

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: SC03-1704

GLOBAL TRAVEL MARKETING,
INC., d/b/a THE AFRICA ADVENTURE
COMPANY d/b/a INTERNATIONAL
ADVENTURES, LTD.,

Appellant,

vs.

MARK R. SHEA, as Personal Representative
of the Estate of MARK GARRITY SHEA,
deceased minor,

Appellee.

**AMICUS CURIAE BRIEF ON BEHALF OF THE
FLORIDA DEFENSE LAWYERS ASSOCIATION**

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INTRODUCTION AND STATEMENT OF INTEREST

The Florida Defense Lawyers Association (“FDLA”) respectfully submits this amicus curiae brief in support of the Appellant, Global Travel Marketing, Inc., d/b/a The Africa Adventure Company. The FDLA is a statewide organization formed in 1967 and comprised of over 1000 Florida lawyers in private practice whose practice focuses primarily on the defense of civil matters. The FDLA’s goals include promoting a level playing field in civil litigation and fostering the professional growth of its members. Accordingly, the FDLA is active in producing quality publications and continuing legal education programs, and also monitors legislative developments and changes in substantive law.

The FDLA appears in this case as an amicus because the issue to be decided - whether an agreement to arbitrate executed by a parent on behalf of her minor child is enforceable - will have a significant impact not only upon the clients of the FDLA’s members, but upon the Florida court system, Florida families and Florida children. The FDLA believes that from a public policy standpoint, the decision of the Fourth District Court of Appeal will have far-reaching consequences, particularly in the great segment of the state’s commerce that is engaged in the sale of goods and services to our state’s children. Accordingly, the FDLA urges this Court to reverse the decision

of the Fourth District Court of Appeal, and hold that an agreement to arbitrate, executed by a parent or legal guardian (“parent”) on behalf of his or her minor child, is fully enforceable.

ISSUES ON APPEAL

The district court of appeal has certified a single question:

WHETHER A PARENT’S AGREEMENT IN A COMMERCIAL TRAVEL CONTRACT TO BINDING ARBITRATION ON BEHALF OF A MINOR CHILD WITH RESPECT TO PROSPECTIVE TORT CLAIMS ARISING IN THE COURSE OF SUCH TRAVEL IS ENFORCEABLE AS TO THE MINOR.

In addressing the question in its initial brief, Global Travel Marketing has broken its analysis into three headings relating to the application of the Federal Arbitration Act, the erroneous consideration of incorrect public policy by the district court, and the application of correct public policy to the issue.

As amicus, the FDLA submits this brief to address solely the issues of public policy. The FDLA confines its analysis of public policy to the proper relationship among three areas of converging growth: the growth of parental authority, the growth of the minor population in Florida, and the growth of arbitration as a favored form of alternative dispute resolution with its own in-built mechanism for protection of minors and others less than fully capable of self-protection.

SUMMARY OF ARGUMENT

Our nation as a whole and Florida as a state have participated in an expansion of parental authority over the past several decades. This expansion comes in part from a recognition of the proper role of the family in any community as well as from a realization that the state cannot successfully assume the responsibilities of parent to all of society's children. This expansion of parental authority has resulted in a corresponding increase in parental involvement in children's lives. The move away from public to private schools and the growth of home-schooling reveal the degree to which parents are willing to assume more direct involvement in their children's complete upbringing and education.

As parental authority and involvement have increased, there has been a corresponding increase in goods and services designed for children. A sizable segment of the total business community deals with children's needs or wants, e.g., private transportation for school and extracurricular activities.

At the same time, the sheer growth in the number of lawsuits has spurred the development of alternative dispute resolution methods. The use of arbitration has become favored as a matter of public policy largely because it offers advantages in speed of resolution and reduction of expenses that the overcrowded court system

lacks.

These simultaneous developments make the sanctity of a parent's contract on his child's behalf not only desirable, but crucial to the continuing vitality of the parental role and to the continuing vitality of the businesses that sell to and serve the state's children.

The impact that the new rules regarding parental authority will have on commerce relating to children is evident. Agreements to arbitrate like the instant one will be held unenforceable despite the fact that it does not meet the test for procedural or substantive unconscionability. The specter of litigation in all matters without a predictable method of securing alternative dispute resolution will surely chill the continuing development and vitality of child-oriented sales and services. The inability of parents to secure such goods and services will correspondingly chill their exercise of parental authority over the many facets of life that combine to produce the mature and socialized adult from the child.

