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Kindly Remove My Child From the Bubble Wrap - Analyzing Childress v. Madison County and Why Tennessee Courts Should Enforce Parental Pre-Injury Liability Concerns

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ARTICLE

KINDLY REMOVE MY CHILD FROM THE BUBBLE WRAP[1]—ANALYZING *CHILDRESS V. MADISON COUNTY* AND WHY TENNESSEE COURTS SHOULD ENFORCE PARENTAL PRE-INJURY LIABILITY WAIVERS

By: Joshua D. Arters &
Ben M. Rose[2]

"I overstepped my parental boundaries at the Aiguille Rock Climbing Center . . . . I signed a waiver absolving it of

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1 Comparing the notion of placing a child in "bubble wrap" to a parent not having the authority to sign a liability waiver on behalf of her child comes from a 2009 editorial in the Orlando New Sentinel after the Florida Supreme Court ruled that parental pre-injury liability waivers were unenforceable. *See infra* note 3.

2 Joshua D. Arters and Ben M. Rose are attorneys in Nashville, Tennessee, and are graduates of the University of Tennessee College of Law. They are counsel of record for the defendant in *Blackwell v. Sky High Sports Nashville Operations*, M2016–00447–COA–R9–CV (Tenn. Ct. App. argued Nov. 16, 2016). In *Blackwell*, a minor filed a lawsuit in Davidson County Circuit Court, by and through his mother, against Sky High Sports Nashville Operations, which is a Nashville business operating in the rapidly-growing "indoor trampoline park" industry. The minor asserted claims related to an injury he allegedly sustained while playing dodgeball at the Sky High Nashville trampoline facility. Sky High Nashville filed a motion with the trial court seeking, among other relief, enforcement of a parental pre-injury liability waiver the minor's mother executed on behalf of the minor. After the trial court denied the motion, the Tennessee Court of Appeals granted Sky High Nashville's application for interlocutory appeal to address the enforceability of the parental pre-injury liability waiver. Much of the substance of this article was presented to the Tennessee Court of Appeals in Sky High Nashville's brief in support of its position and the oral argument held on November 16, 2016. At the time this article was published, the Tennessee Court of Appeals had not yet issued its decision in the *Blackwell* case.

blame if my daughter pulled a Humpty Dumpty from the top of a wall. The Florida Supreme Court recently ruled I didn't have that right. I can make all kinds of decisions for my girl, including life-and-death calls on medical care. But I can't judge the risk she will take scaling a 20-foot wall and decide it is so miniscule that I'm willing to sign a waiver so she can do it—not even if I'm holding the safety line . . . . I appreciate that litigation has made the world a safer place . . . . But I also don't think we should encase kids in bubble wrap and stick them in front of a Wii."[3]

I. Introduction

In today's increasingly litigious society, every parent has likely executed a liability waiver on his or her child's behalf at one time or another. Sending your daughter to play soccer? Liability waiver. Is your son going on a field trip? Liability waiver. Church canoe trip in the Smokies? Liability waiver. These "parental pre-injury liability waivers," as referred to in this article, seem to be virtually everywhere. But are these waivers worth the paper on which they are written? It may come to a surprise to many parents—not to mention the businesses using such waivers—that the traditional answer to that question in Tennessee is "no." In 1989, the Tennessee Court of Appeals held in *Childress v. Madison County* that a parent has no authority to make the decision to waive her child's right to sue someone as a condition of the child's participation in an activity the parent deems worthwhile.[4] Under *Childress*, a parent's relationship to her child—and her authority to make important decisions on her child's

[3] Mike Thomas, Editorial, *Court Decides: Father Doesn't Know Best*, ORLANDO SENTINEL, Apr. 12, 2009, at B1, http://www.fljustice.org/mx/hm.asp?id=Father_doesnt_know_best.

[4] Childress v. Madison County, 777 S.W.2d 1, 6 (Tenn. Ct. App. 1989).

behalf—is arguably no different than that of a distant court-appointed guardian.[5]

In the nearly three decades since *Childress*, however, there have been developments in Tennessee law, United States Supreme Court jurisprudence, and law in other jurisdictions which strongly suggest that the *Childress* rule is obsolete. For example, since *Childress*, the Tennessee Supreme Court has expressly recognized for the first time that the Tennessee Constitution shields a parent's fundamental decision-making authority from state intrusion absent an affirmative finding of significant harm to the child.[6] Similarly, the United States Supreme Court has held that such parental authority is protected under the United States Constitution, as well.[7] Those parental decisions are firmly rooted in the now commonly applied principle that "fit parents act in the best interests of their children," and that the state cannot overturn a parenting decision even if a court believes that a "better" decision could have been made.[8] Based on that principle, numerous other jurisdictions have enforced parental pre-injury liability waivers since *Childress*. Indeed, this article intends to show why other jurisdictions that have enforced parental pre-injury liability waivers since *Childress* accurately reflect a parent's constitutional decision-making authority, thus emphasizing the outdated, unworkable, and unjustified nature of the rule espoused in *Childress*.

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5 *Id.* (citing 44 C.J.S. *Insane Persons* § 49 (1945); 39 Am.Jur.2d, *Guardian & Ward*, § 102 (1968); 42 Am.Jur.2d, *Infants* § 152 (1969)); *see also infra* note 29.

6 Hawk v. Hawk, 855 S.W.2d 573, 582 (Tenn. 1993) (citing TENN. CONST. art I, § 8).

7 Troxel v. Granville, 530 U.S. 57, 72 (2000) (citing U.S. CONST. amend XIV).

8 *Id.* at 68, 73; Wadkins v. Wadkins, No. M2012–00592–COA–R3–CV, 2012 WL 6571044, at *5 (Tenn. Ct. App. Dec. 14, 2012).

Part II summarizes *Childress* and its relatively abbreviated progeny. Part III discusses the important constitutional framework that has developed since *Childress*, which has expressly recognized that the Tennessee and United States Constitutions protect a parent's decision-making authority from unwarranted state intrusion. In other words, such a framework strongly suggests that a parent's decision to execute a parental pre-injury liability waiver is now constitutionally protected, fundamental in character, and superior to Tennessee's *parens patriae*[9] interests. Part IV evaluates both the strong shift favoring the enforcement of parental pre-injury liability waivers in other jurisdictions, and those courts that have been hesitant to follow.[10]

Finally, Part V discusses why enforcement of parental pre-injury liability waivers is appropriate and legally justified in Tennessee. Specifically, a parent has the authority to bind her minor child to other pre-injury contracts, like arbitration provisions or forum selection provisions, so a parental pre-injury liability waiver should not necessarily be any different. This is particularly true because enforcement neither conflicts with a parent's inability to independently settle her child's *existing* tort claim without court approval, nor a minor child's right to avoid or disaffirm a contract. Rather, enforcement is appropriate in light of a parent's newly recognized constitutional parental authority, and it supports other important Tennessee public policies.

A parental pre-injury liability waiver should therefore be enforced under the same standards that any

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9 *Parens patriae* is Latin 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." *Parens patriae*, BLACK'S LAW DICTIONARY (10th ed. 2014).

10 *See also infra* Table I for a state-by-state survey of the enforceability of parental pre-injury liability waivers.

other liability waiver is enforced in Tennessee, and courts should allow parents to remove their children from the proverbial "bubble wrap."

II. An Overview of Current Tennessee Law

A. The General Test for Enforcing Any Given Liability Waiver in Tennessee

A preliminary overview of the factors Tennessee courts apply for determining whether any given liability waiver is enforceable is helpful for a clear understanding of parental pre-injury liability waivers. In that regard, the freedom to contract outweighs the policy favoring the enforcement of tort liability, and, therefore, liability waivers are not *per se* invalid.[11] Certainly, Tennessee courts have long enforced liability waivers.[12] However, courts have been wary of such contracts since their

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[11] Planters Gin Co. v. Fed. Compress & Warehouse Co., 78 S.W.3d 885, 892 (Tenn. 2002); Crawford v. Buckner, 839 S.W.2d 754, 756 (Tenn. 1992); Webster v. Psychemedics Corp., 2011 WL 2520157, at *6 (Tenn. Ct. App. 2011).

[12] Cincinnati, N. O. & T. P. Ry. Co. v. Saulsbury, 90 S.W. 624 (Tenn. 1905); *see e.g.*, Houghland v. Security Alarms & Services, 755 S.W.2d 769, 773 (Tenn. 1988) (liability of burglar alarm service was limited by an exculpatory clause); Evco Corp. v. Ross, 528 S.W.2d 20, 23 (Tenn. 1975) (agreed allocation of risk by parties with equivalent bargaining powers in a commercial setting serves a valid purpose where the agreement explains the parties' duty to obtain and bear the cost of insurance); Kellogg Co. v. Sanitors, 496 S.W.2d 472, 473 (Tenn. 1973) (same); Empress Health & Beauty Spa v. Turner, 503 S.W.2d 188, 191 (Tenn. 1973) (customer assumed the risk of injury from negligence of a health spa); Chazen v. Trailmobile, 384 S.W.2d 1 (Tenn. 1964) (commercial lease absolved both landlord and tenant from liability for a loss resulting from fire); Moss v. Fortune, 340 S.W.2d 902 (Tenn. 1960) (renter assumed the risk incident to injury from the hiring and riding of a horse).

inception.[13] Thus, the enforceability of any given pre-injury liability waiver is governed by certain considerations.[14] As a general matter, these considerations are rooted in contract law principles, public policy considerations, or both.[15]

When addressing whether any given pre-injury liability wavier violates public policy, specifically, the majority of jurisdictions, including Tennessee, have modeled their analytical framework after California precedent.[16] In *Olson v. Molzen*, the Tennessee Supreme Court adopted the reasoning in the seminal California case,

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13 *See* Joseph H. King, Jr., *Exculpatory Agreements for Volunteers in Youth Activities-the Alternative to "Nerf (r)" Tiddlywinks*, 53 OHIO ST. L.J. 683, 710 (1992), https://kb.osu.edu/dspace/bitstream/handle/1811/64603/OSLJ_V53N3_0683.pdf. Although the law is now well-settled that liability waivers are to be construed using a reasonable interpretation rather than a strict approach, Tennessee case law arguably shows the application of different approaches. *Id.*; *see e.g.*, *Empress Health and Beauty Spa*, 503 S.W.2d at 191 (plain, complete, and unambiguous meaning); *Chazen*, 384 S.W.2d at 4 (terms strictly construed); Tate v. Trialco Scrap, 745 F. Supp. 458, 461 (M.D. Tenn. 1989) *aff'd*, 908 F.2d 974 (6th Cir. 1990) (unpublished opinion) (highlighting inconsistencies in Tennessee law on whether a reasonable or strict construction should apply to exculpatory clauses).

14 *Planters Gin Co.*, 78 S.W.3d at 892–93.

15 *See, e.g.*, Adams v. Roark, 686 S.W.2d 73, 75–76 (Tenn. 1985) (general contract law: fraud and duress; and public policy: cannot waive gross negligence or intentional conduct); Miller v. Hembree, 1998 WL 209016, at *3 (Tenn. Ct. App. Apr. 30, 1998) (general contract law: rules of construction); Burks v. Belz-Wilson Properties, 958 S.W.2d 773, 777 (Tenn. Ct. App. 1997) (general contract law: ambiguity); *see also* Memphis & Charleston Railroad Co. v. Jones, 2 Head 517, 518–19 (Tenn. 1859) (same). Pre-injury liability waivers are hybrids of contract and tort law and stem from the inevitable junction of two competing interests: (1) the freedom to contract; and (2) one's duty to take responsibility for his or her actions. *See, e.g.*, Blake D. Morant, *Contracts Limiting Liability: A Paradox with Tacit Solutions*, 69 TUL. L. REV. 715, 716–17 (1995).

16 *See* Olson v. Molzen, 558 S.W.2d 429, 431 (Tenn. 1977).

Tunkl v. Regents of University of California,[17] and promulgated six criteria for determining whether a liability waiver impairs public policy.[18] In short, these criteria consider whether the waiver involves a business that is subject to public regulation, the released party performs a public necessity and/or essential service, the released party has superior bargaining power, and/or the transaction places the person releasing the other from liability in control of the released party.[19] Regardless, a legitimate pecuniary motivation is not contrary to public policy and will therefore not automatically invalidate an exculpatory clause if it is the impetus for including the clause in a contract.[20]

B. *Childress v. Madison County*

In 1989, the Western Section of the Tennessee Court of Appeals in *Childress v. Madison County* held that a parental pre-injury liability waiver that a mother executed on behalf of her mentally handicapped son was against public policy and therefore unenforceable.[21] *Childress* involved an injury sustained by William Childress, a mentally handicapped 20-year-old, while he was training for the Special Olympics at a Y.M.C.A.[22] While under the supervision of Madison County employees, William nearly drowned.[23] William's parents thereafter filed a lawsuit against Madison County and asserted claims on William's behalf.[24]

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17 Tunkl v. Regents of Univ. of Cal., 383 P.2d 441 (Cal. 1963).
18 *Olson*, 558 S.W.2d at 431.
19 *Id.* (citing *Tunkl*, 383 P.2d at 445–46).
20 *See, e.g.*, *Childress*, 777 S.W.2d at 4.
21 *Id.* at 7.
22 *Id.* at 2.
23 *Id.*
24 *Id.*

On appeal, the court evaluated the enforceability of a parental pre-injury liability waiver that the mother executed on William's behalf.[25] After first determining that the waiver did not otherwise violate public policy under *Olson*,[26] the court addressed the first-impression question of whether a parent may execute an enforceable pre-injury liability waiver on behalf of her incompetent child.[27]

The court held that the mother did not have the authority to bind William to the liability waiver because her relationship to him as his parent was essentially the equivalent to that of a legal guardian to a ward.[28] The court reasoned that because a guardian may not generally waive the rights of a ward and because a guardian cannot settle an *existing* lawsuit on behalf of a ward apart from court approval or statutory authority, a parent cannot execute a valid pre-injury waiver as to the rights of her minor or incompetent child.[29] The court placed significant emphasis

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25 *Id.* at 3 (The Tennessee Court of Appeals reversed the trial court's determination that Madison County was not negligent, which consequently implicated the validity of the parental pre-injury liability waiver.).

