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The Validity of Binding Arbitration Agreements and Children's Personal Injury Claims in Florida After *Shea v. Global Travel Marketing, Inc.*

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THE VALIDITY OF BINDING ARBITRATION AGREEMENTS AND CHILDREN'S PERSONAL INJURY CLAIMS IN FLORIDA AFTER *SHEA v. GLOBAL TRAVEL MARKETING, INC.*

DOUGLAS P. GERBER*

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I. INTRODUCTION

Courts in Florida and across the nation favor arbitration¹ as a mechanism of resolving disputes,² which has made arbitration the most popular

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1. Arbitration is the process of resolving disputes by a neutral third party after the arbitrator hears from both parties. BLACK'S LAW DICTIONARY 100 (7th ed. 1999). The characteristics of arbitration include written agreements to resolve controversies through arbitration, non-formal methods, neutral arbiters, and binding awards that can be enforced in court. Jef-

method of alternative dispute resolution.³ The rise in the popularity of arbitration has resulted from the view that arbitration allows parties to settle controversies in a time and cost-efficient manner without the formalities of traditional litigation.⁴ Commercial enterprises have traditionally chosen to use arbitration to settle the disagreements that arise in an array of commercial settings.⁵ A primary reason for the recent popularity of commercial arbitration is because arbitrators often have the same background and working knowledge in the specific area of business as the parties involved in a dispute.⁶ Some businesses—including tour operators and recreation-based organizations, for example—are beginning to use arbitration provisions in their agreements not only to resolve any disputes that may arise over the performance of contracts, but to reduce any potential liability from personal injury claims submitted by participants.⁷

The future of commercial arbitration in Florida as it relates to the personal injury claims of children will change⁸ in the aftermath of *Shea v. Global Travel Marketing, Inc.*⁹ In a case of first impression in Florida,¹⁰ the Fourth District Court of Appeal ruled that parents cannot bind their minor children to arbitrate personal injury claims.¹¹ The court also certified the

frey M. Schalley, Article, *Eliminate Violence from Sports Through Arbitration, Not the Civil Courts*, 8 SPORTS LAW. J. 181, 196 (2001).

2. See *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984); *Martha A. Gottfried, Inc. v. Paulette Koch Real Estate, Inc.*, 778 So. 2d 1089, 1090 (Fla. 4th Dist. Ct. App. 2001); *Info. Tech. & Eng'g Corp. v. Reno*, 813 So. 2d 1053, 1055 (Fla. 4th Dist. Ct. App. 2002); 1 THOMAS H. OEHMKE, COMMERCIAL ARBITRATION § 5:1 (3d ed. 2003); Michael A. Bagot, Jr. & Dana A. Henderson, *Not Party, Not Bound? Not Necessarily: Binding Third Parties to Maritime Arbitration*, 26 TUL. MAR. L.J. 413, 418 (2002).

3. 1 OEHMKE, *supra* note 2.

4. See Thomas J. Stipanowich, *Arbitration and the Multiparty Dispute: The Search for Workable Solutions*, 72 IOWA L. REV. 473, 473–75 (1987); Schalley, *supra* note 1, at 195.

5. See Thomas J. Stipanowich, *Punitive Damages and the Consumerization of Arbitration*, 92 NW. U. L. REV. 1 (1997).

6. See *id.*; see also 1 OEHMKE, *supra* note 2 (discussing the variety of commercial disputes that are resolved through arbitration).

7. Laurie Cunningham, *Parents Can't Waive Children's Rights*, DAILY BUS. REV., May 22, 2003, at A1.

8. See *id.*; Amicus Brief of the Acad. of Fla. Trial Lawyers at 1, *Shea I*, 28 Fla. L. Weekly at D2004 (No. 4D02-910). For purposes of this Note, the term child(ren) will be used interchangeably and has the same definition as the word minor. A minor is an "infant or person who is under the age of legal competence." BLACK'S LAW DICTIONARY 997 (6th ed. 1990).

9. 28 Fla. L. Weekly D2004 (4th Dist. Ct. App. Aug. 27, 2003) [hereinafter *Shea I*].

10. *Id.* at D2005.