Finally, it is not necessary to diminish a parent's authority to enter into a contract on behalf of a minor in order to protect children from a possibly unconscionable agreement to arbitrate. Well-established law permits a court to refuse to enforce an agreement to arbitrate when it is procedurally and substantively

unconscionable.

ARGUMENT

i. The expansion of parental authority creates legal support for parental authority to contract on children’s behalf:

The decisions of the United States Supreme Court that recognize and articulate the rights of parents to authority in their decisions regarding the upbringing and education of their children span the last eighty years. In Meyer v. Nebraska, 262 U.S. 390 (1923), the Court struck down a law prohibiting the teaching of foreign languages because it interfered with the parents’ authority to control their children’s education. The Court recognized that this authority derived from “the natural duty of the parent to give his children education suitable to their station in life.”¹ Id. at 402. This authority is protected by the Fourteenth Amendment.

In 1925, the Court struck down a law requiring children to attend public schools. Pierce v. Society of Sisters, 268 U.S. 510 (1925). The Court acknowledged that a child is **not** “the mere creature of the state” but that the **parents** have “the right and the high duty, to recognize and prepare him for additional obligations.” Id. at

¹Clearly, Ms. Jacobs determined that the specialized safari was “suitable” to her son’s station in life as a dedicated enthusiast of the wilderness places of the planet.

535.²

In Prince v. Massachusetts, 321 U.S. 158 (1944), the Court unequivocally announced that “[T]he custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the State can neither supply nor hinder.”³ Id. at 166.

In Wisconsin v. Yoder, 406 U.S.205 (1972), the Court upheld an Amish family who, due to religious beliefs, wished to educate their children at home by recognizing their authority to do so as a “fundamental” interest compared to the interest of the state. Id. 232. The Court held that the “primary” role of the parents was “beyond debate.” Id. As a fundamental right, only a compelling state interest could overcome the parent’s authority to decide how to bring up, nurture, and educate his children. Id.

Though many of these decisions centered upon issues specifically of schooling, it is apparent that the liberty and privacy interests being protected were not confined to decisions regarding which schoolhouse door a child would enter. The

²Clearly, Ms. Jacobs planned the specialized safari in order to prepare her son for additional obligations to which he and she were drawn.

³Clearly, Ms. Jacobs intended to exercise her freedom to augment her son’s educational experiences by contracting for a specialized safari without hindrance by the state.

liberty/privacy interest is consistently described as an interest in “upbringing.” Consequently, the same parental authority is recognized, and the same line of cases cited, in discussions of the parental role in making health decisions. For example, a parent has the authority, under the same reasoning and line of cases, to admit a child to a mental health facility. Parham v. J.R., 442 U.S. 584 (1979). Parham makes clear that this parental authority is based upon a presumption that the parent will act in the best interest of the child and that courts are not equipped to review parental decisions.

Even in the face of a possibility of parental abuse, the Court held that:

Simply because the decision of a parent is not agreeable to a child, or because it involves risks does not automatically transfer power to make that decision from the parents to some agency of officer of the state. ...Parents can and must make those judgements ... Neither state officials nor federal Courts are equipped to review such parental decisions.

Id. at 603.

In Moore v. City of East Cleveland, 431 U.S. 494 (1977), the Supreme Court struck down an ordinance that prohibited certain extended family members from living together as a family. The ordinance resulted in a criminal conviction of a grandmother who lived with her two grandsons. The Court reviewed its own decisions set forth above, and described the traditional relation of the family as “a relation as old and as fundamental as our entire civilization.” Id. at 504, n.12. The right of the parents to

assume the primary role in the upbringing of their children was described as “founded on the history and culture of Western civilization.” Id.

This long tradition of support for parental authority continues to date. In Troxel v. Granville, 530 U.S. 57 (2000) even the relationship between the child and its grandparents - upheld as being constitutionally protected against governmental intrusion in Moore - was held subject to the authority and control of the parent. In that case, a statute that permitted a court to order visitation rights to nonparents when in the best interest of the child was stricken as an impermissible restriction of the fundamental rights of parents to make decisions regarding the care, custody and control of their children. The Court again articulated the important underlying presumption that “fit parents act in the best interest of their children.” Id. at 68.

ii. Commerce directed to children has correspondingly grown and expanded:

The role of the parent in raising a child is pivotal to a commerce that is growing in part due to sheer population growth and in part due to the consistent affirmation of parental rights.