26 *Id.* at 4. The court first addressed the general public policy criteria outlined in *Olson* and held that the Special Olympics does not normally operate under a public duty and, therefore, does not fall into the public policy exception prohibiting exculpatory clauses. *Id.* (citing *Olson*, 558 S.W.2d at 431). Thus, the court unequivocally held that the liability waiver applied to the mother's claims she asserted on her own behalf. *Id.* at 5–6 (citing Dodge v. Nashville Chattanooga & St. Louis Ry. Co., 215 S.W. 274 (Tenn. 1919) (a party's failure to read does not constitute lack of notice to that party); Dixon v. Manier, 545 S.W.2d 948, 949 (Tenn. Ct. App. 1976)).

27 *Id.* at 6.

28 *Id.* (citing 44 C.J.S. *Insane Persons* § 49 (1945)).

29 *Id.* (citing 39 Am.Jur.2d, *Guardian & Ward*, § 102 (1968); 42 Am.Jur.2d, *Infants* § 152 (1969); Miles v. Kaigler, 18 Tenn. (10 Yerg. 1836) (a guardian cannot settle a minor's existing claim apart from court approval); Spitzer v. Knoxville Iron, Co., 180

on authority related to a guardian's general inability to bind a ward to a contract and waive a ward's *existing* tort claims. [30] Significantly, because there was a lack of authority analyzing parental liability waivers for a minor child's *future* tort claim, the court only relied on two cases regarding a parent's authority to bind her minor child to a pre-injury exculpatory agreement.[31]

S.W. 163 (Tenn. 1915) (same); Tune v. Louisville & Nashville Railroad Co., 223 F. Supp. 928 (M.D. Tenn. 1963) (same)).

30 *Id.* (citing Gibson v. Anderson, 92 So.2d 692, 695 (Ala. 1956) (legal guardian's acts do not estop ward from asserting rights in property); Ortman v. Kane, 60 N.E.2d 93, 98 (Ill. 1945) (guardian cannot wave tender requirements of land sale contract entered into by ward prior to incompetency); Stockman v. City of South Portland, 87 A.2d 679 (Me. 1952) (guardian cannot waive ward's property tax exemption); Sharp v. State, 127 So.2d 865 (Miss. 1961) (guardian cannot waive statutory requirements for service of process on ward); Jones v. Dressel, 623 P.2d 370 (Colo. 1981) (ratification by parent of contract executed by child does not bind child); Whitcomb v. Dancer, 443 A.2d 458 (Vt. 1982) (guardian cannot settle personal injury claim for ward without court approval); Natural Father v. United Methodist Children's Home, 418 So.2d 807 (Miss. 1982) (infant not bound by evidentiary admissions of parent); Colfer v. Royal Globe Ins. Co., 519 A.2d 893 (N.J. Super. 1986) (guardian cannot settle personal injury claim without court approval)).

31 *Id.* at 7 (citing Doyle v. Bowdoin Coll., 403 A.2d 1206, 1208 fn. 3 (Me. 1979); Fedor v. Mauwehu Council, Boy Scouts of Am., 143 A.2d 466, 468 (Conn. 1958)). Significantly, at least two Connecticut cases since *Childress* have enforced pre-injury liability waivers signed by parents against minor children. *See infra*, Saccente v. LaFlamme, No. CV0100756730, 2003 WL 21716586 (Conn. Super. Ct. July 11, 2003); Fischer v. Rivest, No. X03CV000509627S, 2002 WL 31126288 (Conn. Super. Ct. 2002 Aug. 15, 2002). The court in *Childress* suggested that it could be appropriate for the Tennessee legislature or the Tennessee Supreme Court to weigh in on the issue. *Childress*, 777 S.W.2d at 8. However, the Tennessee Supreme Court subsequently denied Madison County's permission to appeal. *Id.*

C. *Rogers v. Donelson-Hermitage Chamber of Commerce* and Subsequent Cases Relying on *Childress*

The last time any Tennessee appellate court has addressed the enforceability of a parental pre-injury liability waiver was only one year after *Childress* when the Middle Section of the Tennessee Court of Appeals decided *Rogers v. Donelson-Hermitage Chamber of Commerce*.[32]

Although the *Childress* court only cited two cases regarding parental pre-injury liability waivers, several other courts had also invalidated parental pre-injury liability waivers before *Childress* was decided. *See, e.g.*, Apicella v. Valley Forge Military Acad. and Junior Coll., 630 F. Supp. 20, 24 (E.D. Pa. 1985) ("Under Pennsylvania law, parents do not possess the authority to release the claims or potential claims of a minor child merely because of the parental relationship") (citing Crew v. Bartels, 27 F.R.D. 5 (E.D. Pa. 1961); Commonwealth v. Rothman, 209 223 A.2d 919 (Pa. Sup. Ct. 1966); Myers v. Sezov, 39 Pa. D & C 2d 650 (1966); Langon v. Strawhecker, 46 Pa. D & C 2d (1969)); Valdimer v. Mount Vernon Hebrew Camps, 172 N.E.2d 283 (N.Y. Ct. App. 1961) ("*A fortiori*, we are extremely wary of a transaction that puts parent and child at cross-purposes and, in the main, normally tend to quiet the legitimate complaint of the minor child. Generally, we may regard the parent's contract of indemnity, however, well-intended, as an instrument that motivates him to discourage the proper prosecution of the infant's claim, if that contract be legal. The end result is either the outright thwarting of our protective policy or, should the infant ultimately elect to ignore the settlement and to press his claim, disharmony within the family unit. Whatever the outcome, the policy of the state suffers.").

[32] Rogers v. Donelson-Hermitage Chamber of Commerce, 807 S.W.2d 242, 242 (Tenn. Ct. App. 1990). Coincidentally, a California case issued in the same month that the *Rodgers* decision was rendered held for the first time—in any jurisdiction—that a parental pre-injury liability waiver was enforceable. *See* Hohe v. Unified Sch. Dist., 224 Cal. App. 3d 1559, 1564–65 (Cal. Ct. App. 1990). *See infra* Section IV(A).

There, Brandy Nichole Rogers, a minor, participated in a horse race event at the annual Andrew Jackson Day celebration at the Hermitage in Nashville, Tennessee.[33] As a condition of Brandy's participation, her parents needed to provide a permission slip.[34] Accordingly, Brandy's mother provided a handwritten note stating: "Brandy Rogers has my permission to race today. Under no circumstances will anyone or anything be liable in case of an accident."[35]

When Brandy crossed the finish line, two vehicles crossed her path, causing her to turn her horse's head to the left to avoid colliding with the vehicles.[36] Unfortunately, the horse fell and rolled over Brandy and caused severe injuries, which ultimately led to her death two days later.[37] Brandy's parents sued the organizers of the horse race and the owners of the land upon which the horse race took place pursuant to Tennessee's wrongful death statute.[38]

The defendants ultimately conceded to the *Childress* rule as it applied to personal injury claims, but argued that it did not apply to the parents' wrongful death claim.[39] In that regard, the defendants argued that the release affected only the parents' rights, as the parents possessed the right to bring the wrongful death claim.[40] In other words, the defendants contended that the enforcement of the release would only bar the parents' right to assert the wrongful death claim and would not limit Brandy's rights,

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33 *Rodgers*, 807 S.W.2d at 243.

34 *Id.* at 243–44.

35 *Id.* at 244. The court reflected on whether the permission slip needed to include specific wording. *Id.* at 243–44. The plaintiffs argued that Brandy told them all that they needed to provide is a simple permission slip, while the defendants asserted that everyone in the race needed to provide a full liability release. *Id.* Ultimately, this constituted a non-issue in the court's determination. *Id.*

36 *Id.* at 244.

37 *Id.*

38 *Id.* at 244–45 (citing TENN. CODE ANN. § 20–5–106(a) (1978)).

39 *Id.* at 246.

40 *Id.*

specifically.[41] The court disagreed, however, and held that the defendants' position "place[d] too much emphasis on where . . . [the] recovery . . . [would] ultimately go, and overlook[ed] the theory of the wrongful death statute and the reasoning of *Childress*."[42] In that regard, the court held that the claim for wrongful death actually belonged to Brandy and that the parents were merely nominated to maintain the action on her behalf.[43] Accordingly, the court held that the parental pre-injury liability waiver that Brandy's mother had executed was unenforceable as to the wrongful death claim pursuant to the *Childress* rule.[44]

Since *Rogers*, *Childress* has not been substantively developed any further, as there have not been any published Tennessee appellate court cases analyzing the *Childress* rule. Similarly, there are only two unpublished cases from United States District Courts in Tennessee that have relied on *Childress* and *Rogers* but contain relatively little substantive analysis of *Childress*.[45]

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41 *Id.*

42 *Id.*

43 *Id.* (stating that "the right of action for wrongful death is that which this child would have possessed had she lived, and any recovery is in her right") (citing Middle Tenn. R.R. v. McMillan, 184 S.W. 20 (Tenn. 1915)).

44 *Id.* at 243. However, the court emphasized that the liability waiver was valid with respect to the mother's claims. *Id*. (citing *Childress*, 777 S.W.2d at 4); *see also Childress*, 777 S.W.2d at 6 (stating that "the trial judge was correct in dismissing this case as to Mrs. Childress individually").

45 *See* Bonne v. Premier Athletics, No. 3:04–CV–440, 2006 WL 3030776, at *5–6 (E.D. Tenn. Oct. 23, 2006); Albert v. Ober Gatlinburg, No. 3:02–CV–277, 2006 WL 208580, at *5–6 (E.D. Tenn. Jan. 25, 2006).

III. A New Constitutional Standard Developed Since *Childress*

In the nearly three decades since *Childress*, both the Tennessee and United States Supreme Courts have expressly recognized a parent's fundamental right to make important decisions for her child pursuant to the Tennessee and United States Constitutions.[46] As a result, the analysis outlined in *Childress* does not fully account for a parent's fundamental decision-making authority. [47] Indeed, as described in this Section, new constitutional precedent strongly suggests that a parent now possesses the constitutional authority to make the decision to sign a parental pre-injury liability waiver, and the state is significantly more limited in overturning that decision by refusing to enforce the contract.

A. Tennessee's New Standard for State Invalidation of Parental Decisions

In *Hawk v. Hawk*—decided four years after *Childress*—the Tennessee Supreme Court recognized for the first time that parents possess a right to make important decisions for their children, and that such a right is a fundamental liberty interest protected by both the Tennessee and United States Constitutions. [48] *Hawk*

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[46] *See Hawk*, 855 S.W.2d at 575 (citing TENN. CONST. art I, § 8); *Troxel*, 530 U.S. at 63 (citing U.S. CONST. amend XIV).

[47] *See Childress*, 777 S.W.2d at 7.

[48] TENN. CONST. art I, § 8; *Hawk*, 855 S.W.2d at 575. At the time of the *Hawk* decision, the United States Supreme Court had not yet expressly recognized the specific character of a parent's fundamental liberty interest protected by the U.S. Constitution—a decision that would come seven years later in *Troxel*. *See Troxel*, 530 U.S. at 63. However, the Tennessee Supreme Court thoughtfully recognized that a parent's authority to make important family decisions is firmly rooted in United States jurisprudence.

involved a parent's constitutional challenge to a Tennessee statute that allowed a court to order visitation to her child's grandparents, if a court deemed such visitation to be as "in the best interests of the minor child."[49] The trial court awarded visitation to the grandparents over the parents' decision to deny such visitation, thereby exercising the state's *parens patriae* power to impose "its own opinion of the 'best interests' of the children over the opinion of the parents[.]"[50]

On appeal, the Tennessee Supreme Court reversed and unequivocally recognized for the first time that parenting decisions are protected from unwarranted state intrusion by Article I, Section 8 of the Tennessee Constitution:

> Tennessee's historically strong protection of parental rights and the reasoning of federal constitutional cases convince us that parental rights constitute a fundamental

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Hawk, 855 S.W.2d at 575; *see also* Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."). Moreover, "[f]or centuries it has been a canon of the common law that parents speak for their minor children. So deeply imbedded in our traditions is this principle of law that the Constitution itself may compel a State to respect it." Parham v. J.R., 442 U.S. 584, 621 (1979) (Stewart, J., concurring) (citations and footnotes omitted). Accordingly, "the 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 for additional obligations." Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925). In that way, the Tennessee Supreme Court was arguably ahead of its time and accurately predicted the outcome of *Troxel*, recognizing the continuing shift toward strengthening parental privacy. *See Hawk*, 855 S.W.2d at 575.

[49] *Id.* at 577 (footnote omitted).

[50] *Id*.

liberty interest under Article I, Section 8 of the Tennessee Constitution. In *Davis v. Davis*, 842 S.W.2d 588 (1992), we recognized that although "[t]he right to privacy is not specifically mentioned in either the federal or the Tennessee state constitution . . . there can be little doubt about its grounding in the concept of liberty reflected in those two documents." *Id.* at 598. We explained that "the notion of individual liberty is . . . deeply embedded in the Tennessee Constitution . . . ," and we explicitly found that "[t]he right to privacy, or personal autonomy ('the right to be let alone'), while not mentioned explicitly in our state constitution, is nevertheless reflected in several sections of the Tennessee Declaration of Rights . . . ." *Id.* at 599–600. Citing a wealth of rights that protect personal privacy, rights such as the freedom of worship, freedom of speech, freedom from unreasonable searches and seizures, and the regulation of the quartering of soldiers, we had "no hesitation in drawing the conclusion that there is a right of individual privacy guaranteed under and protected by the liberty clauses of the Tennessee Declaration of Rights." *Id.* Finding the right to procreational autonomy to be part of this right to privacy, we noted that the right to procreational autonomy is evidence by the same concepts that uphold "parental rights and responsibilities with respect to children." *Id.* at 601. Thus, *we conclude that the same right to privacy espoused in* Davis *fully protects the right of*

> *parents to care for their children without unwarranted state intervention.*[51]

As a result, the Tennessee Supreme Court established a new standard for determining when parenting decisions warrant the state's oversight and intrusion.[52] Following *Hawk*, a party must show more than the "best interests of the child" to overcome a parent's fundamental right to make parenting decisions.[53] That is, the state may only intrude upon parenting decisions *where such intrusion is* "*necessary to prevent serious harm to a child.*"[54] Significantly, the Tennessee Supreme Court provided insight as to what it considered "serious harm to a child" by comparing such harm to "an individualized finding of parental neglect[.]"[55]

According to the Tennessee Supreme Court, the reason for such a limitation is relatively straightforward. Specifically, requiring a court to make an initial finding of harm to the child before intervening in a parental decision works to "prevent judicial second-guessing of parental decisions."[56] Indeed, the Tennessee Supreme Court recognized that Tennessee courts resolutely support such a

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51 *Id.* at 579 (internal footnotes omitted and emphasis added); *see* TENN. CONST. art I, § 8; Davis v. Davis, 842 S.W.2d 588, 598 (Tenn. 1992) (recognizing the right to procreational autonomy).

