/child waivers, is just one aspect of a much larger issue, the availability of limited immunity from liability for ordinary negligence in public and/or private recreation and sports. In a number of jurisdictions, including Virginia, various laws (e.g. governmental immunity statutes and state recreational use statutes) already exist which provide public and/or private entities with the same level of limited immunity available in a valid and enforceable waiver, i.e., no liability for ordinary negligence, only gross negligence.