For 19 years, the state’s number of school children has continued to rise. Statistical Brief, Bureau of Education & Accountability Services, Florida Department of Education, Series 2003-B (January, 2003). The population of school children has

grown 8.71% overall, and as much as 34.375% in Osceola County. Id. at page 1. Large population counties have school children in the hundreds of thousands: 373,375 for Miami-Dade County; 267,884, Broward County; 175,305, Hillsborough County; 164,796, Palm Beach County; 158,643 for Orange County; 114,754 in Pinellas County. Id. at Table 2.

The federal census figures confirm this huge segment of the population. See, U.S. Census Bureau, American FactFinder, Quick Tables, [Http://factfinder.census.gov/servlet/BasicFactsTable?](http://factfinder.census.gov/servlet/BasicFactsTable?) More than 25% of the total population of 15,982,378 is age 19 and below. Id. 1,986,554 households have members who are under 18 years of age. Id.

Since Pierce v. Society of Sisters, Florida has seen the proliferation of private schools. In the state of Florida, enrollment in private schools ranged from 30,000 kindergarteners to 12,000 twelfth-graders in 2001-2. Statistical Brief, Bureau of Education Information & Accountability Services, Florida Department of Education, Series 2003-26B (July 2003), Figure 1. That enrollment grew to a range from 32,000 kindergarteners to 17,000 twelfth-graders in 2002-3. Id. As of 2002-3, there are 2,108 private schools. Id. at page 1. There are 62,257 children enrolled in private pre-kindergarten programs. Id. at Table 2. Many counties have private school enrollments

in the tens of thousand: Miami-Dade County has 73,663; Broward County, 44,910; Duval County, 28,442; Orange County, 28,402; Palm Beach County, 29,890. Id. at Table 2. Several other counties have in excess of 15% of all children enrolled in private schools: Clay, 18.02%; Escambia, 15.25%; Jefferson, 16.58%; Leon, 15.8%; Pinellas, 15.57%.

Since Wisconsin v. Yoder, Florida has also seen the proliferation of home schools. Florida's Home Education Program, is defined as a "sequentially progressive instruction of a student directed by his or her parent." Section 1002.01(1), Fla. Stat. (2002). Since 1997-98, the number of families home-schooling their children has risen from about 20,000 to approximately 28,000. The number of children being home-schooled has risen from 30,000 to 44,460.

With these private schools and home schools come, of course, goods and services in the private sector. An obvious and important service is, of course, transportation. U.S. Department of Transportation figures show that 3,000 million "person trips" are made in school buses annually. Transportation Statistics Annual Report 1999, Chapter Four, Figure 4-2 (www.bts.gov/publications/transportation-statistics-annual-report/1999/chapter4). Approximately 440,000 public school buses transport 23.5 million children across the nation daily. Id. In Florida, the

transportation of school children, whether public, private, or home school, is accomplished by private companies as well as by public school buses. It goes without saying that thousands of teenagers drive private vehicles to school and extracurricular and leisure activities. The existence of arbitration clauses in vehicular insurance policies is commonplace. E.g., *Midwest Mutual Ins. Co. v. Santiesteban*, 287 So.2d

665 (Fla. 1973).

Associated with the education of the state's children are an almost infinite variety of non-academic opportunities: after school care; athletic programs at public parks, private clubs, and community service centers; and enrichment activities sponsored by private museums, public libraries, philanthropic institutions, just to name a few.

In all of these realms, the primary authority of the parent and his ability to contract on behalf of his child, has been presumed. What the United States Supreme Court has called a "fundamental" parental interest is, to the commerce that serves the child population, an essential ingredient of the commercial economy.

iii. The instant decision undermines parental authority and changes the rules of law governing parental contracts for minors:

Although the Fourth District Court of Appeal framed its certified question so as to attempt to narrow the scope of the case, it is clear that the import of the decision goes far beyond the question. The question purports to limit the consideration of this Court to “commercial travel” contracts. However, in what may or may not ultimately prove to be obiter dictum, the reasoning of the Fourth District reaches far beyond “commercial travel” contracts to the entire commerce serving the state’s children. This reach is seen in a single paragraph that creates a new general rule of parental lack of authority to contract for children and a very limited exception to that rule. The issue and the governing premise are phrased:

Ultimately, the question of whether parents can contract on behalf of their children is determined on public policy grounds.

Decision at 3. Following discussion of a few cases in which parents were held not to have authority to bind their children, the court in a single paragraph proposed that the authority to bind children is an **exception** to a general rule of lack of such authority:

Florida does, however, recognize that parents have authority to contract for their children when it comes to medical care. [cite omitted]. Patently, there is a common sense basis **for such medical service or medical insurance exception.**

Id. at 3.