52 *Hawk*, 855 S.W.2d at 580.

53 *See id.* The Court also affirmed the application of the strict-scrutiny test for the fundamental right to make parenting decisions: "'[w]here certain fundamental rights are involved . . . , regulation[s] limiting these rights may be justified only by a 'compelling state interest' . . . and . . . legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.'" *Id.* at 579 n. 8 (quoting Roe v. Wade, 410 U.S. 113, 155 (1973)).

54 *Id.* at 580 (emphasis added).

55 *Id.* (citing Stanley v. Illinois, 405 U.S. 645 (1972)).

56 *Id.* at 581; *see also* Simmons v. Simmons, 900 S.W.2d 682, 683 (Tenn. 1995) (discussing the *Hawk* standard).

limitation because "[i]mplicit in Tennessee case and statutory law has always been the insistence that a child's welfare must be threatened *before* the state may intervene in parental decision-making."[57]

B. The United States Supreme Court's Recognition of a New Standard

Seven years after the Tennessee Supreme Court's decision in *Hawk*—and eleven years after *Childress*—the United States Supreme Court issued its landmark ruling in *Troxel v. Granville*.[58] Echoing the Tennessee Supreme Court seven years earlier, *Troxel* recognized once and for all that a parent's right to make important decisions for her children free from unwarranted state intrusion is a fundamental liberty interest guaranteed by the Due Process Clause of the Fourteenth Amendment.[59]

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57 *Hawk*, 855 S.W.2d at 581 (emphasis added); *see also* TENN. CODE ANN. § 36–6–101(a)(1) (stating that in a divorce case, the harm from the discontinuity of the parents' relationship compels the court to determine child custody "as the welfare and interest of the child or children may demand"); *Stanley*, 405 U.S. at 658; *Yoder*, 406 U.S. at 234 (denying state action because the First and Fourteenth amendments disallowed the state from forcing Amish children to attend public schools until they reached sixteen years of age); *Pierce*, 268 U.S. at 534–35 (holding that parents' decisions to send their children to private schools were "not inherently harmful," as there was "nothing in the . . . records to indicate that . . . [the private schools] have failed to discharge their obligations to patrons, students, or the state"); *In re* Hamilton, 658 S.W.2d 425 (Tenn. Ct. App. 1983) (holding that state action was appropriate when a child was declared "dependent and neglected" because her father refused cancer treatment for her on religious grounds and such neglect exposed the child to serious harm) (citing State Dep't of Human Serv. v. Northern, 563 S.W.2d 197 (Tenn. Ct. App. 1979)).

58 *See Troxel*, 530 U.S. at 57.

59 *Id.* at 66; *see* U.S. CONST. amend XIV.

Similar to *Hawk*, *Troxel* involved an action for visitation rights brought by the grandparents of two young girls pursuant to a Washington statute which provided that a court may award such visitation over the parents' wishes if the court believes that it "may serve the best interest of the child[.]"[60] After the Washington Supreme Court held that the statute unconstitutionally infringed upon the fundamental rights of parents,[61] the United States Supreme Court granted *certiorari* and affirmed.[62] In doing so, the Court expressly recognized for the first time parents' robust constitutional right to control the upbringing of their children free from unwarranted state oversight:

> [I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.[63]

In addition, *Troxel* confirmed that courts cannot interfere with a parental decision without first finding harm or potential harm to the child.[64] Indeed, it is now clear that after *Troxel*, a court is constitutionally prohibited from overturning a parental decision based on its subjective notion of a child's best interests, even if the court believes that a "better" decision could have been made:

> The problem here is not that the Superior Court intervened, but that when it did so, it gave no special weight to Granville's determination of her daughters' best

60 *Troxel*, 500 U.S. at 61.
61 *See In re* Custody of Smith, 969 P.2d 21 (Wash. 1998).
62 *Troxel*, 500 U.S. at 63.
63 *Id.* at 66.
64 *Id.* at 71.

> interests. More importantly, it appears that the Superior Court applied exactly the opposite presumption[,] [favoring grandparent visitation].
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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.*[65]

Thus, the limitation on state intrusion into a parent's decision—even if a court believes that a "better" decision could have been made—is firmly rooted in a presumption that "fit parents act in the best interests of their children."[66] Tennessee courts now recognize and routinely apply these principles.[67]

IV. Courts Dealing With Parental Liability Waivers

After *Hawk* and *Troxel*, the *Childress* rule no longer accurately reflects the relevant body of constitutional law that has developed over the last three decades. At the very least, *Childress* does not consider a parent's fundamental decision-making authority.[68] Significantly, other jurisdictions have strongly shifted toward favoring the enforcement of parental pre-injury liability waivers since *Childress* by considering a parent's constitutionally

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65 *Id.* at 69, 72–73 (emphasis added); *see also* Lovelace v. Copley, 418 S.W.3d 1 (Tenn. 2013) (affirming the principles of *Hawk* as supplemented by *Troxel*).

66 *Troxel*, 500 U.S. at 68.

67 *See, e.g.*, *Wadkins*, 2012 WL 6571044, at *5.

68 *See id.*

protected decision-making authority.[69] These cases make clear that a court's interference with a parent's decision to execute a parental pre-injury liability waiver on behalf of her minor child constitutes an unwarranted intrusion into the parent's constitutional rights.[70]

A. Courts Have Shifted Toward Enforcement.

In 1990—coincidentally in the same month that the Tennessee Court of Appeals issued its ruling in *Rogers*—California[71] became the first state to hold that parental waivers were enforceable in *Hohe v. San Diego Unified School District*.[72] *Hohe* involved a 15-year-old high school student who was injured while under the effects of hypnosis at a school assembly.[73] The student's father had signed a waiver prior to the child's voluntary participation in the assembly, but he sued claiming the parental pre-injury liability waiver was against public policy and therefore unenforceable because of the child's minority status.[74] Citing *Tunkl*, the California Court of Appeals disagreed and held that no public policy necessarily opposes private, voluntary transactions in which one party agrees to shoulder a risk, which the law would otherwise have placed upon the other party—even in the context of a parental pre-injury liability waiver.[75]

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69 *See, e.g.*, *Hohe*, 224 Cal. App. 3d at 1564–65.

70 *See id.*

71 Notably, California was also the state that ultimately designed the general public policy architecture relating to the validity of liability waivers for the majority of jurisdictions, including Tennessee. *See generally Olson*, 558 S.W.2d; *Tunkl*, 383 P.2d.

72 *Hohe*, 224 Cal. App. 3d at 1564–65.

73 *Id.*

74 *Id.*

75 *Id.* (citing *Tunkl*, 383 P.2d at 441).

In pertinent part, the court held as follows:

> The public as a whole receives the benefit of such waivers so that groups such as Boy and Girl Scouts, Little League, and parent-teacher associations are able to continue without the risks and sometimes overwhelming costs of litigation. Thousands of children benefit from the availability of recreational and sports activities. Those options are steadily decreasing—victims of decreasing financial and tax support for other than the bare essentials of an education. Every learning experience involves risk. In this instance Hohe agreed to shoulder the risk. No public policy forbids the shifting of that burden.[76]

The court acknowledged the rule that a minor can generally disaffirm a contract signed by the minor alone, but ultimately held that parental pre-injury liability waivers are clearly enforceable and may not be disaffirmed.[77] In that regard, the court judiciously reasoned that "[a] parent may contract on behalf of his or her children" and that the law which allows minors to disaffirm their own contracts "was not intended to affect contracts entered into by adults on behalf of their children."[78]

Since *Hohe*, other courts have enforced parental pre-injury liability waivers and have principally relied upon the constitutionally protected parental rights expressly recognized after *Childress*. For example, in *Zivich v. Mentor Soccer Club*, the Ohio Supreme Court enforced a

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[76] *Id.* at 1564.
[77] *Id.*
[78] *Id.* at 1565 (citing Doyle v. Guiliucci, 62 Cal. 2d. 606, 609 (Cal. 1965)).

parental pre-injury liability waiver signed by a mother as a condition of her son's participation in a youth soccer club.[79] There, the court first emphasized the important policy interests favoring the enforcement of liability waivers because they enable organizations the opportunity to provide affordable recreational opportunities for minors.[80] Next, the court recognized that the parental authority to bind one's child to such exculpatory agreements is rooted in the parent's fundamental rights:

> [T]he right of a parent to raise his or her child is a natural right subject to the protections of due process. Additionally, parents have a fundamental liberty interest in the care, custody and management of their offspring. Further the existence of a fundamental, privacy-oriented right of personal choice in family matters has been recognized under the Due Process Clause by the United States Supreme Court.
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> [M]any decisions made by parents "fall within the penumbra of parental authority, e.g., the school that the child will attend, the religion that the child will practice, the medical care that the child will receive, and the manner in which the child will be disciplined."[81]

79 Zivich v. Mentor Soccer Club, 696 N.E.2d 201, 207 (Ohio 1998).
80 *Id.* at 205.
81 *Id.* at 206 (citing Meyer v. Nebraska, 262 U.S. 390 (1923); Santosky v. Kramer, 455 U.S. 745 (1982)).

Indeed, according to the Ohio Supreme Court, invalidating a release is "inconsistent with conferring other powers on parents to make important life choices for their children."[82]

Numerous other jurisdictions have since enforced parental pre-injury liability waivers in a wide variety of contexts, including both commercial and non-commercial settings.[83] For example, in *Fischer v. Rivest*, a Connecticut

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[82] *Id.*; *see also* BJ's Wholesale Club v. Rosen, 80 A.3d 345, 346 (Md. Ct. App. 2013) (noting all of the other laws providing parents the right to make important decisions on their children's behalf); Doyice J. Cotten & Sarah J. Young, *Effectiveness of Parental Waivers, Parental Indemnification Agreements, and Parental Arbitration Agreements as Risk Management Tools*, 17 J. LEGAL ASPECTS OF SPORT 53, 60–61 (2007); King, *supra* note 13, at 716 ("[J]udicial attitudes toward [invalidating] exculpatory agreements signed by parents on behalf of their minor children seem inconsistent with the powers conferred on parents respecting other important life choices.").

[83] *See generally* Kelly v. U.S., 809 F. Supp. 2d 429 (E.D.N.C. 2011) (parental pre-injury liability waiver as a condition of the minor child's participation in the Navy Junior Reserve Officer Training Corps is enforceable against the minor); *Saccente*, 2003 WL 21716586 (parental pre-injury liability waiver as a condition of the minor child's participation in horseback-riding lesson is enforceable against the minor); Fischer v. Rivest, No. X03CV000509627S, 2002 WL 31126288 (Conn. Super. Ct. Aug. 15, 2002) (affirming the parental principles outlined in *Zivich* and enforcing a parental pre-injury liability waiver in the context of youth hockey); Sharon v. City of Newton, 769 N.E.2d 738 (Mass. 2002) (enforcing a parental pre-injury liability waiver in the context of a cheerleading program); Quirk v. Walker's Gymnastics & Dance, No. 005274L, 2003 WL 21781387 (Mass. Super. July 25, 2003) (parental pre-injury liability waiver as a condition of the minor child's participation in gymnastics is enforceable against the minor because "[s]uch releases are clearly enforceable even when signed by a parent on behalf of their child"); *Rosen*, 80 A.3d 345 (parental pre-injury liability waiver as a condition of the minor child's use of a supervised play area offered by a wholesale retail store is enforceable against the minor); Kondrad v. Bismarck Park Dist., 655 N.W.2d 411 (N.D. 2003) (parental pre-injury liability waiver as a condition of the minor child's participation in an after-

court held that a parental pre-injury liability waiver signed by a parent as a condition of his minor son's participation in a hockey league is enforceable against the minor.[84] Citing *Zivich*, the court held that there were persuasive policy reasons to enforce such exculpatory contracts.[85] Noting that there was no essential service or good being

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school child care program is enforceable against the minor); *Zivich*, 696 N.E.2d 201 (parental pre-injury liability waiver in the context of a minor's injury while participating in a youth soccer club); Lehmann v. Har-Con Corp., 76 S.W.3d 55 (Tex. App. 2002) (parents had the authority to execute a prospective liability waiver that binds their minor child's future claims); Walker v. V.I. Waste Mgmt. Auth., 2015 WL 404007 (V.I. Super. Jan. 26, 2015) (parental pre-injury liability waiver as a condition of minor's participation in the Virgin Islands Waste Management Authority's Youth Environmental Summer Program is enforceable against the minor); Osborn v. Cascade Mountain, 655 N.W.2d 546 (Wi. Ct. App. 2002) (parental pre-injury liability waiver as a condition of the minor's participation in skiing is enforceable against the minor).

Notably, at least three other states—Georgia, Idaho, and Mississippi—have cases that imply that a parental pre-injury liability waiver might be enforceable against a minor child. *See, e.g.*, DeKalb Cty. Sch. Sys. v. White, 260 S.E.2d 853 (Ga. 1979) (upholding an athletic eligibility release signed by a parent against a minor child); Smoky v. McCray, 396 S.E.2d 794, 797 (Ga. Ct. App. 1990) (invalidating a parental pre-injury liability waiver because only the minor executed the release and "was fourteen years old and unaccompanied by any adult or guardian"); Davis v. Sun Valley Ski Educ. Found., 941 P.2d 1301 (Id. 1997) (invalidating a parental pre-injury liability waiver because it was not drafted properly); Quinn v. Mississippi State Univ., 720 So.2d 843 (Miss. 1998) (Mississippi Supreme Court held that reasonable minds could differ as to the risks that the plaintiffs were assuming and did not suggest that parental pre-injury liability waivers violate public policy).

84 *Fisher*, 2002 WL 31126288 at *8. Significantly, the Tennessee Court of Appeals in *Childress* relied on a case from Connecticut to support its decision to invalidate the pre-injury liability wavier as to the child. *See Childress*, 777 S.W.2d at 6.