11. *Id.*; see Cunningham, *supra* note 7. The court originally reversed the trial court's arbitration order and remanded the case for further proceedings on the claims brought forth by the decedent's father in a ruling issued on April 23, 2003. *Shea v. Global Travel Mktg., Inc.*,

issue to the Supreme Court of Florida as a matter of great public importance.¹² This Note will discuss the court's reasoning in *Shea* and assert that the court's primary holding was a proper public policy decision in accord with similar cases in other jurisdictions under *parens patriae*, which is the ability of the state to protect persons of legal disability who cannot adequately protect their legal interests, including children.¹³ However, portions of the court's reasoning and analysis were ambiguous. By not clearly articulating significant issues affecting state and federal law, the court does not provide any closure to the issues raised in *Shea*;¹⁴ on the contrary, the court's approach casts doubt on the validity and practicality of the ruling.¹⁵ "In order to eliminate any uncertainty or confusion as to the applicability of the result in this case statewide"¹⁶ as it relates to parental discretion,¹⁷ the state's economy,¹⁸ judicial administration,¹⁹ and other aspects of society in the state, the Supreme Court of Florida needs to resolve the ambiguities of the *Shea* panel's rationale.

Part I will survey similar cases involving arbitration clauses and children's personal injury claims in other jurisdictions to illustrate the novelty of this issue. Although cases like *Shea* are rare, this section will show that there is already a split among and within jurisdictions concerning the validity of binding arbitration provisions and the personal injury claims of minors. Part II will provide the factual and procedural background of *Shea* that begins with the tragic and gruesome death of an eleven-year-old boy. Part III will discuss the court's rationale and its emphasis on the public policy concerns

28 Fla. L. Weekly D1009, D1011 (4th Dist. Ct. App. Apr. 23, 2003) [hereinafter *Shea II*]. The court withdrew its prior opinion and substituted a new opinion on August 27, 2003. *Shea I*, 28 Fla. L. Weekly at D2004.

12. *Shea I*, 28 Fla. L. Weekly at D2006. Article V, section 3(b)(4) of the Florida Constitution gives the Supreme Court of Florida the discretion to review the ruling of a district court of appeal that presents a question certified by the supreme court as being of "great public importance." FLA. CONST. art. V, § 3(b)(4); e.g., FLA. R. APP. P. 9.030(a)(2)(B)(i). The issue the *Shea* panel has certified to the Supreme Court of Florida states: "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." *Shea I*, 28 Fla. L. Weekly at D2006. No information was available on the status of the certification action at the time of this Note.

13. BLACK'S LAW DICTIONARY 1114 (6th ed. 1990); see Cunningham, *supra* note 7.

14. See Cunningham, *supra* note 7.

15. See *id.*

16. Appellee's Motion for Certification to the Fla. Sup. Ct. of a Question of Great Public Importance at 3, 28 Fla. L. Weekly D2004 (4th Dist. Ct. App. Aug. 27, 2003) (No. 4D02-910).

17. See Cunningham, *supra* note 7.

18. See *id.*

19. See *id.*

of parents entering into contracts on behalf of their children in the form of parental waivers and other exculpatory agreements that contain arbitration provisions.

Although some critics believe the *Shea* court has improperly interfered with a parent's ability to raise his or her children,²⁰ Part IV will assert that the ruling made by the panel was proper under public policy and *parens patriae*, including the decision to validate parental waivers for school-sponsored or community oriented activities for minors. Part V will assess the weaknesses of the court's rationale, specifically the court's silence on whether the Federal Arbitration Act²¹ or Florida Arbitration Code²² should have been applied. Another inadequacy of the *Shea* court's rationale is its ambiguity concerning the activities where parental waivers that include arbitration agreements would be permissible under public policy.

II. AN OVERVIEW OF CASE LAW INVOLVING THE BINDING OF CHILDREN'S PERSONAL INJURY, NEGLIGENCE, OR TORT CLAIMS TO ARBITRATION

With some exceptions,²³ agreements that generally bind minors to arbitration involve insurance contracts²⁴ or separation agreements that concern child custody, support, and visitation rights.²⁵ However, cases on point concerning the issue of whether parents can compel their children to resolve personal injury claims through binding arbitration are rare.²⁶ Despite the

20. *See id.*

21. 9 U.S.C. §§ 1-16 (2000).