This announcement is a serious reversal of the constitutionally protected

parental rights to decide and contract for children in all areas of their upbringing and education. Thus, the effect of the Fourth District’s new rule will not be limited to “commercial travel” for the general rule applies to all contracts. Only in the area of medical service or medical insurance is there support for parental authority in the court’s statement of the general rule and its exception.⁴

iv. The law of arbitration enjoys growing favor and contains ample protection for those in our society who cannot protect themselves:

Early decisions considering enforcement of arbitration clauses provided little support for arbitration. Agreements to submit all disputes arising out of a given contract were held to be against public policy as ousting the courts of jurisdiction:

By common law doctrine, which has been recognized by this court, parties to a contract are unable to make an irrevocable agreement to arbitrate all future controversies. such agreement is said to be contrary to public policy and obnoxious to the law in that it seeks to oust courts of

⁴The court does also exempt volunteers and employees working for nonprofit entities who offer organized recreational activities. But this exception is also very small compared to the segment of commerce engaged in selling goods or services to the state’s children. The district court reasons that the ability to bind a child to an arbitration agreement is necessary to the survival of nonprofit entities who offer recreational activities, and that society should support the existence of such activities. However, the ability to bind a child to a contract is no less necessary to the survival of private, for-profit entities that offer recreational, enrichment, after-school-care, transportation, and countless other activities.

jurisdiction. Steinhardt v. Consolidated Grocer Co., 80 Fla. 531, 86 So. 432; Fenster v. Makovsky, Fla. 1953, 67 So.2d 427.

Flaherty v. The Metal Products Corp., 83 So.2d 9, 10 (Fla. 1955).

By contrast, arbitration now enjoys a favored status as an alternative to litigation. Every appellate court in the state has recognized the public policy supporting arbitration agreements. Moser v. Barron Chase Securities, Inc., 783 So.2d 231 (Fla. 2001); Cassedy v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 751 So.2d 143 (Fla. 1st DCA 2000); Alexander v. Minton, 855 So.2d 94 (Fla. 2d DCA 2003); Prudential Securities, Inc. v. Katz, 807 So.2d 173 (Fla. 3d DCA 2002); Martha A. Gottfried, Inc. v. Paulette Koch Real Estate, Inc., 778 So.2d 1089 (Fla. 4th DCA 2001); Florida Power Corp. v. City of Casselberry, 793 So.2d 1174 (Fla. 5th DCA 2001).

The public policy is based upon the fact that arbitration is efficient and serves important goals of avoiding the delays and expenses of litigation.⁵ The Regency Group, Inc. v. McDaniels, 647 So.2d 192 (Fla. 1st DCA 1994); KFC Nat'l. Mgmt. Co. v. Beauregard, 739 So.2d 630, 631 (Fla. 5th DCA 1999). To fulfill the public policy that favors arbitration, every inference and presumption is indulged and all

⁵The empirical data supporting the benefits of arbitration abound. In a white paper published by the National Arbitration Forum, several sources of data were surveyed and compared to confirm the advantages in time and expense in commercial disputes. Business-to-Business Arbitration vs. Litigation, National Arbitration Forum, www.arbitration-forum.com/articles/index.asp.

doubts are resolved in favor of an agreement to arbitrate:

Courts generally favor arbitration as a means of alternative dispute resolution, and any doubt concerning the scope of the arbitration clause should be resolved in favor of arbitration. [Citations omitted]. ‘Arbitration clauses are to be given the broadest possible interpretation in order to accomplish the purpose of resolving controversies outside of the courts.’

Hirshenson v. Spaccio, 800 So. 2d 670, 674 (Fla. 5th DCA 2001). See also, Cassedy, supra, 751 So.2d at 150; Prudential Securities, supra, 807 So.2d at 174; Martha A. Gottfried, supra, 778 So.2d at 1089.

In contrast to these expressions of public policy, and in contrast to the parental authority recognized by the United States Supreme Court and based upon presumptions that fit parents make decisions in the best interest of their children, the Fourth District’s new rule suggests a different set of presumptions.

The decision suggests, first, a presumption that arbitration is not in and of itself a favorable alternative to litigation, one which is more efficient and avoids delay and expense. The decision suggests secondly a presumption that parental decisions are suspect or unsound, that only in exceptional circumstances can their decisions be presumed to be in their children’s best interests, i.e., when the child needs medical care or insurance.