85 *Fisher*, 2002 WL 3116288 at *14.

withheld by the defendant—along with the obvious benefit which recreational and sports activities provide children—the court held that every learning experience involves risks and that no public policy forbids the shifting of the burden to the participant's parents, who have agreed to shoulder such risks.[86]

Similarly, in *Sharon v. City of Newton*, the Massachusetts Supreme Court enforced a parental pre-injury liability waiver signed by a father on behalf of his daughter as a condition of the minor's participation in a cheerleading program.[87] Like the court in *Hohe*, the *Sharon* court addressed the minor's right to avoid a contract, which the court recognized as founded on a policy "to afford protection to minors from their own improvidence and want of sound judgment."[88] The court held that such a policy "comports with common sense and experience and is not defeated by permitting parents to exercise their own providence and sound judgment on behalf of their minor children."[89]

Importantly, however, *Sharon* expressly emphasized the fundamental principles outlined in *Hawk* and *Troxel*—that is, "the law presumes that fit parents act in furtherance of the welfare and best interests of their children, and with respect to matters relating to their care, custody, and upbringing have a fundamental right to make those decisions for them."[90] Indeed, according to the Massachusetts Supreme Court, "[t]o 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

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86 *Id.* at *6.

87 *Sharon*, 769 N.E.2d at 749.

88 *Id.* at 746 (citing Frye v. Yasi, 101 N.E.2d 128 (Mass. 1951)).

89 *Id.* (citing *Parham*, 442 U.S. 584).

90 *Id.* (citing *Parham*, 442 U.S. 584; Petition of the Dep't of Pub. Welfare to Dispense with Consent to Adoption, 421 N.E.2d 28 (Mass. 1981); Sayre v. Aisner, 748 N.E.2d 1013 (2001)).

risks that will inevitably lead to the reduction of those programs."[91]

In *Saccente v. LaFlamme*, a Connecticut Superior Court enforced a parental waiver, noting that "the essence of parenthood is the companionship of the child and the right to make decisions regarding his or her care, control, education health, religion and association." [92] *Saccente* made clear that the ability of a parent to execute a liability waiver on behalf of her child "clearly" comports with both the essence of parenthood and emphasized the presumption that "fit parents act in furtherance of the welfare and best interests of their children, and with respect to matters relating to their care, custody, and upbringing have a fundamental right to make those decisions for them[.]"[93] Indeed, the *Saccente* court reasoned that, by executing the parental pre-injury liability waiver, *the parent made "an important family decision cognizant of the risk of physical injury to his child and the financial risk to the family as a whole.*"[94] Thus, according to the *Saccente* court, in the context of a "voluntary nonessential activity," courts should not disturb such parental judgment.[95]

In 2011, in *Kelly v. United States*, a United States district court analyzed the effectiveness of a parental pre-injury liability waiver under North Carolina law executed on behalf of a minor high school student in conjunction with the student's participation in the Navy Junior Reserve Officer Training Corps.[96] The plaintiffs cited the traditional rule that parents may not bind their children to pre-injury liability waivers.[97] The *Kelly* court recognized that many

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91 *Id.* at 747.

92 *Saccente*, 2003 WL 21716586, at *6 (citing *Pierce*, 268 U.S. at 534–35; *Meyer*, 262 U.S. at 399).

93 *Id.*

94 *Id.* (emphasis added).

95 *Id.*

96 *Kelly*, 809 F. Supp. 2d at 432.

97 *Id.* at 435.

jurisdictions ultimately reached that conclusion by relying on traditional policy principles—including the same principle cited in *Childress*—that refusing to enforce a pre-injury waiver is supported by the well-settled rule that a parent may not settle a minor's post-injury tort claim without court approval.[98]

The *Kelly* court stressed, however, that such a stringent rule may not be applicable in all scenarios, and particularly in circumstances where parental pre-injury liability waivers are enforced in the context of non-commercial activities.[99] The *Kelly* court held that the North Carolina Supreme Court would uphold a parental pre-injury liability waiver in the context of litigation against "schools, municipalities, or clubs providing activities for children."[100]

Recently, in *BJ's Wholesale Club v. Rosen*, the Maryland Court of Appeals enforced a parental pre-injury liability waiver in a commercial setting: a minor child's use of a supervised play area offered by a wholesale retail center.[101] The *Rosen* court held that the parent made the decision to execute the parental pre-injury liability waiver "in the course of the parenting role."[102] The *Rosen* court recognized that such broad parental authority is reflected by many Maryland laws that are rooted in the "societal expectation that parents should make significant decisions pertaining to a child's welfare" and enable parents to "exercise their authority on behalf of their minor child in the most important aspects of a child's life," like important health decisions,[103] important educational and employment

98 *Id.*

99 *Id.* at 436.

100 *Id.* at 437.

101 *Rosen*, 80 A.3d at 345.

102 *Id.* at 362.

103 *Id.* 353 (citing MD. CODE ANN., HEALTH-GEN. § 20–101(b); MD. CODE ANN., HEALTH-GEN. §102 (parental consent to having their children give blood); MD. CODE ANN., HEALTH-GEN. § 20–106(b) (parental consent to the use of a tanning bed); MD. CODE ANN.,

decisions, [104] and important familial and societal decisions.[105]

Ultimately, it is important for the purposes of determining the viability of *Childress* to recognize that the constitutional bases upon which the foregoing courts have enforced parental pre-injury liability waivers are nearly mirror images of the constitutional rights recognized in post-*Childress* Tennessee decisions.[106]

HEALTH-GEN. § 18–4A–02(a) (familial consent to immunization of minor family member); MD. CODE ANN., HEALTH-GEN. § 10–610 (parental authority to commit child for mental treatment); MD. CODE ANN., HEALTH-GEN. § 10–923 (parental consent for therapeutic group home services)).

[104] *Id.* (citing MD. CODE ANN., EDUCATION § 7–301(a)(1) (parental choice to homeschool children); MD. CODE ANN., EDUCATION § 7–301(a)(2) (parental decision to defer compulsory schooling for one year if parent determines child is not mature enough); MD. CODE ANN., EDUCATION § 7–305(c) (parent may meet with school superintendent if child is suspended for more than ten days or is expelled from school); MD. CODE ANN., LABOR AND EMPLOYMENT § 3–211(b)(1) (child may not work more than is statutorily permitted without a parent giving written consent); MD. CODE ANN., LABOR AND EMPLOYMENT § 3–403(a)(7) (wage and hour restrictions do not apply when child works for parent)).

[105] *Id.* (citing MD. CODE ANN., FAMILY LAW § 2–301 (parental permission for child to marry); MD. CODE ANN., FAMILY LAW § 4–501(b)(2) (parental decision to use corporal punishment to discipline children); MD. CODE ANN., FAMILY LAW § 4–522(a)(2) (parental authority to apply on behalf of minor to address confidentiality program); MD. CODE ANN., FAMILY LAW § 10-314 (authority to bring action on behalf of minor child for unpaid child support); MD. CODE ANN., NATURAL RESOURCES § 10–301(h) (consent to a child obtaining a hunting license)).

[106] *Compare Sharon*, 769 N.E.2d at 746-47 (a parental pre-injury liability waiver should be enforced because the "*law presumes that fit parents act in furtherance of the welfare and best interests of their children* . . . and with respect to matters relating to their care, custody, and upbringing have a fundamental right to make those decisions for them") (citation omitted and emphasis added); *Saccente*, 2003 WL 21716586, at *6 (citation omitted and emphasis added); *Rosen*, 80 A.3d at 362 (a parent's decision to

B. Analysis of Cases Hesitant to Enforce Parental Pre-Injury Liability Waivers

Several courts since *Hohe* have refused to enforce parental pre-injury liability waivers.[107] The bases for those rulings can summarily be described with two basic and related ideologies: (1) pre-injury waivers are no different that post-injury settlements; [108] and (2) a parent's relationship to her child is essentially identical to the relationship between a guardian and a ward, and, therefore, a parent has no greater rights than any other court-appointed legal guardian.[109]

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execute a pre-injury liability waiver on her child's behalf should not be invalidated because it was "made by a parent on behalf of her child in the course of the parenting role"), *with Hawk*, 855 S.W.2d at 579 ("without a substantial danger of harm to the child," a court may not constitutionally exercise the state's *parens patriae* interest by imposing its own subjective notions of the "best interests of the child"); *Wadkins*, 2012 WL 6571044, at *5 ("*a fit parent [acts] in [their] child's best interest*") (emphasis added).

107 *See, e.g.*, J.T. ex rel. Thode v. Monster Mountain, 754 F. Supp. 2d 1323 (M.D. Ala. 2010) (applying Alabama law); Hojnowski v. Vans Skate Park, 901 A.2d 381 (N.J. 2006); Scott v. Pacific West Mountain Resort, 834 P.2d 6 (Wash. 1992) (en banc); Meyer v. Naperville Manner, 634 N.E.2d 411 (2d Dist. 1994); Cooper v. Aspen Skiing Co., 48 P.3d 1229 (Colo. 2002); Kirton v. Fields, 997 So.2d 349 (Fla. 2008); Galloway v. State, 790 N.W.2d 252 (Iowa 2010); Hawkins v. Peart, 37 P.3d 1062 (Utah 2001). *See infra* Section V for a more complete analysis as to why these decisions do not fully consider important policy considerations.

108 *Meyer*, 634 N.E.2d at 414; *Cooper*, 48 P.3d at 1234; *Kirton*, 997 So.2d at 359 (Anstead, J., specially concurring); *Galloway*, 790 N.W.2d at 257; *Hawkins*, 37 P.3d at 1066.

109 *Monster Mountain*, 754 F. Supp. 2d at 1327–28 (applying Alabama law); *Hojnowski*, 901 A.2d at 387; *Scott*, 834 P.2d 6. In addition, a small minority of cases also have held that these waivers simply violate the general public policy as promulgated in *Tunkl*, but this analysis has been essentially encompassed by the other cases. *See, e.g.*, Wagenblast v. Odessa, 758 P.2d 968, 973 (Wash. 1988) (a

For example, two years after *Hohe*, in *Scott v. Pacific West Mountain Resort*, the Washington Supreme Court invalidated a parental pre-injury liability waiver signed by a mother on behalf of her minor son.[110] Ultimately, the *Scott* court held that such a pre-injury release was invalid because "a parent generally may not release a child's cause of action after injury, it makes little sense, if any sense, to conclude a parent has the authority to release a child's cause of action prior to an injury."[111] Moreover, in addressing the argument that invalidating such waivers could lead to prohibitive costs for those providing minors with opportunities to participate in inherently more risk-related activities, the *Scott* court recycled the traditional argument that pre-injury waivers simply conflict with the fundamentals of tort law—an argument which has been asserted against the freedom to shift liability for prospective negligence in the context of waivers more generally since their very inception.[112]

However, *Scott* was decided long before the landmark United States Supreme Court ruling in *Troxel*. Notably, *Troxel* was also a case originating in Washington and ultimately led to the United States Supreme Court clearly establishing a parent's broad right to raise her own children.[113] At least one post-*Troxel* Washington case has suggested that the principals espoused in *Troxel* could have affected the *Smith* ruling.[114] Indeed, like *Childress*, there is

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standardized form signed by a parent on behalf of a child releasing a school district from liability is a waiver that impairs the public interest as set forth in *Tunkl*).

110 *Scott*, 834 P.2d at 12.

111 *Id.* at 11–12.

112 *Id.* at 12; *see* King, *supra* note 13, at 710 (concern over general liability waivers has historically led to ambiguity and unpredictable application).

113 *Troxel*, 530 U.S. 57, 62–63.

114 *See* Chauvlier v. Booth Creek Ski Holdings, 35 P.3d 383, 388 n. 27 (Wash. Ct. App. 2001) (noting in *dicta* that "*Scott* . . . focused

certainly a question over whether *Scott* offers a complete analysis of whether a parent's rights in a post-*Troxel* world are superior to the state's *parens patriae* powers.

In *Cooper v. Aspen Skiing Company*, the Colorado Supreme Court refused to enforce a parental pre-injury liability waiver—a decision that prompted the Colorado Legislature to immediately respond with expressly superseding legislation, effectively overturning the ruling.[115] In *Cooper*, a father brought a negligence suit individually and on behalf of his minor son against a ski club in connection with a skiing accident that left the minor blinded and with other severe injuries.[116] The trial court granted summary judgment in favor of the defendants on the basis of the parental pre-injury liability waiver signed on the minor's behalf, and the Colorado Court of Appeals affirmed, relying heavily on *Troxel*—which was published only two months before the Colorado Court of Appeals' ruling in *Cooper*.[117]

The Colorado Supreme Court reversed, holding that Colorado's general public policy affords minors significant protections that ultimately preclude a parent's right to contract on behalf of her minor child.[118] In rejecting the

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solely on the issue of *parental power* to sign releases on behalf of their children" (emphasis added)).

115 *Cooper*, 48 P.3d at 1237 *superseded by statute*, COLO. REV. STAT. ANN. § 13–22–107. Indeed, within a year of the Colorado Supreme Court's holding in *Cooper*, the Colorado Legislature responded with legislation explicitly overturning the Colorado high court's holding. *See* COLO. REV. STAT. ANN. § 13–22–107. The Colorado legislation, which remains current today, allows parents to "release or waive the child's prospective claim for negligence" and ultimately declares that parents have a fundamental right to make decisions on behalf of their children, including deciding whether the children should participate in risky activities. *Id.*

116 *Cooper*, 48 P.3d at 1229.

117 *See* Cooper v. U.S. Ski Ass'n., 32 P.3d 502, 504–05 (Colo. App. 2000) *rev'd sub nom. Cooper*, 48 P.3d 1229.

118 *Cooper*, 48 P.3d at 1231.

argument that a parent's right to execute an enforceable parental pre-injury liability waiver is rooted in the parent's right to make other important decisions for her child, the Colorado Supreme Court essentially held that parental pre-injury liability waivers are different.[119] That is, the *Cooper* court held that the refusal to enforce a pre-injury liability waiver against a child signed by that child's parent does not implicate a parent's *traditional* fundamental interests, such as those respective of a child's education, religious upbringing, or with respect to the parent's right to play a "substantial role" in medical decisions for the child.[120] In other words, according to the Colorado Supreme Court, a parent's fundamental right to make other important decisions on behalf of her child does not necessarily include her decision to accept the risk of her child's participation in a worthwhile activity.[121]

The Florida Supreme Court issued a ruling similar to *Cooper* in *Kirton v. Fields* that received a nearly identical public response and that was overruled by statute in less than a year.[122] In *Kirton*, the estate of a deceased minor child brought an action against the operators of an ATV course after the minor child was killed while

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119 *Id.* at n. 11.

120 *Id.*; *see, e.g.*, *Meyer*, 262 U.S. at 400 (regarding education); *Wisconsin*, 406 U.S. at, 214 (regarding religion); *Parham*, 442 U.S. at 603.

121 *Cooper*, 48 P.3d at 1231.