22. FLA. STAT. § 682.01-.22 (2002).

23. 1 MICHAEL DOMKE & GABRIEL M. WILNER, *DOMKE ON COMMERCIAL ARBITRATION*, § 10:10 (rev. ed. 1999). The exceptions include controversies where the claims of a child are not submitted to arbitration unless there is a court order issued. *Id.* The court order can be issued after a parent or personal representative of the minor files an application with the court, unless the controversy is an insurance claim. *Id.*

24. *Id.*; *see also* *Doyle v. Giuliucci*, 401 P.2d 1, 2-3 (Cal. 1965) (holding that a child can be bound to arbitrate claims under health care contract because parent has the right and duty to care for child). Although this Note will not focus on the legality of arbitration agreements and medical insurance claims or health care for minors, it should be noted that the Fourth District Court of Appeal in *Shea* found that the trial court erroneously relied on *Doyle* in its analysis. *Shea I*, 28 Fla. L. Weekly at D2006.

25. 1 DOMKE & WILNER, *supra* note 23.

26. *See Fleetwood Enter., Inc. v. Gaskamp*, 280 F.3d 1069, 1076 (5th Cir. 2002); *Troshak v. Terminix Int'l Co., L.P.*, No. CIV.A.98-1727, 1998 WL 401693, at *4 (E.D. Pa. July 2, 1998); *Cross v. Carnes*, 724 N.E.2d 828, 836 (Ohio 11th Ct. App. 1998); Shannon P. Duffy, *Parents Can't Sign Away Child's Potential Claim*, LEGAL INTELLIGENCER, July 7, 1998, at 1 (discussing *Troshak*). *Cross* was a case of first impression in Ohio, and in *Troshak* and *Fleetwood*, the federal courts had to determine how the supreme courts of Pennsylvania and

infrequency of these cases, there is a split among and within jurisdictions regarding the validity of a child being bound by a parent to settle claims through an arbitrator rather than by a jury.²⁷

A. *Children Cannot be Bound to Arbitrate Claims*

In *Troshak v. Terminix International Corp.*,²⁸ a minor was rendered unconscious by toxic fumes produced by a pesticide treatment of the minor's house.²⁹ When the minor's parents filed personal injury claims against Terminix,³⁰ the company removed the case to federal court and moved to stay litigation pending arbitration—including the child's claims—because the child's father had agreed to arbitrate any controversies arising under the company's service agreement.³¹ The district court found that the father and mother's claims were bound by the arbitration agreement.³² Since there were no Pennsylvania cases that directly dealt with binding minors to arbitration clauses,³³ the district court had to determine how the Supreme Court of Pennsylvania would rule on the matter.³⁴ The court turned to relevant federal cases that held parents could not waive the legal claims of their children simply because of the parental relationship.³⁵ Based on these cases, the district

Texas, respectively, would rule on the issue. See *Fleetwood*, 280 F.3d at 1076; *Troshak*, 1998 WL 401963, at *4; *Cross*, 724 N.E.2d at 836.

27. See *Fleetwood*, 280 F.3d at 1077; *Costanza v. Allstate Ins. Co.*, No. Civ. A. 02-1492, 2002 WL 31528447, at *7 (E.D. La. Nov. 12, 2002); *Troshak*, 1998 WL 401693, at *4; *Accomazzo v. CEDU Educ. Servs. Inc.*, 15 P.3d 1153, 1156 (Idaho 2000); *Cross*, 724 N.E.2d at 836.

28. No. CIV.A.98-1727, 1998 WL 401693, at *1 (E.D. Pa. July 2, 1998).

29. See *Duffy*, *supra* note 26. The minor's name was Richard Troshak, III. His father, Richard Troshak, II was not knocked out by the fumes of the termite control treatment, but was found "stumbling in an incoherent state." *Id.*

30. *Troshak*, 1998 WL 401693, at *3. The Troshaks also filed suit for property damages to their house, and Susan Troshak—the mother and wife of the victims, respectively—sought recovery for a loss of consortium. *Id.*

31. *Id.* at *1–2. The father assented to the terms of the contract when he signed the company's "Termite Service Plan" agreement. *Id.* at *2.

32. *Troshak*, 1998 WL 401693, at *2–3; *Duffy*, *supra* note 26, at 6. Although Susan Troshak did not sign the Terminix contract, the court still found that she was bound to the agreement under Pennsylvania law that presumes that one spouse has the power to act for the other spouse in respect to the properties that are jointly held. *Troshak*, 1998 WL 401693, at *3; *Duffy*, *supra* note 26, at 6.

33. *Troshak v. Terminix Int'l Co., L.P.*, No. CIV.A.98-1727, 1998 WL 401693, at *3 (E.D. Pa. July 2, 1998); *Duffy*, *supra* note 26, at 6.