Finally, the decision suggests the presumption that litigation will favor the

plaintiff while arbitration will favor the defendant. This presumption is without foundation and is contradicted by literature addressing results of arbitrated disputes. An American Bar Association study showed that consumers prevail 71 percent of the time in court, but 80 percent of the time in arbitration. Anne Brafford, “Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Traps for the Weak and Unwary?” 21 J. Corp. L. 331, 358 (1996). As much as 10 years ago, the Consumer Reports recommended arbitration agreements to consumers. The Consumer Reports Law Book: Your Guide to Resolving Everyday Legal Problems (1994).

This new rule also runs counter to the growth of arbitration in all segments of society. An example involving children is seen in Midwest Mutual Ins. Co. v. Santiesteban, 287 So.2d 665 (Fla. 1973). In that case, a minor was injured while riding on a motorcycle. The insurer, who contested coverage on only one of two policies potentially available for the minor’s injuries pursuant to uninsured motorist provisions, agreed to arbitration of the losses under the uncontested policy’s arbitration agreement. The Florida Supreme Court acknowledged the policy of favored treatment that has been judicially granted to arbitration because it expedites claims and reduces litigation.

None of the presumptions suggested by the new rule that parents lack authority to contract for their children **except** on health and health insurance matters is

supported by any empirical evidence. Surely, such sweeping changes in the operative presumptions underlying parental authority and enforcement of arbitration agreements should be made only after thorough consideration of empirical information - consideration that is, ultimately, for the legislature.

The FDLA does not suggest that the Fourth District's evident desire to provide protection for children is not itself commendable. However, the court did not have to reach so far to create protection for children in the arena of arbitration. The well-established contract law governing arbitration agreements contains a mechanism that will protect children. That is, an arbitration agreement will not be enforced when the agreement is procedurally and substantively unconscionable. Powertel, Inc. v. Bexley, 743 So.2d 570, 574 (Fla. 1st DCA 1999), rev.denied, 763 So.2d 1044 (Fla. 2000). Procedural unconscionability may be found in a contract of adhesion in which a party had no choice while substantive unconscionability may be found in a manifestly unfair agreement.

In the instant case, the court found neither procedural nor substantive unconscionability. Neither did the facts before the court suggest a possibility of either: the mother was a lawyer, and every detail of the extended safari was negotiated and arranged personally by her, precluding any finding of procedural

unconscionability; the unique interests of Ms. Jacobs and her son were weighed against the risks of travel into remote wilderness areas and the terms of the engagement which included a reduction of possible time and expense in ensuing litigation were fair, precluding any finding of substantive unconscionability.

Yet, if the agreement was neither procedurally nor substantively unconscionable, whence the public policy to avoid the contract?

Where the alternative dispute resolution mechanism is so soundly declared to be in the public interest, and where the existing body of law concerning enforcement of such agreements contains a clear mechanism by which third party beneficiaries who cannot help themselves may avoid unconscionable agreements, arbitration agreements should be enforced in all cases but those subject to the defense of unconscionability.

CONCLUSION

The expansion of parental authority, grounded in the liberty and privacy rights protected against governmental intrusion by the Fourteenth Amendment, has corresponded with the growth of the minor population and the commerce that sells and services their needs. At the same time, the use of arbitration as an alternative dispute resolution mechanism has grown in favor and protection. All of these interests coalesce in the case before this Court: a parent has the authority to enter into all

manner of contracts on behalf of his child; an agreement to arbitrate is no different from an agreement to participate in a dangerous safari in which the child could lose his life; the constitution protects the parent's choices in such matters and the state cannot contravene that choice by second-guessing what is in the child's best interest.

Finally, the well established law that permits a court to refuse to enforce an unconscionable contract is ample protection for any third-party beneficiary who may not be fully capable of self-protection. The error in the Fourth District's decision is manifest in the fact that the instant arbitration was not found to be and was not unconscionable. Nevertheless, the predictability of the bargain entered into by the parent and the business endeavoring to supply the educational experience desired by the parent has been utterly abrogated. All commercial dealings with parents will now be suspect and unpredictable. The effect on a huge segment of our economy is inestimable.

The decision should be reversed, the authority of the parent to enter into the contract at issue affirmed, and the public policy favoring arbitration effectuated.

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CERTIFICATES OF SERVICE AND COMPLIANCE

We hereby certify that a true copy of the foregoing was mailed this 14th day of November, 2003 to: All Counsel listed on attached list.

We hereby certify that the foregoing amicus curiae brief was prepared in font New Times Roman, 14 point.

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