122 *Kirton* 997 So.2d at 350, *superseded by statute*, FLA. STAT. § 744.301(3). Like *Cooper*, *Kirton* was not the law for very long. The Florida Legislature responded to *Kirton* within a year after its publication and passed FLA. STAT. § 744.301(3), which provides that parents can release commercial providers of activities for children from liability for injuries sustained due to "the inherent risks" of the activity. FLA. STAT. § 744.301(3). The statue provides a rebuttable presumption that a child's injury was caused by an "inherent risk," which may be rebutted by clear and convincing evidence. FLA. STAT. § (3)(c)(2).

operating an ATV.[123] In analyzing the parental pre-injury liability waiver signed on behalf of the minor, the Florida Supreme Court held that the state's *parens patriae* power prevails over a parent's fundamental right to raise his children in the context of a parental pre-injury liability waiver related to *commercial* activity.[124] The court held that, despite *Troxel* and in the court's view of Florida precedent, "[i]t cannot be presumed that a parent who decided to voluntarily risk a minor child's physical well-being is acting in the child's best interest."[125] Rather, in the *Kirton* court's view, "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 [commercial] activity provider."[126] The *Kirton* court essentially emphasized that commercial entities should be treated differently than non-commercial entities on the logic that the former "can take precautions to ensure the child's safety and insure itself when a minor child is injured while participating in the activity[.]"[127] Ostensibly, the *Kirton* court suggested that commercial entities need to be exposed to potential liability as an "incentive to take reasonable precautions to protect the safety of minor children."[128]

Finally, in the sharply divided case *Woodman v. Kera*, the Michigan Supreme Court held that a parental pre-injury liability waiver was against Michigan public policy

123 *Kirton*, 997 So.2d at 351.

124 *Id.* at 358. With its emphasis on *commercial* activity, the *Kirton* court arguably implicitly suggested that a parental pre-injury liability waiver executed in the context of non-commercial activity might have otherwise been enforceable under Florida law.

125 *Id.* at 357.

126 *Id.*

127 *Id.* at 358.

128 *Id.*

and therefore unenforceable.[129] In *Woodman*, a child broke his leg when he jumped off a slide at an indoor play area.[130] Ultimately, the court held that under Michigan common law, a parent has no authority to bind his child by contract, just as a guardian cannot contractually bind a minor ward.[131] Moreover, in ostensibly rejecting *Troxel*, the *Woodman* court emphasized that the fundamental character of a parent's decision-making authority "does not alter this bedrock legal principle."[132] In doing so, the *Woodman* court expressly held that *a parent's relationship to his or her child is essentially no different than the parent's relationship to any other non-consenting third party, like his or her "neighbor or a coworker."*[133] Ultimately, the *Woodman* court recycled the commonly cited position with little substantive analysis that, because a parent cannot settle her child's claim post-injury without court approval,

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129 *Woodman*, 785 N.W.2d at 2. However, as noted by Justice Markman in his concurring opinion, the majority's discussion as to the validity of parental pre-injury liability waivers in *Woodman* is arguably non-binding *dicta*. *Id.* at 19 (Markman, J., concurring). In that regard, the majority's holding that the minor was not bound by the liability waiver was first based upon the court's conclusion that the specific liability waiver at issue did not clearly indicate that the parent was waiving specifically the minor's claims. *Id.*

130 *Id.* at 3.

131 *Id.* at 5 (citing Reynolds v. Garber-Buick Co., 149 N.W. 985 (Mich. 1914); Lothrop v. Duffield, 96 N.W. 577 (Mich. 1903); Armitage v. Widoe, 36 Mich. 124 (1877)).

132 *Id.* Notably, the court evaluated a Michigan statute, which provided a parent the authority to bind a minor child to an arbitration provision in medical care contexts. *Id.* at 8. The court recognized that under Michigan common law specifically, a parent is without the authority to bind her child to an arbitration provision. *Id.* This is in stark contrast to other case law, including law in Tennessee, which has held that minor children may be bound to forum selection clauses selecting arbitral forums. *See infra* Section V(A).

133 *Woodman*, 785 N.W.2d at 8 (emphasis added).

she should not be allowed to waive her child's prospective tort claims.[134]

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[134] *Id.* Having concluded that Michigan's common law supported invalidating the pre-injury liability waiver, the court went on to conclude that it had no place to change the common law. *Id.* at 16.

Notably, there was a stark division among the justices in *Woodman*, which led to equally sharply divided opinions drafted by several justices. For example, four justices concluded that the basis of the court's ruling should be that the common law simply does not permit a parent to contract on behalf of her child. *Id.* at 2, 9, 15 (majority opinion); *id.* at 17 (Hathaway, J., concurring). In addition, ostensibly only three of those justices concluded that pre-injury liability waivers should be treated the same as post-injury settlement releases. *Id.* at 17 (Hathaway, J., concurring). However, three justices, although concurring that the underlying Court of Appeals opinion should be affirmed on other grounds, would hold that pre-injury waivers signed on behalf of minor children by their parents are not presumptively invalid. *Id.* at 18 (Cavanagh, J., concurring); *id.* at 18 (Markman, J., concurring); *id.* at 45 (Corrigan, J. concurring with Markman, J.).

Among the three justices submitting opinions stating that they would *not* hold a parental pre-injury waiver presumptively invalid was Justice Markman, who was joined by Justice Corrigan, who submitted a scathing concurring opinion outlining the erroneous reasoning of the majority holding. *Id.* at 18 (Markman, J., concurring). Indeed, Justice Markman's concurring opinion offers significant insight into the reasons why courts should enforce parental pre-injury liability waivers. *Id.* Ultimately, Justice Markman criticized the majority on a total of seven separate grounds, including: (1) that the rules regarding a minor's incapacity to contract are not inconsistent with a parent exercising her fundamental authority—which *Troxel* solidified—to act in ways which she deems are in the best interest of the child; (2) that logic of cases from other states which enforce parental pre-injury waivers are persuasive; (3) that other authority exists that supports a public policy in favor of enforcing parental pre-injury waivers; (4) that courts should not intrude in a private party's freedom to contract in this context; and (5) that the result will ultimately open the floodgates of litigation and cause dwindling recreational opportunities for minors by "summarily strik[ing] down tens of thousands of waivers . . . believed to be valid and enforceable by thousands of providers of recreational and sporting opportunities

V. Enforcing Parental Pre-Injury Liability Waivers Is Appropriate and Justified Under Current Tennessee Law and Public Policies.

Notwithstanding some courts' hesitancy to enforce parental pre-injury liability waivers, there are certainly valid justifications now supporting enforcement in Tennessee. At the very least, the *Childress* rule does not consider the limits that a parent's now-recognized fundamental decision-making authority places on the state's power to intervene therein. This is particularly true in light of other laws and public policies supporting enforcement, outlined below, which courts that have been hesitant to enforce parental pre-injury liability waivers respectfully fail to fully appreciate.

A. A Parent Can Choose the Forum in Which Her Minor Child's Claim is Litigated and Even Bind Her Child to Mandatory Arbitration.

A parent is certainly not unable to execute other types of enforceable contracts on her child's behalf. For example, courts have routinely permitted parents to prospectively waive a minor's right to file a lawsuit by executing a mandatory arbitration provision on behalf of her child. One of the first cases that analyzed a parent's authority to prospectively select a forum for her minor child's claims was another California case, *Doyle v. Guiliucci*, dealing with a minor's rights under an insurance contract. [135] The *Doyle* court enforced an arbitration provision in the insurance contract against the minor child, holding that it did not unreasonably restrict the child's

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and the parents of children who partake in such opportunities." *Id.* at 43.

135 *Doyle*, 401 P.2d at 1.

rights because it did "no more than specify a forum for the settlement of disputes."[136] Thus, because a parent has a "right and duty to provide for the care of his child," the parent must be allowed to contract on behalf of her minor child in the context of medical services.[137]

Since *Doyle*, other courts have routinely held that parents have the authority to bind their minor child to arbitration provisions in lawsuits involving general negligence and other tort liability.[138] That is because these courts have reasoned that an arbitration provision is really a forum selection provision and merely "specifies the forum for resolution of the child's claim."[139] Forum selection provisions are enforced against minors outside of arbitration provision contexts because courts uphold arbitration provisions on the basis that they are essentially choice of law provisions.[140] Indeed, "[l]ogically, if a parent

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136 *Id*. at 3.

137 *Id*.

138 *See, e.g.*, Global Travel Mktg. v. Shea, 908 So.2d 392 (Fla. 2005) (father's wrongful death action against a safari operator brought on behalf of his minor son after the minor was killed by hyenas while on a safari is subject to arbitration provision signed by the father); *Hojnowski*, 868 A.2d at 1092 (child's claim for bodily injuries he received at a skateboarding park is subject to an arbitration provision signed by the child's parents); Cross v. Carnes, 724 N.E.2d 828 (Ohio 1998) (child's defamation and fraud claims against the Sally Jessy Raphael Show are subject to an arbitration provision signed by the child's parents); *see also* Leong v. Kaiser Found. Hosps., 788 P.2d 164, 169 (Haw. 1990).

139 *Cross*, 724 N.E.2d at 836; *see also Shea*, 908 So.2d at 403392 (arbitration provision merely "constitutes a prospective choice of forum").

140 *Cross*, 724 N.E.2d at 836; *Shea*, 908 So.2d 392. In addition, although laws generally allow minors to disaffirm their own contracts, those laws are ultimately "not intended to affect contracts entered into by adults on behalf of their children." *Hohe*, 224 Cal. App. 3d at 1565 (citing *Doyle*, 401 P.2d 1). It is also not necessary to make a distinction between commercial versus non-commercial entities in the determination of whether a forum

has the authority to bring and conduct a lawsuit on behalf of the child, he or she has the same authority to choose arbitration as the litigation forum."[141] Importantly, it is immaterial that the selected forum is more preferable to one party over a minor child.[142] Rather, the real test is "whether the contracting parties intended that [a minor] should receive a benefit," thereby subjecting the minor to enforceable obligations.[143]

In *Doe v. Cedars Academy*, a Delaware Superior Court upheld a California forum selection and choice of law provision against a minor's personal injury claims.[144] There, a mother entered into a contract with a private boarding school to enroll her minor son as a student.[145] The mother executed the contract individually and on behalf of her minor son, which included a pre-injury liability waiver, a mandatory California forum selection provision, and a California choice of law provision.[146]

After the minor was allegedly sexually assaulted on campus, his mother sued the private school individually and on behalf of her minor son.[147] The court first held that both the mother and her minor son were generally bound by the contract because the son would not have been able to go

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selection provision executed by a parent is enforceable against her minor child. *Compare Cross*, 724 N.E.2d 828, *with Hojnowski*, 868 A.2d 1087 *and Shea*, 908 So.2d 392.

141 *Cross*, 724 N.E.2d at 836.

142 *Shea*, 908 So.2d at 403; *Cross*, 724 N.E.2d at 836 (citing *Zivich*, 696 N.E.2d 201).

143 *Hojnowski*, 868 A.2d at 1092 (citing Borough of Brooklawn v. Brooklawn Hous. Corp., 11 A.2d 83, 85 (N.J. 1940)).

144 Doe v. Cedars Acad., No. 09C–09–136 JRS, 2010 WL 5825343 (Del. Super. Ct. Oct. 27, 2010).

145 *Id.* at *1.

146 *Id.* at *1–2. The contract also contained an arbitration provision, *id.* at *2, but it was ultimately a non-issue as the court dismissed the case in favor of either California courts or an arbitral forum in the state of California. *Id.* at *7.

147 *Id.* at *2.

to that specific school without his mother contracting for such services.[148] The court held that to conclude that the contract did not apply to the minor would be inconsistent with fundamental parental rights and would be practically unworkable:

> [Not enforcing the contract against the minor would be] tantamount to concluding that a parent can never contract with a private school (or any other service provider) on behalf and for the benefit of her child. *As a practical matter, no service provider would ever agree to a contract with a parent if a child could ignore the provisions of the contract that pertain to him without recourse. Such a result is inconsistent with the law's concept of the family which "rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions."*[149]

Because the choice of law and forum selection provisions did not "seriously impair" the plaintiff or the minor son's ability to pursue the cause of action, the court enforced the forum selection and choice of law provisions and dismissed the entire case in favor of California jurisdiction.[150]

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148 *Id*. at *4.

149 *Id.* (emphasis added and footnote omitted) (quoting *Parham*, 442 U.S. at 602).

150 *Id.* at *7 ("Mere inconvenience or additional expense is not sufficient evidence of unreasonableness."); *see also* Sevier Cnty. Bank v. Paymentech Merch. Servs., No. E2005–02420–COA–R3–CV, 2006 WL 2423547, at *6 (Tenn. Ct. App. Aug. 23, 2006) ("A party resisting a forum selection clause *must show more than* inconvenience or annoyance such as *increased litigation*

Recently, in *Williams v. Smith*, the Tennessee Court of Appeals ostensibly arrived at a nearly identical result as those reached in the foregoing authorities and held that a parent may bind her child to a choice of law contract.[151] In *Williams*, the plaintiffs—a minor child and her parents—were involved in a car accident in Tennessee while driving from North Carolina to Missouri in a vehicle owned by North Carolina residents.[152] The vehicle was insured by a Missouri insurance policy and provided coverage of $25,000.00 per person and $50,000.00 per accident.[153] In addition, the relevant policy included a Missouri choice of law provision and provided $50,000.00 per person and $100,000.00 per accident in uninsured motorist coverage.[154] The policy did not provide underinsured motorist coverage, however, and such coverage was not required under Missouri law.[155] Conversely, North Carolina law required a minimum automobile insurance liability limits of $30,000.00 per person and $60,000.00 per accident.[156] Further, under North Carolina law, a driver carrying less than the minimum limits is considered an

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expenses.") (emphasis in original). The court's ruling applied regardless of whether California law could ostensibly be more favorable to Cedars Academy. *See Hohe*, 224 Cal. App. 3d at 1559. The court also emphasized that the forum selection clause was valid and enforceable because the clause was not ambiguous and because the parties "intended to consent to the exclusive jurisdiction of California courts or arbitration panels to litigate their claims." *Cedars Acad.*, 2010 WL 5825343, at *7. The court did not rule on the validity of the liability waiver because the dispositive issue to dismissal was the choice of law and forum selection provisions.

151 Williams v. Smith, 465 S.W.3d 150, 157 (Tenn. Ct. App. 2014).

152 *Id.* at 151–52.

153 *Id.* at 152.

154 *Id.*

155 *Id.*

156 *Id.* (citing N.C. GEN. STAT. ANN. § 20–279.21(b)(2)).