34. *Troshak*, 1998 WL 401693, at *4.

35. *Id.* at *3–4; see also *Apicella v. Valley Forge Military Acad. & Junior Coll.*, 630 F. Supp. 20, 24 (E.D. Pa. 1985) (stating that Pennsylvania law prevents parents from releasing claims of minors); *Simmons v. Parkette Nat'l Gymnastic Training Ctr.*, 670 F. Supp. 140, 143

court found that a child could not be bound by his parents to arbitrate personal injury claims when the minor had the right to file claims in court.³⁶ The court stated:

If a parent cannot prospectively release the potential [tort] 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.³⁷

In *Accomazzo v. CEDU Educational Services, Inc.*,³⁸ a child was enrolled in a private educational program for juveniles with emotional, behavioral, and academic difficulties.³⁹ The enrollment contract signed by the child's parents included an arbitration provision that required all disputes arising from the agreement to be submitted to binding arbitration.⁴⁰ When the child was injured in a physical confrontation with one of the school's counselors during a counseling session,⁴¹ the minor's parents brought claims of battery, negligence, and violation of state laws protecting children.⁴² The school moved to stay litigation and bind the child to the arbitration provision signed by his parents, but the motion was denied by the district court.⁴³ In affirming the district court's ruling, the Supreme Court of Idaho ruled that the minor was not bound to the arbitration provision based on the language in the contract.⁴⁴

In *Fleetwood Enterprises, Inc. v. Gaskamp*,⁴⁵ a child living in her family's new mobile home began to suffer from breathing difficulties and had to be hospitalized because of a respiratory disease caused by exposure to for-

(E.D. Pa. 1987) (stating that a release signed by parent does not protect defendant from minor's cause of action).

36. *Troshak*, 1998 WL 401693, at *4.

37. *Id.*

38. 15 P.3d 1153 (Idaho 2000).

39. *Id.* at 1154.

40. *Id.* at 1155.

41. *Id.* at 1156.

42. *Id.* at 1155. The Accomazzos also brought causes of action for breach of contract, common law fraud, violation of Idaho's Consumer Protection Act, and negligence. *Accomazzo*, 15 P.3d at 1155.

43. *Id.*

44. *Id.* at 1156. Although the court held that the child was not compelled to arbitrate, the Accomazzo parents were bound to arbitrate the battery, negligence, and state children's protection claims because the waiver was considered and consented to by the parents and CEDU Educational Services when the contract was signed. *Id.*

45. 280 F.3d 1069 (5th Cir. 2002).

maldehyde.⁴⁶ The parents brought personal injury claims on behalf of their children against the manufacturer of the home, the home seller, the manufacturer of particles in the home, and the financing company.⁴⁷ Two defendants responded by moving to compel arbitration against the entire Gaskamp family because the parents had signed a contract containing an arbitration provision that “knowingly and voluntarily” waived the family’s right to a jury trial.⁴⁸ Although the children did not sign the agreement, and the Gaskamp parents did not expressly agree to submit their children’s claims to arbitration,⁴⁹ the district court ruled that the children were bound to settle their claims out of court because the children’s use of the mobile home derived from the parents’ use of the property.⁵⁰ The Gaskamps appealed.⁵¹

Like the federal court in *Troshak*, the appellate court in *Fleetwood* had to determine how the state’s supreme court would rule on the issue since the matter had never been heard before in Texas.⁵² The court applied Texas contract law relating to third-party beneficiaries and non-signatories.⁵³ Before *Fleetwood*, Texas case law held that non-signatories were bound to arbitrate when the non-signatory party brings suit on the contract and the non-signatory was a third-party beneficiary.⁵⁴ After its analysis, however, the *Fleetwood* panel reversed the district court’s ruling and found that the chil-

46. *Id.* at 1071–72. All of the members of the Gaskamp family—including two other Gaskamp children—suffered health problems from the formaldehyde exposure. *Id.* at 1071.

47. *Id.* at 1072. The Gaskamps filed suit in Mississippi state court against, respectively, Fleetwood Enterprises, Inc., Manufactured Bargains, Georgia-Pacific Corporation (Georgia-Pacific), and Bombadier Capital. *Id.*

48. *Fleetwood*, 280 F.3d at 1071–72. Fleetwood and Georgia-Pacific filed their motions in the Southern District of Texas. *Id.* The arbitration agreement was part of a financing agreement for the home. *Id.* at 1071.

