



WORTH THE PAPER THEY'RE WRITTEN ON?

Examining preinjury release of a minor child's claims.

BY RYAN G. COLE

As any parent of young children will tell you, life was much different when we were growing up. Gone are the days when moms and dads turned their kids loose in the neighborhood with one simple instruction—to be home for dinner. Now, many parents are opting for more supervised activities. Kids today participate in year-round sports leagues and also frequent indoor climbing walls, bounce houses, trampoline parks, and sky diving facilities. Parents sacrifice significant amounts of money and their nights and weekends to attend such activities. So what happens if your child is injured while climbing, bouncing, jumping, or flying?

In our litigious society, businesses often attempt to insulate themselves from liability for injuries to minors by requiring the parent or guardian to first sign a waiver and release. Texas law allows for the preinjury release of claims, so long as it provides fair notice of its terms (the language must satisfy the express negligence test and be conspicuous).¹ A release is a contractual agreement where one party assumes the liability inherent in a situation, thereby relieving the other party of responsibility.² It operates to extinguish the claim or cause of action as effectively as would a prior judgment between the parties, and it is an

absolute bar to any right of action on the released matter.³ When interpreting a contract, the court's primary concern is to ascertain and give effect to the intent of the parties as expressed in the contract.⁴ When the language is plain and unambiguous, courts construe the contract as a matter of law and enforce the contract as made by the parties.⁵

Minors cannot sign waivers or releases.⁶ In most situations, they lack legal capacity to enter into valid contracts. So what is the effect of the release signed by a parent or guardian? Surprisingly, even with the growth of year-round recreational leagues and indoor activity centers, the question of a parent's ability to release a child's claim preinjury has not been resolved.

Texas law encourages and supports the freedom to contract,⁷ and the Texas Supreme Court has long recognized the state's strong public policy in favor of preserving this. The court held 150 years ago:

[I]f there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract.⁸

In addition, Texas Constitution art. I, § 16 provides that “no bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made.” Equally important, Texas courts also recognize the “indispensable partner” to the freedom of contract: contract enforcement.⁹ However, freedom of contract is not without limitation: “As a rule, parties have the right to contract as they see fit as long as their agreement does not violate the law or public policy.”¹⁰

The Texas Legislature determines public policy through its statutes.¹¹ To date, it has not spoken on the enforceability of a preinjury release of a minor child's claims. The Texas Supreme Court also plays a role in development of public policy, but it likewise has not addressed the enforceability of a parent's waiver or release of a minor child's claims.

The 14th Court of Appeals in Houston discussed waiver of a child's claims in *Munoz v. II Jaz, Inc.*¹² In *Munoz*, the trial court granted summary judgment to an amusement park based on a waiver and release signed by the injured minor's adult sister. Plaintiffs appealed, arguing that the trial court erred in granting summary judgment because an adult daughter/sister had no authority to waive the causes of action of a minor child/sister and her parents. The Court of Appeals agreed and stated, “[i]n order for the waiver to be effective, an agency relationship must have existed between the adult daughter and the parents. The adult daughter must have had either actual or apparent

authority to bind the parents to such a waiver.”¹³ The court determined that the adult daughter had no such authority.

Plaintiffs also argued that the adult daughter had no legal authority to waive the child's right to sue because the Texas Family Code vests that power in the parents exclusively or, alternatively, that it is against public policy for even parents to waive their minor child's right to sue.¹⁴ Former section 12.04(7) of the Family Code (now section 151.001a(7)), grants to the parents of a minor child the power to make decisions of substantial legal significance concerning the child. The *Munoz* court determined that the Texas Family Code did not provide the adult daughter with authority to exercise powers reserved to the parents.¹⁵

The Court of Appeals could have stopped at that point, but chose not to. It determined that the adult daughter did not have authority under the law of agency or the Texas Family Code to sign away the minor's rights. However, the court, in dicta, expanded its decision by determining that the parents also would not have been able to sign a waiver that affected the child's rights.¹⁶ The parents' authority was not before the court in *Munoz*, as the facts establish that the parents did not sign the waiver.