"uninsured motorist." [157] Accordingly, if the insurance policy's choice of law provision were not enforced, North Carolina law would apply, and the plaintiffs' would be permitted to assert a claim for underinsured motorist coverage.[158]

The trial court held that the Missouri choice of law provision was enforceable against the plaintiffs, including the minor, and dismissed the claim for underinsured motorist coverage on the basis of the choice of law provision.[159] The Tennessee Court of Appeals affirmed the trial court, ostensibly sanctioning the notion that a minor may be bound as a non-signatory to a choice of law and/or forum selection provision.[160] Indeed, if the minor in that case was not so bound, the applicable coverage would have been determined under North Carolina law, or arguably through a conflicts of law analysis based on Tennessee common law.[161]

Accordingly, enforcing a contract executed by a parent on her minor child's behalf is certainly not as taboo as one might think. At the very least, such enforcement reflects the well-settled rule that he may be the third-party beneficiary of a contract to which he is a non-signatory.[162]

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157 *Id.* (citing N.C. GEN. STAT. ANN. § 20–279.21(b)(3)).

158 *Id.*

159 *Id*. If Missouri law controlled, there was no underinsured motorist coverage; while if North Carolina law controlled, there was such coverage. *Id*.

160 *See id.*

161 *See generally id*. at 153.

162 *See, e.g.*, Benton v. Vanderbilt Univ., 137 S.W.3d 614, 615–16 (Tenn. 2004); *In re* Justin A.H., No. M2013–00292–COA–R3CV, 2014 WL 3058439, at *9 (Tenn. Ct. App. June 7, 2014); Lopez v. Taylor, 195 S.W.3d 627, 635 (Tenn. Ct. App. 2005); Butler v. Eureka Sec. Fire & Marine Ins. Co., 105 S.W.2d 523, 524 (Tenn. Ct. App. 1937).

B. Enforcing Parental Pre-Injury Liability Waivers Comports With Existing Tennessee Law and Public Policies.

Like several of the cases outlined in Section IV(B), *supra*, the general rule espoused in *Childress* was based upon the following two principles: (1) the rule that a guardian cannot settle a minor's existing tort claim apart from court approval or statutory authority; and (2) the rule that minors cannot waive anything themselves, so their parents cannot waive anything for them.[163] However, a parent's constitutional right to make the "important family decision" to execute a pre-injury liability waiver on her child's behalf is congruent with other Tennessee laws and public policies. In other words, there is no reason to extend the policy behind those two well-settled rules to invalidate a parent's constitutional decision-making authority, because those principles are not mutually exclusive.

1. No Conflict With a Parent's Inability to Settle Her Minor Child's Existing Tort Claims

As *Childress* recognized, Tennessee has long-required court approval for minor settlements.[164] Significantly, the policy for disallowing parents from settling their children's existing tort claims is rooted in the concern that the parent might place her own financial motivations over her child's interests.[165] However, laws permitting state intrusion into a parent's decision to settle her minor's existing tort claim fit precisely within the framework promulgated by *Hawk* and *Troxel*. In other

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163 *Childress*, 777 S.W.2d at 6–7.

164 *See generally* TENN. CODE ANN. § 29–34–105 (2012); Busby v. Massey, 686 S.W.2d 60, 63 (Tenn. 1984); Wade v. Baybarz, 660 S.W.2d 493, 494 (Tenn. Ct. App. 1983).

165 *Id.*

words, enforcing parental pre-injury liability waivers pursuant to *Hawk* and *Troxel* would not disrupt the well-settled rule against the settlement of a minor's existing tort claims apart from court approval.

This is because a parent's decision to settle her child's existing tort claim involves myriad interests that conflict with those of her child—*most significantly, a financial interest*—which naturally rebuts the presumption that she acts in her child's best interests.[166] Stated simply, *Hawk* and *Troxel* certainly permit judicial oversight of a minor settlement based on the obvious conflict of interest created by a parent's potential financial motivations to settle her child's lawsuit, which rebuts the presumption that her decision to settle a claim serves her child's best interests.[167]

When a parent signs a pre-injury liability waiver on her child's behalf, however, her interests do not conflict with her child's—in actuality, they fall squarely in line with her child's interests. Therefore, the constitutional presumption that she acts in her child's best interest remains. As the court in *Zivich* reflected:

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166 *Zivich*, 696 N.E.2d at 206 ("A parent dealing with an existing claim is simultaneously coping with an injured child; such a situation creates a potential for parental action contrary to that child's ultimate best interests.") (quoting Angeline Purdy, *Scott v. Pacific West Mountain Resort: Erroneously Invalidating Parental Releases of A Minor's Future Claim*, 68 WASH. L. REV. 457, 474 (1993)).

167 Even Tennessee's minor settlement statute reflects the specific concern that a parent has a financial motivation to settle her minor child's existing claims by requiring more thorough judicial oversight for larger settlements. *See* TENN. CODE ANN. § 29–34–105 (2012) (a minor settlement that is less than $10,000.00 can be approved by a court without a hearing and relying solely on affidavits from legal guardians, while settlements over $10,000.00 require a greater judicial oversight and a hearing before the court).

"The concerns underlying the judiciary's reluctance to allow parents to dispose of a child's existing claim do not arise in the situation where a parent waives a child's future claim.

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A parent who signs a release before her child participates in a recreational activity . . . faces an entirely different situation. First, such a parent has no financial motivation to sign the release. To the contrary, because a parent must pay for medical care, she risks her financial interests by signing away the right to recover damages. Thus, the parent would better serve her financial interests by refusing to sign the release.

A parent who dishonestly or maliciously signs a preinjury release in deliberate derogation of his child's best interests also seems unlikely. Presumably parents sign future releases to enable their children to participate in activities that the parents and children believe will be fun or educational. Common sense suggests that while a parent might misjudge or act carelessly in signing a release, he would have no reason to sign with malice aforethought.

Moreover, parents are less vulnerable to coercion and fraud in a preinjury setting. A parent who contemplates signing a release as a prerequisite to her child's participation in some activity faces none of the emotional

> trauma and financial pressures that may arise with an existing claim. That parent has time to examine the release, consider its terms, and explore possible alternatives. A parent signing a future release is thus more able to reasonably assess the possible consequences of waiving the right to sue."[168]

Accordingly, laws prohibiting a parent from settling her minor child's existing tort claim without court approval do not necessarily conflict with her constitutionally protected right to make the decision to execute a pre-injury liability waiver on her child's behalf, as *Childress* and other courts that are hesitant to enforce parental pre-injury liability waivers suggest.

2. No Conflict With a Minor's Right to Avoid or Disaffirm Contracts

Similarly, enforcing a parental pre-injury liability waiver does not necessarily conflict with the Tennessee law allowing minors to avoid and/or disaffirm contracts, as *Childress* suggests.[169] To be clear, the minor's right in that context is "based upon the underlying purpose of the 'infancy doctrine' which is to protect minors from their lack of judgment[.]"[170] Certainly, the state has an interest in protecting minors "from squandering their wealth through improvident contracts with crafty adults who would take advantage of them in the marketplace."[171]

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168 *Zivich*, 696 N.E.2d at 206 (quoting Purdy, *supra* note 166, at 474).

169 *Childress*, 777 S.W.2d at 6–7; *see, e.g.*, Dodson v. Shrader, 824 S.W.2d 545, 547 (Tenn. 1992) (quoting Human v. Hartsell, 148 S.W.2d 634, 636 (Tenn. Ct. App. 1940)).

170 *Dodson*, 824 S.W.2d at 547 (citing Halbman v. Lemke, 298 N.W.2d 562, 564 (Wis. 1980)).

171 *Id.*

Parenting decisions are fundamentally different, however, because "the law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions."[172] Indeed, disallowing a parent to exercise her fundamental right to make a decision to execute an enforceable contract on her child's behalf could be as harmful to her child as it would be practically unworkable.[173]

The California Court of Appeals rejected the contention that the policy behind a minor's right to disaffirm contracts conflicts with enforcing parental pre-injury liability waivers, as early as the *Hohe* case: "[a] parent may contract on behalf of his or her children" and the laws allowing minors to disaffirm their own contracts were "not intended to affect contracts entered into by adults on behalf of their children."[174] During the nearly thirty years since *Childress*, courts have routinely recognized that the public policy permitting minors to avoid and/or disaffirm their contracts is congruent with allowing a parent to exercise her parental authority to execute a pre-injury liability waiver on behalf of her minor child:

> [A minor's right to avoid a contract is founded on a policy] to afford protection to minors from their own improvidence and want of sound judgment [and such a purpose] comports with common sense and experience and is not defeated by permitting parents to exercise their own providence and

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172 *Parham*, 442 U.S. at 602.

173 *Cedars Acad.*, 2010 WL 5825343, at *4 ("As a practical matter, no service provider would ever agree to a contract with a parent if a child could ignore the provisions of the contract that pertain to him without recourse.").

174 *Hohe*, 224 Cal. App. 3d at 1565 (citing *Doyle*, 62 Cal.2d. at 609).

> sound judgment on behalf of their minor children.[175]

Further, Tennessee law already reflects its trust in parenting decisions by granting a parent the authority to make significant, potentially life-altering decisions on behalf her minor child in a number of instances. For example, statutory law provides a parent the authority to refuse medical treatment for her minor child,[176] to consent to an abortion procedure,[177] or to submit her minor child to involuntary mental health or socioemotional screening.[178] Additionally, statutory law allows a parent to submit her minor child to convulsive therapy,[179] to provide consent for her minor child to be legally married,[180] to release her minor child's protected health information,[181] to release her minor child's confidential education records,[182] or to allow, or prohibit, a physician to report a pregnancy believed to be

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175 *Sharon*, 769 N.E.2d at 746 (upholding parental pre-injury liability waiver) (citing *Parham*, 442 U.S. at 602; Frye v. Yasi, 101 N.E.2d 128 (Mass. 1951)); *see also* Elisa Lintemuth, *Parental Rights v. Parens Patriae: Determining the Correct Limitations on the Validity of Pre-Injury Waivers Effectuated by Parents on Behalf of Minor Children*, 2010 MICH. ST. L. REV. 169, 197 (2010) ("Parents have the fundamental right to make decisions for their child and do so every day . . . . There is a presumption that in doing so, parents act in their child's best interest . . . . '[And when executing a liability waiver on behalf of their child], in the circumstance of a voluntary, nonessential activity, [courts] will not disturb this parental judgment.'") (citing *Parham*, 422 U.S. at 602) (quoting *Sharon*, 769 N.E.2d at 747).

176 TENN. CODE ANN. § 34–6–307 (2003).

177 TENN. CODE ANN. § 37–10–303 (2006).

178 TENN. CODE ANN. § 49–2–124 (2016).

179 TENN. CODE ANN. § 33–8–303 (2000).

180 TENN. CODE ANN. § 36–3–106 (2012).

181 TENN. CODE ANN. § 68–1–118 (2001).

182 TENN. CODE ANN. § 49–7–1103 (2005).

the result of statutory rape.[183] Moreover, these rights extend to the often varied situations that a parent may face, such as the right to allow her minor child to donate blood,[184] to have physicians furnish information regarding contraceptive supplies to her minor child,[185] to allow her minor child to be employed,[186] to solicit her minor child's name, photograph, or likeness,[187] to allow her minor child to get a body piercing,[188] to allow her minor child to use a tanning device,[189] or the authority to expose her minor child to clothing-optional beaches.[190] Certainly, the trust that Tennessee law extends to parenting decisions has been long-recognized as contradictory to the invalidation of parental pre-injury liability waivers, or as Professor King observed:

> *[J]udicial attitudes toward [invalidating] exculpatory agreements signed by parents on behalf of their minor children seem inconsistent with the powers conferred on parents respecting other important life choices.*[191]

Indeed, if the law respects a parent's authority to make other significant decisions on behalf of her child in numerous contexts, there is not necessarily any reason to

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183 TENN. CODE ANN. § 38–1–302 (1996); *see also* State v. Goodman, 90 S.W.3d 557, 559 (Tenn. 2002) (holding that a minor child may be removed and/or confined against her will, absent force, threat, or fraud, and such removal/confinement would not constitute kidnapping given parental consent).

184 TENN. CODE ANN. § 68–32–101 (2008).

185 TENN. CODE ANN. § 68–34–107 (1971).

186 TENN. CODE ANN. § 50–5–105 (1999).

187 TENN. CODE ANN. § 47–25–1105 (2005).

188 TENN. CODE ANN. § 62–38–305 (2001).

189 TENN. CODE ANN. § 68–117–104 (2002).

190 TENN. CODE ANN. § 36–6–304 (1996).

191 King, *supra* note 13, at 716; *see also Rosen*, 80 A.3d at 346.

believe that public policy demands invalidating her decision to prospectively waive her child's right to sue so that the child can participate in a worthwhile activity. This is particularly true in light of a parent's newly-recognized fundamental right to make precisely those types of decisions.

Accordingly, laws allowing a minor to avoid or disaffirm a contract certainly do not necessarily conflict with a parent's constitutionally protected right to make the decision to execute a pre-injury liability waiver on her child's behalf.

3. Enforcing Parental Pre-Injury Liability Waivers Furthers Other Important Public Policies.

Finally, enforcing a parental pre-injury liability waiver promotes other important Tennessee public policies. For instance, enforcing a pre-injury liability waiver executed by a parent on behalf of her minor child encourages the availability of affordable recreational activities. The California Court of Appeals emphasized this benefit:

> Hohe volunteered to be part of a [school] activity because it would be "fun." There was no essential service or good being withheld by [the school]. Hohe, like thousands of children participating in recreational activities sponsored by groups of volunteers and parents, was asked to give up her right to sue. *The public as a whole receives the benefit of such waivers so that groups such as Boy and Girl Scouts, Little League, and parent-teacher associations are able to continue without the risks and sometimes overwhelming costs of litigation.*

> *Thousands of children benefit from the availability of recreational and sports activities. Those options are steadily decreasing*—victims of decreasing financial and tax support for other than the bare essentials of an education. Every learning experience involves risk. In this instance Hohe agreed to shoulder the risk. No public policy forbids the shifting of that burden.[192]

Moreover, although parental pre-injury liability waivers have been enforced in cases involving non-commercial settings, even those cases emphasize the primary importance of promoting opportunities for children to "learn valuable life skills . . . to work as a team and how to operate within an organizational structure . . . and to exercise and develop coordination skills."[193] Accordingly, the public policy behind enforcing parental pre-injury liability waivers is nevertheless furthered when commercial activity is involved.[194]

Therefore, a commercial versus non-commercial distinction is not necessarily appropriate when determining the enforceability of a parental pre-injury liability waiver. Indeed, courts have expressly analyzed and rejected the commercial versus non-commercial distinction, emphasizing that such a distinction has no basis in common law:

> Whether a child's judgment renders him less capable of looking out for his own welfare heeds true whether or not he or she is

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192 *Hohe*, 224 Cal. App. 3d at 1564.