49. *Id.* at 1074 n.2.

50. *Id.* at 1072–73. The district court did not cite any authority for its rationale and holding. *Fleetwood*, 280 F.3d at 1072–73.

51. *Id.* at 1071. In addition to arguing that their children were not bound to arbitrate, the Gaskamps also asserted that the arbitration agreement should be declared void because of procedural unconscionability. *Id.*

52. *Id.* at 1076.

53. *Id.* at 1074; Bagot & Henderson, *supra* note 2, at 432. Third-party beneficiaries are not parties to contracts, but still benefit from the promises made in the contracts. BLACK’S LAW DICTIONARY 1480 (6th ed. 1990). A non-signatory is a party who does not personally sign a contract or agree to the document through an agent. *Contra id.* at 1381. Nevertheless, a non-signatory becomes a party to the contract. *Id.*

54. *Fleetwood Enter., Inc. v. Gaskamp*, 280 F.3d 1069, 1074 (5th Cir. 2002). Under the common law of contracts and agency—which the appellate court considered in its analysis—there are seven general exceptions providing a basis to bind non-signatories to arbitration agreements: agency, assumption/implied conduct, alter ego/veil piercing, assumption, estoppel, incorporation by references, successor in interest, and third-party beneficiaries. *Id.* at 1076; I DOMKE & WILNER, *supra* note 23; Bagot & Henderson, *supra* note 2, at 436.

dren were not compelled to arbitrate their causes of action “simply because they are minors and their claims are related to those of their parents.”⁵⁵ In addition, because the children did not sign and were not bound to the agreement, they were incidental—not third-party—beneficiaries, and their cause of action was based in tort, not on the contract.⁵⁶

B. *Children Can be Bound to Arbitrate Claims*

There is a split within the Fifth Circuit regarding a parent’s ability to bind children to arbitration to settle their personal injury claims.⁵⁷ The parents in *Costanza v. Allstate Insurance Co.*⁵⁸ brought claims against various businesses and organizations for the personal injuries their children suffered when water leaked into their home.⁵⁹ In response, two defendants moved to compel arbitration for the family’s claims based on the arbitration agreement signed by the parents.⁶⁰ Relying on *Fleetwood*, the parents claimed that their children should not have their claims settled by arbitration because the minors were not third party beneficiaries or bringing a cause of action on the contract.⁶¹ The district court held that the children could seek personal injury claims as it related to the homebuilder’s contract and the other contracts at bar because the children were not enforcing the provisions of these agreements nor were they third-party beneficiaries.⁶² However, the *Costanza* panel held that the children were bound to arbitrate their claims pursuant to the arbitration clause of the limited warranty agreement because the court reasoned that the children were pursuing claims under the contract, not in

55. *Fleetwood*, 280 F.3d at 1076.

56. *Id.* at 1077; e.g., 1 DOMKE, *supra* note 23; 1 THOMAS H. OEHMKE, COMMERCIAL ARBITRATION § 12:9 (rev. ed. 2003); see *Children not Bound by Parents’ Agreement to Arbitrate*, 13 WORLD ARB. & MEDIATION REP. 207, 208 (2002). The Gaskamp parents, however, were still bound to arbitrate their claims because, as contract signatories, they did not raise any valid defenses against the arbitration provisions. *Fleetwood*, 280 F.3d at 1077.

57. See Doug Uloth & Hamilton Rial, *Enforcing Arbitration Against Nonsignatories*, 65 TEX. B.J. 802, 806–07 (2002).

58. No. CIV.A.02-1492, 2002 WL 31528447, at *1 (E.D. La. Nov. 12, 2002).

59. *Id.* The Costanzas filed claims against the manufacturer who designed the exterior insulation and finish system for their house, the homebuilder, the installer of the system, Allstate Insurance, the Residential Warranty Corporation (RWC), the Western Pacific Mutual Insurance Company (WPIC), and the Federal Emergency Management Agency (FEMA). *Id.*

60. *Id.* at *1–2. RWC and WPIC moved to stay the proceedings after the Costanza parents had signed an application for a limited warranty that included a binding arbitration clause. *Id.*

61. *Costanza*, 2002 WL 31528447, at *6 (relying on *Fleetwood*, 280 F.3d at 1073).