The Southern District of Texas has also weighed in on the issue. The Hon. Lee H. Rosenthal was required to evaluate a waiver and release that members had signed when they joined a national health club chain. By relying in substantial part on *Munoz*, the court determined that a preinjury release of a minor child's claims is not enforceable.¹⁷ Judge Rosenthal was making an *Erie* guess, and such rulings are not controlling on the Texas Supreme Court.¹⁸

The freedom of contract and the validity of a preinjury waiver and release of a minor's claims may be in direct conflict. On one hand, a parent voluntarily signs an unambiguous release contract, thereby accepting responsibility for injuries suffered by him or her and by his or her children. Part of the consideration (along with an entry fee) for the release and waiver is the limited license to use the facilities and/or to compete. Recreational activity providers will argue that parents have a duty to provide medical care for their children, and if they did not want to accept legal responsibility for a child's injuries, the parent could have elected not to have the child participate.¹⁹ They may also argue that the legal protections afforded by the release allow them to provide activities at a lower cost and to more children.

On the other hand, Texas courts have already developed a procedure and likely revealed how this issue may ultimately be resolved. The Texas Supreme Court, in promulgating the Texas Rules of Civil Procedure, has established a process for settling an injured minor's claim: A lawsuit is filed through a “next friend,” a guardian ad litem is appointed by the court, and the court approves a settlement after a hearing. The guardian ad litem is appointed to represent a minor child in most cases wherein the child has sustained an injury and the parents may have

a claim to part of the settlement proceeds.²⁰ The ad litem is charged to protect the rights and interests of the minor child, as the parents are seen as having a potential conflict of interest.²¹ The case is resolved through a friendly suit, which is a fairly informal hearing wherein the details of a settlement are presented to a trial court for approval.²² The trial court must approve the settlement to bind the minor and bar future litigation.²³

If the Texas Supreme Court does not trust the parents to resolve a minor child's claim *after* the child has been injured, why would a court give the parents authority to release a child's claim preinjury? For a practitioner, this issue can become more complicated, as an indemnity agreement is typically included in the same document as the waiver and release. Parents may face the real-world situation wherein a child has a valid claim, but they may owe indemnity for that claim—and end up wondering if these alternative recreational activities are the better choice after all. **TBJ**

NOTES

1. *Quintana v. CrossFit Dallas, L.L.C.*, 347 S.W.3d 445, 450 (Tex. App.—Dallas [5th Dist.] 2011, no pet.).
2. *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d, 505, 508 (Tex. 1993).
3. *Id.*
4. *In re Service Corp. Int'l*, 355 S.W.3d 655, 661 (Tex. 2011).
5. *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 753 (Tex. 2006).
6. *Dairyland Cty. Mut. Ins. Co. v. Roman*, 498 S.W.2d 154, 158 (Tex. 1973).

7. *Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653 (Tex. 2008).
8. *Wood Motor Co. v. Nebel*, 238 S.W.2d 181, 185 (Tex. 1951) (quoting *Printing and Numerical Registering Co. v. Sampson*, 19 L.R., Equity, 462, 465, 1874 WL 16322 (1875)).
9. *Chesapeake Operating, Inc. v. Nabors Drilling USA, Inc.*, 94 S.W.3d 163, 176 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (en banc).
10. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 129 & n. 11 (Tex. 2003); see *Sonny Arnold, Inc. v. Sentry Sav. Ass'n*, 633 S.W.2d 811, 815 (Tex. 1982) (recognizing “the parties’ right to contract with regard to their property as they see fit, so long as the contract does not offend public policy and is not illegal”).
11. *Town of Flower Mound v. Stafford Estates Ltd. P’ship*, 135 S.W.3d 620, 628 (Tex. 2004).
12. *Munoz v. Il Jaz, Inc.*, 863 S.W.2d 207 (Tex. App.—Houston [14th Dist.] 1993, no writ).
13. *Id.* at 209.
14. *Id.* at 209-210.
15. *Id.* at 209.
16. *Id.* at 210.
17. *Paz v. Life Time Fitness, Inc.*, 757 ESupp. 2d 658 (S.D. Tex. 2010).
18. *Id.* at 663.
19. Tex. Fam. Code § 151.001a(3) (A parent of a child has the duty to provide medical and dental care.).
20. Tex. R. Civ. P. 173.2 cmt. 3.
21. Tex. R. Civ. P. 173.4(c).
22. Tex. R. Civ. P. 44(2).
23. *Id.*



RYAN G. COLE

is a shareholder in Passman & Jones. He can be contacted at rcole@passmanjones.com.



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