193 *Zivich*, 696 N.E.2d at 205.

194 *See, e.g.*, *Saccente*, 2003 WL 21716586, at *5 (Conn. Super. Ct. July 11, 2003) (enforcing a parental pre-injury liability waiver in a case involving a contract for a child's horseback riding lessons).

> playing on a school playground or in a commercial setting. As we have explained, parents are charged with protecting the welfare of their children, and we will defer to a parent's determination that the potential risks of an activity are outweighed by the perceived benefit to the child when she executes an exculpation agreement.[195]

Stated simply, applying a commercial versus non-commercial distinction leads to the flawed and paradoxical conclusion that the law should allow parents to exculpate only non-profit and state entities because such entities either cannot "take precautions to ensure the child's safety and insure [themselves]" from risks of loss, or they simply do not need any incentive to take reasonable precautions as commercial entities purportedly do.[196] Indeed, such logic clearly conflicts with the entire purpose of the *parens patriae* principle itself: that the state has the ultimate responsibility—and the *ability*—to act as provider of protection to those unable to care for themselves.

Moreover, a rejection of the commercial versus non-commercial distinction is supported by scholarly publications analyzing this precise issue:

> [A court which invalidated a parental pre-injury liability waiver] reached a flawed decision which threatens children's organized recreational activities. Such

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[195] *Rosen*, 80 A.3d at 360 (enforcing a parental pre-injury liability waiver in a case involving a contract between a mother and a retailer); *see also Lehmann*, 76 S.W.3d at 55 (enforcing a parental pre-injury liability waiver in a case involving a commercial entity); *Osborn*, 655 N.W.2d at 546 (enforcing a parental pre-injury liability waiver in a case involving a contract between a mother and a ski resort).

[196] *See, e.g.*, *Rosen*, 80 A.3d at 358.

> activities already suffer from severe pressures. Increased costs and the fear of litigation threaten to drive recreation activities for children out of the market. Given the virtues of and need for children's recreational programs, courts should do what they can to encourage such programs. *Because recreation providers will take care of their customers in order to assure their continued patronage, validating releases that protect a recreation provider would help to keep children's recreational programs available and affordable without diminishing the safety of such programs.*[197]

In addition to an outright rejection of the commercial versus non-commercial distinction, other courts have emphasized that such a distinction would necessarily render an unclear application of the law:

> For example, is a Boy Scout or Girl Scout, YMCA, or church camp a commercial establishment or a community-based activity? Is a band trip to participate in the Macy's Thanksgiving Day parade a school or commercial activity? What definition of commercial is to be applied?

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[197] Purdy, *supra* note 166, at 475–76 (emphasis added). *See generally*, Robert S. Nelson, *The Theory of the Waiver Scale: An Argument Why Parents Should be Able to Waive their Children's Tort Liability Claims*, 36 U.S.F. L. REV. 535 (2002); Cotten, *et al*., *supra* note, 82; Allison M. Foley, *We, the Parents and Participant, Promise not to Sue . . . Until There is an Accident. The Ability of High School Students and their Parents to Waive Liability for Participation in School-Sponsored Athletics*, 37 SUFFOLK U. L. REV. 439 (2004).

> 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.[198]

Certainly, the ultimate issue is a threat of litigation that often "strongly deters" the availability of recreational activities for children in *any setting*.[199] Public policy has a strong preference for protecting opportunities to provide children "*affordable* recreation."[200] Therefore, the problem is not whether to allow parental pre-injury liability waivers in a non-commercial versus a commercial setting. Rather, enforcement of parental pre-injury liability waivers is important to diminish the risk of overwhelming costs of litigation that constrains opportunities for children:

> [W]here parents are no longer able to sign preinjury waivers allowing their minor

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198 *Rosen*, 80 A.3d at 360 (citing *Kirton*, 997 So. 2d at 363 (Wells, J., dissenting)).

199 *Id.*; *cf. Zivich*, 696 N.E.2d at 206.

200 *Zivich*, 696 N.E.2d at 205 (emphasis added).

> children to participate in commercial activities, businesses across [that] state have become weary of exposure to total liability. Even businesses whose customer base is comprised mostly of adults have wheezed at the potential legal implications affecting their patrons. These companies also cater to the children accompanying their parents . . . . [Rulings that invalidate parental pre-injury liability waivers] have several long-lasting impacts on the manner in which corporations, both in and out of the state, anticipate risks that were previously immunized by exculpatory agreements. First, corporate risk management offices must undertake a careful analysis of the consequences exposed by the invalidation of parental waivers. Second, corporations will likely need to carry additional insurance to cover lawsuits by minors, which are now unleashed by the blanket of voidance of certain preinjury waivers. This will lead to the eventual rise in prices charged to customers, as businesses receive the bills from the insurance contracts. In the end, the consumer will face a higher cost to engage in certain activities as a result of the delicate balance between the state's role as *parens patriae* and the parent's right to assess the perils awaiting her child.[201]

[201] Jordan A. Dresnick, *The Minefield of Liability for Minors: Running Afoul of Corporate Risk Management in Florida*, 64 U. MIAMI L. REV. 1031 (2010); *see also Fischer*, 2002 WL 31126288, *14 (enforcing a liability waiver signed by a parent against his child in conjunction with his participation in a hockey league because a contrary holding would deprive "thousands of children . . . of the valuable opportunity to play organized sports").

Accordingly, enforcing parental pre-injury liability waivers against minors is not only required by the constitutional authority developed since *Childress*, but also promotes Tennessee public policy.

VI. Conclusion

Certainly, the law has changed since *Childress*, as recognized by other jurisdictions. At the very least, *Childress* fails to fully appreciate a parent's newly-recognized constitutional authority. However, there is certainly good reason to believe that the *Childress* rule now entirely misses the mark. In that regard, a parent's decision to execute parental pre-injury liability waiver is now more accurately considered as constitutionally protected, fundamental in character, and superior to Tennessee's *parens patriae* interests. A parental pre-injury liability waiver should therefore be enforced under the same standards that any other liability waiver that is enforced in Tennessee. [202] Undoubtedly, such parental pre-injury liability waivers allow businesses the ability to provide children with affordable and worthwhile activities in an increasingly litigious society. Tennessee courts should therefore extend a parent the recognition that she makes the decision to execute a parental pre-injury liability waiver with her child's interests in mind.

In short, parents and children would simply be better off if courts recognized a parent's right to remove her child from the "bubble wrap."

[202] *See Olson*, 558 S.W.2d at 431.

TABLE I: STATE-BY-STATE SURVEY

State	Enforcement	Relevant Case(s) and/or Statute(s)
Ala.	Unlikely	Thode v. Monster Mountain, 754 F. Supp. 2d 1323, 1328 (M.D. Ala. 2010) ("Based on all of the above considerations, the court concludes that, under Alabama law, a parent may not bind a child to a pre-injury liability waiver in favor of a for-profit activity sponsor by signing the liability waiver on the child's behalf. Accordingly, the Release Thompson signed on J.T.'s behalf, based on authority given by J.T.'s parents, does not bar J.T. from asserting a negligence claim against the Monster Mountain Defendants.")
Alaska	Yes	ALASKA STAT. § 09.65.292 ("Except as provided in (b) of this section, 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. The release or waiver must be in writing and shall be signed by the child's parent.")

Ariz.	Yes (Equine Facilities)	Ariz. Rev. Stat. § 12–533(A)(2) ("An equine owner or an agent of an equine owner who regardless of consideration allows another person to take control of an equine is not liable for an injury to or the death of the person if . . . [t]he person or the parent or legal guardian of the person if the person is under eighteen years of age has signed a release before taking control of the equine.")
Ark.	Unlikely	Williams v. United States, 660 F. Supp. 699, 703 (E.D. Ark. 1987) ("A custodian of a child who advises [the child's] parent of potentially hazardous activity in which his child may participate and receive injury through no fault of anyone does not by doing so effectively disclaim legal responsibility for injuries to the child that the custodian causes . . . . It is inconsistent for the Government to promise 'supervised' activities and then disclaim liability when a child dies because he was lost to observation for an unreasonable period of time by those charged with responsibility of supervision . . . . To permit the Government to assume the care and custody of school children without an underlying policy encouraging the exercise of reasonable care would violate basic principles of fairness.")
Cal.	Yes	Hohe v. San Diego Unified Sch. Dist., 224 Cal.App.3d 1559, 1564 (Cal. Ct. App. 1990) ("The public as a whole receives the benefit of such waivers so that groups such as Boy and Girl Scouts, Little League, and parent-teacher associations are able to continue without the risks and sometimes overwhelming costs of litigation. Thousands of children benefit from the availability of

		recreational and sports activities. Those options are steadily decreasing—victims of decreasing financial and tax support for other than the bare essentials of an education. Every learning experience involves risk. In this instance Hohe agreed to shoulder the risk. No public policy forbids the shifting of that burden.")
		Aaris v. Las Virgenes Unified Sch. Dist., 75 Cal. Rptr. 2d 801, 805 (Cal. Ct. App. 1998) ("It is well established that a parent may execute a release on behalf of his or her child.")
		Eriksson v. Nunnink, 183 Cal. Rptr. 3d 234 (Cal. Ct. App. 2015) (parental pre-injury liability waiver enforced against minor's wrongful death claim).
Colo.	Yes	COLO. REV. STAT. ANN. § 13–22–107 (2003) ("The general assembly further declares that the Colorado supreme court's holding in [Cooper v. Aspen Skiing Co.], 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 . . . . A parent of a child may, on behalf of the child, release or waive the child's prospective claim for negligence.")
Conn.	Yes	Fischer v. Rivest, 33 Conn. L. Rptr. 119 (Conn. Super. Ct. Aug. 15, 2002) ("The injuries sustained by Gabriel Fischer were tragic. However, if courts did not enforce this type of exculpatory contract, organizations such as USA Hockey, little league and youth soccer, and the individuals who volunteer their time as coaches could well decide that the risks of large legal fees and potential

		judgments are too significant to justify their existence or participation. Thousands of children would then be deprived of the valuable opportunity to play organized sports.")
		Saccente v. LaFlamme, 35 Conn. L. Rptr. 174 (Conn. Super. Ct. July 11, 2003) ("The decision here by her father to let the minor plaintiff waive her claims against the defendants in exchange for horseback riding lessons at their farm is consistent with the rights and responsibilities regarding a child possessed by a parent and recognized by the legislature and cannot be said to be against public policy. The plaintiff's father made a conscious decision on the behalf of his child to go to the defendants' farm for the purpose of obtaining horseback riding lessons for her. This was obviously an independent voluntary decision made upon what he viewed as her best interests.")
Del.	Possibly	Doe v. Cedars Acad., No. 09C–09–136 JRS, 2010 WL 5825343, at *4 (Del. Super. Ct. Oct. 27, 2010) (enforcing a California forum selection provision contained in a parental pre-injury liability waiver because "[t]o conclude that John Doe is not bound by the Agreement's otherwise enforceable terms, as Plaintiffs contend, simply because he is a minor would be tantamount to concluding that a parent can never contract with a private school (or any other service provider) on behalf and for the benefit of her child. As a practical matter, no service provider would ever agree to a contract with a parent if a child could ignore the provisions of the contract that pertain to him without recourse. Such a result is

		inconsistent with the law's concept of the family which 'rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions.'" However, the court declined to address the enforceability of the liability waiver itself: "This Court need not weigh in on behalf of Delaware, however, because even if the pre-injury release is invalid, the presence of the provision would not render the entire Agreement unenforceable.") (footnotes omitted).
Fla.	Yes	FLA. STAT. ANN. § 744.301(3) ("In addition to the authority granted in subsection (2), natural guardians are authorized, on behalf of any of their minor children, to waive and release, in advance, any claim or cause of action against a commercial activity provider, or its owners, affiliates, employees, or agents, which would accrue to a minor child for personal injury, including death, and property damage resulting from an inherent risk in the activity.") *But see* Claire's Boutiques v. Locastro, 85 So.3d 1192, 1200 (Fla. Dist. Ct. App. 2012) ("After [Kirton v. Fields, 997 So.2d 349 (Fla. 2008)], however, the legislature passed a statute to limit its holding by permitting parents to release a commercial activity provider for a child's injuries occurring as a result of the inherent risk of the activity under certain circumstances . . . . Those circumstances do not include releasing the commercial activity provider from liability for its own negligence . . . . [T]he legislature did not intend to permit commercial activity providers to avoid the consequences of their own

		negligence when children are injured, recognizing the essential holding of *Kirton*.") (footnotes and internal citations omitted).
Ga.	Possibly	*See* DeKalb Cty. Sch. Sys. v. White, 260 S.E.2d 853 (Ga. 1979) (enforcing an athletic eligibility release executed by a parent against the parent's minor child).
Haw.	Yes	HAW. REV. STAT. ANN. § 663–10.95(a) ("Any waiver and release, waiver of liability, or indemnity agreement in favor of an owner, lessor, lessee, operator, or promoter of a motorsports facility, which releases or waives any claim by a participant or anyone claiming on behalf of the participant which is signed by the participant in any motorsports or sports event involving motorsports in the State, shall be valid and enforceable against any negligence claim for personal injury of the participant or anyone claiming on behalf of and for the participant against the motorsports facility, or the owner, operator, or promoter of a motorsports facility. The waiver and release shall be valid notwithstanding any claim that the participant did not read, understand, or comprehend the waiver and release, waiver of liability, or indemnity agreement if the waiver or release is signed by both the participant and a witness. A waiver and release, waiver of liability, or indemnity agreement executed pursuant to this section shall not be enforceable against the rights of any minor, unless executed in writing by a parent or legal guardian.") Leong v. Kaiser Found. Hosps., 788 P.2d 164 (Haw. 1990) (enforcing against a minor an arbitration provision

		contained in a contract executed by the minor's parents).
Idaho	Possibly	Davis v. Sun Valley Ski Educ. Found., 941 P.2d 1301 (Id. 1997) (invalidating a parental pre-injury liability waiver because it was not drafted properly). Accoamzzo v. CEDU Educ. Servs., 15 P3d 1153 (Id. 2000) (discussing the enforceability of an arbitration provision).
Ill.	No	Meyer v. Naperville Manner, 634 N.E.2d 411, 414 (Ill. Ct. App. 1994) ("Since a parent generally may not release a minor child's cause of action after an injury, there is no compelling reason to conclude that a parent has the authority to release a child's cause of action prior to the injury.") Wreglesworth ex rel. Wreglesworth v. Arctco, 738 N.E.2d 964, 969 (Ill. App. Ct. 2000) ("Accordingly, we hold that any settlement of a minor's claim is unenforceable unless and until there has been approval by the probate court. Thus under Illinois law, the August 16, 1997, release is unenforceable by the Arctco defendants with regard to Nicholas' claims.")
Ind.	Possibly	Bellew v. Byers, 396 N.E.2d 335, 337 (Ind. 1979) (Claims brought by children were barred where their parent signed a settlement release stating that the parent "[did] hereby release and forever discharge [one alleged joint tortfeasor and wife] . . . from any and all claims, demands, damages, actions, or causes of action of every kind or character arising out of an automobile accident.")