62. *Id.* at *7.

tort.⁶³ In staying the children's proceedings, the court stated that the children "cannot avail themselves of the benefits of the contract and not be bound by its restrictions."⁶⁴

Although a personal injury claim was not involved, the issue of whether a child was bound to an arbitration agreement over other tortious acts was raised in *Cross v. Carnes*.⁶⁵ In *Cross*, the minor first brought defamation and fraudulent concealment claims against the "Sally Jessy Raphael" television program.⁶⁶ The show moved to stay proceedings pending arbitration based on a release and consent form containing an arbitration provision the mother had signed on her daughter's behalf.⁶⁷ The arbitration clause stated that the minor would arbitrate any controversy arising from the show's consent and release form or her appearance on the program.⁶⁸ The trial court stayed the proceedings, and *Cross* appealed.⁶⁹ Ohio's Eleventh District Court of Appeals affirmed the ruling, basing its rationale on cases in other jurisdictions where parents could bind their children's claims to arbitration.⁷⁰ The court also relied on a ruling made by the Supreme Court of Ohio, which held that

63. *Id.*

64. *Id.*

65. 724 N.E.2d 828 (Ohio 11th Ct. App. 1998).

66. *Id.* at 830. Heather Cross's (Heather) claim was brought in Ohio by and through her mother Karen Cross (Cross) after Heather appeared on an episode entitled "Teen Girl Bullies." *Id.* at 830-31. The Crosses allege that the theme of the program was fraudulently concealed from them. *Id.* As part of the episode, Patti and Corinna Carnes falsely portrayed Heather as a bully on national television. *Id.* at 831. Cross amended the complaint to rescind the release and the arbitration clause for a lack of assent. *Cross*, 724 N.E.2d at 831.

67. *Id.*

68. *See id.* The provision read in part: "Any dispute arising out of this RELEASE, and/or of my appearance on SALLY JESSY RAPHAEL™ will be resolved by binding arbitration . . . in New York City and will be governed by the procedural and substantive law of New York." *Id.* In general, tort claims like the one brought in *Cross* are not subject to arbitration because torts typically do not arise out of contract but occur between parties who are not familiar with each other, e.g., automobile accidents. Joseph T. McLaughlin, *Arbitrability: Current Trends in the United States*, 59 ALB. L. REV. 905, 931 (1996). However, *Cross* appears to be an exception to the rule. *See id.* at 932. It also appears that the producers of "Sally Jesse Raphael" anticipated tortious conduct in *Cross* and included the arbitration agreement in the contract in order to reduce any potential liability. *See id.* Although the language of the arbitration provision in *Cross* was broad, Cross's tort claim was arbitrable because the claim was related to the subject matter of the show contract. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402 (1967); 21 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 57:31 (4th ed. 2001).

69. *Cross v. Carnes*, 724 N.E.2d 828, 832 (Ohio 11th Ct. App. 1998).

70. *Id.* at 836; *see also Doyle v. Giulucci*, 401 P.2d 1, 3 (Cal. 1965).

parents could bind their children to exculpatory agreements to participate in nonprofit sports activities.⁷¹ In its holding, the court stated:

The parent's consent and release to arbitration only specifies the forum for resolution of the child's claim; it does not extinguish the claim. Logically, if a parent 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.⁷²

The analyses applied and conclusions reached by the respective courts in the previous cases further illustrate the split involving binding arbitration and children's personal injury claims. In determining if parents can bind children to arbitration provisions, the courts will either apply a strict contract analysis or a public policy analysis based on the parent-child relationship.⁷³ The courts' rationales in *Accomazzo*, *Fleetwood*, and *Costanza* predominantly focused on the application of ordinary principles of state contract law, instead of the ability of a parent to waive a minor's right to bring a cause of action when that child suffers a personal injury.⁷⁴ Despite applying like analyses, the courts reached different conclusions.⁷⁵

In assessing the validity of the arbitration agreements in their respective cases, the courts in *Troshak* and *Cross* both focused on the authority of parents to release the potential claims of their children.⁷⁶ However, the respective holdings in these cases stand in sharp contrast and reveal differing views concerning arbitration agreements. The *Troshak* court viewed the arbitration provision as a substantive release of liability, while the court in *Cross* reasoned that the arbitration agreement was merely a procedural matter.⁷⁷ In validating the arbitration provision for possible tortious conduct, the court's holding in *Cross* implies that minors still have an opportunity to seek relief if

71. *Cross*, 724 N.E.2d at 836 (citing *Zivich v. Mentor Soccer Club, Inc.*, 696 N.E.2d 201, 205 (Ohio 1998)).

72. *Id.*

73. See *Fleetwood Enter., Inc. v. Gaskamp*, 280 F.3d 1069, 1074 (5th Cir. 2002); *Costanza v. Allstate Ins. Co.*, No. CIV.A.02-1492, 2002 WL 31528447, at *6-7 (E.D. La. Nov. 12, 2002); *Troshak v. Terminix Int'l Corp.*, No. CIV.A.98-1727, 1998 WL 401963, at *4 (E.D. Pa. July 2, 1998); *Accomazzo v. CEDU Educ. Servs.*, 15 P.3d 1153, 1156 (Idaho 2000); *Cross*, 724 N.E.2d at 836.

74. See *Accomazzo*, 15 P.3d at 1156; *Fleetwood*, 280 F.3d at 1074; *Costanza*, 2002 WL 31528447, at *6-7.

75. See *Accomazzo*, 15 P.3d at 1156; *Fleetwood*, 280 F.3d at 1074; *Costanza*, 2002 WL 31528447, at *7.

76. See *Troshak*, 1998 WL 401963, at *4; *Cross*, 724 N.E.2d at 836.

77. *Troshak*, 1998 WL 401963, at *5-6; *Cross*, 724 N.E.2d at 836; Appellee's Answer Brief at 8, *Shea II*, 28 Fla. L. Weekly at D1009 (No. 4D02-910).

they are injured.⁷⁸ Until additional cases that directly address this issue become commonplace, other forums will have to determine what analyses to apply and conclusions to reach on a case-by-case basis.⁷⁹

III. A FACTUAL AND PROCEDURAL BACKGROUND OF *SHEA*

Before falling asleep on the night of July 19, 2000, Garrit Shea ("Garrit") thanked his mother Molly Bruce Jacobs ("Jacobs") for taking him on an African safari to Botswana and Zimbabwe.⁸⁰ The expedition was organized by Global Marketing Travel ("Global"), a Fort Lauderdale-based corporation conducting business and offering tours for more than fifteen years as the Africa Adventure Company.⁸¹ "I can't wait until tomorrow," Garrit said.⁸²

Tomorrow would be a day that was supposed to be the highlight of Garrit's twenty-five day safari, which was Garrit's second African expedition.⁸³ The eleven-year-old boy from the Baltimore suburbs with a keen interest in the animal kingdom was back in the African bush and coming into contact with the wildlife he had grown to know, love, and respect.⁸⁴ The straight-A student, aspiring hockey goalie, and "gentle spirit"⁸⁵ also grew to appreciate the diverse cultures of the bushmen, who he had traveled with on hunting outings and danced with in their villages.⁸⁶

Tomorrow never came for Garrit. While he slept alone in his tent on the perimeter of the Xakanaxa Campsite in Botswana's Okavango Delta on that fateful night, a pack of hyenas entered Garrit's tent, mauled him, and

78. See Schalley, *supra* note 1, at 202.

79. See *Fleetwood Enter., Inc.*, 280 F.3d at 1076.

80. Bruce Jacobs, *My Son Garrit, 'Little Bum' Tribute*, BALT. SUN, Sept. 17, 2000, at 1H, available at <http://www.sunspot.net>.

81. Noah Bierman & Scott Hutchinson, *Broward Firm Faces Suit in Safari Death of Boy, 11*, MIAMI HERALD, Apr. 24, 2003, at 2B; Rafael A. Olmeda, *Court Lets Suit Against Travel Firm Go Ahead*, SUN-SENTINEL, Apr. 24, 2003, at 4B; Cunningham, *supra* note 7.

82. Jacobs, *supra* note 80.

83. See Lynn Anderson & Tom Bowman, *Brooklandville Boy Killed in Hyena Attack in Botswana*, BALT. SUN, July 20, 2000, at 24B, available at <http://www.sunspot.net>; Jacobs, *supra* note 80; Bierman & Hutchinson, *supra* note 81. Garrit had made his first safari to Botswana with Jacobs and his older brother in 1999. *Id.* Garrit's father, Mark Shea, who is divorced from Jacobs, did not go on the expeditions in 1999 or 2000. *Id.*