		IND. CODE ANN. § 34–28–3–2 (allowing an emancipated minor to execute valid minor liability waiver). Huffman v. Monroe Cty. Cmty. Sch. Corp., 564 N.E.2d 961, 964 (Ind. Ct. App. 1991), rev'd on other grounds, 588 N.E.2d 1264 (Ind. 1992).
Iowa	No	Galloway v. State, 790 N.W.2d 252, 258 (Iowa 2010) ("We conclude for all of these reasons that the public policy protecting children from improvident actions of parents in other contexts precludes the enforcement of preinjury releases executed by parents for their minor children. Like a clear majority of other courts deciding such releases are unenforceable, we believe the strong policy in favor of protecting children must trump any competing interest of parents and tortfeasors in their freedom to contractually nullify a minor child's personal injury claim before an injury occurs.")
Kan.	Possibly	Betz v. Farm Bureau Mut. Ins. Agency of Kansas, 8 P.3d 756, 762 (Kan. 2000) (After the parent of a minor executed a settlement and release, the minor is not allowed to bring a claim for medical expenses based on the argument that the parent "waived" her right to recover: "Betz may not now seek medical expenses because he no longer holds a cause of action for medical expenses, which was extinguished upon settlement of his daughter's case.")
Ky.	Unknown	
La.	No	LA. CIV. CODE ANN. art. 2004 ("Any clause is null that, in advance, excludes

		or limits the liability of one party for intentional or gross fault that causes damage to the other party . . . . Any clause is null that, in advance, excludes or limits the liability of one party for causing physical injury to the other party.")
Me.	No	Rice v. Am. Skiing Co., No. CIV.A.CV–99–06, 2000 WL 33677027, at *3 (Me. Super. Ct. May 8, 2000) ("This court cannot conclude that the public policy consideration espoused by the defendants is paramount to the right of the infant to his negligence claim.")
Md.	Yes	BJ's Wholesale Club v. Rosen, 80 A.3d 345, 362 (Md. 2013) ("We have, thus, *never* applied *parens patriae* to invalidate, undermine, or restrict a decision, such as the instant one, made by a parent on behalf of her child in the course of the parenting role. We conclude, therefore, that the Court of Special Appeals erred by invoking the State's *parens patriae* authority to invalidate the exculpatory clause in the Kids' Club Rules agreement.")
Mass.	Yes	Sharon v. City of Newton, 769 N.E.2d 738, 746–47 (Mass. 2002) ("In the instant case, Merav's father signed the release in his capacity as parent because he wanted his child to benefit from participating in cheerleading, as she had done for four previous seasons. He made an important family decision cognizant of the risk of physical injury to his child and the financial risk to the family as a whole. In the circumstance of a voluntary, nonessential activity, we will not disturb this parental judgment. This comports with the fundamental liberty

		interest of parents in the rearing of their children, and is not inconsistent with the purpose behind our public policy permitting minors to void their contracts.")
		Vokes v. Ski Ward, No. 032313B, 2005 WL 2009959, at *1 (Mass. Super. July 5, 2005) ("There is no allegation of fraud, deceit, negligent misrepresentation, duress, lack of capacity, lack of consideration or of any other impediment to the enforcement of the contract. Under those circumstances, the Court finds that there was a valid enforceable release signed by the plaintiff's mother before his participation in the ski school program.")
Mich.	No	Woodman v. Kera LLC, 785 N.W.2d 1, 16 (Mich. 2010) ("The relief impliedly sought by defendant requires the creation of a new public policy for this state by modification of the common law. Although this Court has the authority to create public policy through its management of the common law, we share that authority with the Legislature. This Court has fewer tools for assessing the societal costs and benefits of changing the common law than the Legislature, which is designed to make changes in public policy and the common law. Moreover, defendant has failed to identify *any* existing public policy supporting the change in the common law that it seeks; the existing positive law and common law indicate that enforcing parental waivers is contrary to the established public policy of this state. Accordingly, in matters such as these, I am persuaded that the prudent practice for this Court is

		conservancy of the common law.")
Minn.	Yes	Moore v. Minnesota Baseball Instructional Sch., No. A08–0845, 2009 WL 818738 (Minn. Ct. App. Mar. 31, 2009) (enforcing a parental pre-injury liability waiver in the context of an injury a minor sustained while playing in a youth baseball league).
Miss.	Possibly	Quinn v. Mississippi State Univ., 720 So.2d 843 (Miss. 1998) (The Mississippi Supreme Court held that reasonable minds could differ as to the risks that the plaintiffs were assuming and did not suggest that parental pre-injury liability waivers violate public policy).
Mo.	Possibly	Salts v. Bridgeport Marina, 535 F. Supp. 1038, 1040 (W.D. Mo. 1982) (enforcing parental pre-injury liability waiver in a jet ski rental agreement).
Mont.	No	MONT. CODE ANN. § 28–2–702 ("Except as provided in 27–1–753, all contracts that have for their object, directly or indirectly, to exempt anyone from responsibility for the person's own fraud, for willful injury to the person or property of another, or for violation of law, whether willful or negligent, are against the policy of the law.")
Neb.	Unknown	
Nev.	Unknown	
N.H.	Unknown	
N.J.	No	Hojnowski v. Vans Skate Park, 901 A.2d 381, 389–90 (N.J. 2006) ("Accordingly, in view of the

		protections that our State historically has afforded to a minor's claims and the need to discourage negligent activity on the part of commercial enterprises attracting children, we hold that a parent's execution of a pre-injury release of a minor's future tort claims arising out of the use of a commercial recreational facility is unenforceable.")
N.M.	Unknown	
N.Y.	No	Valdimer v. Mount Vernon Hebrew Camps, 172 N.E.2d 283 (N.Y. 1961) ("[W]e are extremely wary of a transaction that puts parent and child at cross-purposes and, in the main, normally tends to quiet the legitimate complaint of the minor child. Generally, we may regard the parent's contract of indemnity, however well-intended, as an instrument that motivates him to discourage the proper prosecution of the infant's claim, if that contract be legal. The end result is either the outright thwarting of our protective policy or, should the infant ultimately elect to ignore the settlement and to press his claim, disharmony within the family unit. Whatever the outcome, the policy of the State suffers.")
N.C.	Maybe	Kelly v. United States, 809 F. Supp. 2d 429, 437 (E.D.N.C. 2011) ("The court is persuaded by the analysis of those courts that have upheld such waivers in the context of litigation filed against schools, municipalities, or clubs providing activities for children, and concludes that, if faced with the issue, the North Carolina Supreme Court would similarly uphold a preinjury release executed by a parent on behalf of

		a minor child in this context.")
N.D.	Yes	Kondrad v. Bismarck Park Dist., 655 N.W.2d 411, 414 (N.D. 2003) ("It is undisputed that Kondrad's bicycle accident occurred on the school grounds while Kondrad was participating in the BLAST program. This is the very type of situation for which the Park District, under the release language, insulated itself from liability for alleged negligence while operating the after-school care program. Under the unambiguous language of the agreement, McPhail exonerated the Park District from liability for injury and damages incurred by Kondrad while participating in the program and caused by the alleged negligence of the Park District . . . . We hold the Parent Agreement signed by McPhail clearly and unambiguously exonerates the Park District for injuries sustained by Kondrad while participating in the BLAST program and which were allegedly caused by the negligent conduct of the Park District.") (footnote omitted).
Ohio	Yes	Zivich v. Mentor Soccer Club, 696 N.E.2d 201, 205–07 (Ohio 1998) ("Therefore, we conclude that although Bryan, like many children before him, gave up his right to sue for the negligent acts of others, the public as a whole received the benefit of these exculpatory agreements. Because of this agreement, the Club was able to offer affordable recreation and to continue to do so without the risks and overwhelming costs of litigation. Bryan's parents agreed to shoulder the risk. Public policy does not forbid such an agreement. In

		fact, public policy supports it . . . . Therefore, we hold 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. These agreements may not be disaffirmed by the child on whose behalf they were executed.")
Okla.	Unlikely	Holly Wethington v. Swainson, 155 F. Supp. 3d 1173, 1179 (W.D. Okla. 2015) ("Based on the case law in Oklahoma and other jurisdictions, the Court is led to the conclusion that (1) Makenzie's acknowledgment and execution of the Release is of no consequence and does not preclude her claims against Defendant, and (2) the Oklahoma Supreme Court would find that an exculpatory agreement regarding future tortious conduct, signed by parents on behalf of their minor children, is unenforceable.")
Or.	Unknown	
Pa.	Unlikely	Grenell v. Parkette Nat. Gymnastic Training Ctr., 670 F. Supp. 140, 144 (E.D. Pa. 1987) ("In the case before us, however, there was no court involvement in the transaction which occurred between the minor plaintiff and the defendants. Thus, she received none of the protections provided by the aforementioned special rules of procedure which apply to the settlement of minors' claims. Further, the public policy concern of the effective settlement of litigation is not involved here because of the very nature of the exculpatory agreement which the minor plaintiff executed. For these reasons, we

		do not believe that the Pennsylvania courts would bind the minor plaintiff to the agreement which she signed. Thus, we will deny the defendants' summary judgment motion as to those claims asserted by the minor plaintiff.")
		Troshak v. Terminix Int'l Co., No. CIV. A. 98–1727, 1998 WL 401693, at *5 (E.D. Pa. July 2, 1998) (Analyzing an arbitration provision, the court held "that a parent cannot bind a minor child to an arbitration provision that requires the minor to waive his or her right to file potential claims for personal injury in a court of law. If a parent cannot prospectively release the potential claims of a minor child, then a parent does not have authority to bind a minor child to an arbitration provision that requires the minor to waive their right to have potential claims for personal injury filed in a court of law. Accordingly, the court will not stay the claims brought by or on behalf of Richard Troshak, III for personal injury.")
R.I.	Unknown	
S.C.	Unknown	
S.D.	Unknown	
Tenn.	No	Childress v. Madison County, 777 S.W.2d 1, 7 (Tenn. Ct. App. 1989) ("We, therefore, hold that Mrs. Childress could not execute a valid release or exculpatory clause as to the rights of her son against the Special Olympics or anyone else, and to the extent the parties to the release

		attempted and intended to do so, the release is void.") *But see* Blackwell v. Sky High Sports, M2016–00447–COA–R9–CV (Tenn. Ct. App. argued Nov. 16, 2016) (Tennessee Court of Appeals granting application for interlocutory appeal to assess the validity of parental pre-injury liability waiver).
Tex.	No	Munoz v. II Jaz Inc., 863 S.W.2d 207, 210 (Tex. Ct. App. 1993) ("Therefore, in light of this state's long-standing policy to protect minor children, the language, 'decisions of substantial legal significance' in section 12.04(7) of the Family Code cannot be interpreted as empowering the parents to waive the rights of a minor child to sue for personal injuries. Appellants' public policy argument is sustained.") Fleetwood Enters. v. Gaskamp, 280 F.3d 1069 (5th Cir. 2002) (arbitration provision executed by a parent on behalf of a minor was not enforceable under Texas law). Paz v. Life Time Fitness, 757 F. Supp. 2d 658 (S.D. Tex. 2010) (parental pre-injury liability waiver not enforceable against commercial enterprise).
Utah	Yes (Inherent Risks Associated to Equine Facilities; No Release for Negligence)	UTAH CODE ANN. § 78B–4–203 ("(1) An equine or livestock activity sponsor shall provide notice to participants of the equine or livestock activity that there are inherent risks of participating and that the sponsor is not liable for certain of those risks. (2) Notice shall be provided by . . . (b) providing a document or release for the participant, or the

		participant's legal guardian if the participant is a minor, to sign.")
		Hawkins v. Peart, 37 P.3d 1062, 1067–68 (Utah 2001) ("We, too, conclude that public policy renders void the indemnity agreement between Navajo Trails and Hawkins's mother. By shifting financial responsibility to a minor's parent, such indemnity provisions would allow negligent parties to circumvent our newly adopted rule voiding waivers signed on behalf of a minor. Although the indemnity contract theoretically binds only Hawkins's mother, as a practical matter, it could chill Hawkins's pursuit of her legal claims against Navajo Trails since her mother, not Navajo Trails, would be the ultimate source of compensation.")
Vt.	Unknown	
Va.	No	Hiett v. Lake Barcroft Cmty. Ass'n, 418 S.E.2d 894, 897 (Va. 1992) (liability waivers are invalid regardless of whether they relate to the claims of an adult or a minor).
Wash.	No	Scott v. Pacific West Mountain Resort, 834 P.2d 6, 12 (Wash. 1992) ("We hold that to the extent a parent's release of a third party's liability for negligence purports to bar a child's own cause of action, it violates public policy and is unenforceable. However, an otherwise conspicuous and clear exculpatory clause can serve to bar the parents' cause of action based upon injury to their child. Therefore, we hold that Justin's parents' cause of action is barred by the release; Justin's own cause of action is not barred.")

W. Va.	Unlikely	Johnson v. New River Scenic Whitewater Tours, 313 F. Supp. 2d 621, 632 (S.D. W. Va. 2004) ("[T]he West Virginia Supreme Court's holding in *Murphy* compels the conclusion that a parent may not indemnify a third party against the parent's minor child for liability for conduct that violates a safety statute such as the Whitewater Responsibility Act.")
Wis.	Yes	Osborn v. Cascade Mountain, 655 N.W.2d 546 (Wis. Ct. App. 2002) ("The Osborns also contend that the release Amanda signed was not valid because she was a minor. That is true, but irrelevant. The first release, signed by Joan [on Amanda's behalf], remained in effect.")
Wyo.	Unknown	