84. See Jacobs, *supra* note 80; Ann LoLordo, *Mark Garrity Shea, 11, Loved Science, Sports*, BALT. SUN, July 24, 2000, at 4B, available at <http://www.sunspot.net>. Garrit was from Brooklandville, Maryland, and owned dogs, cats, birds, a rooster, hens, lizards, and emus. *Id.*; Anderson & Bowman, *supra* note 83. He collected an elephant tusk, a whale tooth, and a bear claw during the family's various trips across the United States and to Africa, Australia, the Caribbean, and Mexico. *Id.*

85. LoLordo, *supra* note 84 (quoting Garrit's great aunt Rachel Garrity).

86. See Jacobs, *supra* note 80.

dragged him into the bush.⁸⁷ Garrit's mother and the tour guides heard his screams, but they were too late to stop the attack and were not able to search out Garrit in the darkness.⁸⁸ His mother and the guides did not find Garrit until they discovered his body near the tour campsite the following day.⁸⁹ Garrit had been decapitated.⁹⁰

Prior to their departure to Africa, Jacobs agreed to all of the terms of Global's tour contract so she and Garrit could participate in the safari.⁹¹ The tour contract included a waiver that released Global for any liability that may have occurred during the tour.⁹² The release stated in part:

I HEREBY RELEASE, WAIVE, INDEMNIFY, and AGREE NOT TO SUE THE AFRICA ADVENTURE COMPANY . . . for any and all losses, damages, or injuries or any claim or demand on account of injury or emotional trauma . . . or on account of death resulting from any cause...while the undersigned is participating in a tour or any travel or other arrangements by THE AFRICA ADVENTURE COMPANY⁹³

Pursuant to a provision in the contract, Jacobs also assented that any dispute arising from the agreement would be settled in the following manner:

Any controversy or claim arising out of or relating to this Agreement, or the making, performance or interpretation thereof, shall be settled by binding arbitration in Fort Lauderdale, FL, in accordance with the rules of the American Arbitration Association then existing, and judgment on the arbitration award may be entered in any court having jurisdiction over the subject matter of the controversy.⁹⁴

87. *Id.*; Cunningham, *supra* note 7; Bierman & Hutchinson, *supra* note 81.

88. Cunningham, *supra* note 7. Jacobs was in a nearby tent recapping the day's events into a tape recorder when the attack occurred. *Id.*

89. *Id.*

90. *Id.* The legal counsel for Global Travel Marketing/The African Adventure Company said that Garrit's death marked the first time that there had been a fatality on one of the company's tours. Bierman & Hutchinson, *supra* note 81.

91. *Shea I*, 28 Fla. L. Weekly at D2004. The applicable provision of the contract reads: "I, as parent or legal guardian of the below named minor, hereby give my permission for this child or legal ward to participate in the trip and further agree, individually and on behalf of my child or ward, to the terms of the above." *Id.* at D2005.

92. *Id.* at D2004.

93. *Id.*

94. Appellant's Brief at 5, *Shea II*, 28 Fla. L. Weekly at D1009 (No. 4D02-910).

In 2001, Mark Shea (“Shea”)—Garrit’s father—brought suit against Global as the personal representative of Garrit’s estate, alleging that the company’s negligence led to his son’s death.⁹⁵ He attempted to recover damages for pain and suffering under the Florida Wrongful Death Act,⁹⁶ which is intended to shift the losses resulting from an individual’s untimely demise from the decedent’s survivors to the liable party.⁹⁷ Global moved to stay proceedings pending arbitration pursuant to the tour contract.⁹⁸ Shea countered Global’s motion on grounds that Jacobs did not have the legal authority to waive her son’s right to a jury trial via the arbitration provision, and that Garrit and Shea were not parties to the agreement.⁹⁹ The trial court ruled that Garrit could be bound to the arbitration clause because parents have the right to choose the forum for their children’s claims, and Florida and federal law favor arbitration.¹⁰⁰ Since Shea brought suit on behalf of Garrit’s estate, he was also bound to the provision.¹⁰¹ Shea appealed.¹⁰²

95. Cunningham, *supra* note 7; Bierman & Hutchinson, *supra* note 81. Shea alleged that Garrit should not have been allowed to sleep alone in the tent, the tent was not properly secured, the tour guides did not check to see if the tent was made safe by the tent’s dual zipper mechanism, and that a buildup of garbage on the perimeter of the camp attracted the hyenas. *See id.*; Cunningham, *supra* note 7. Shea argued that the failure to take these precautions led to Garrit’s death. *E.g.*, *Shea I*, 28 Fla. L. Weekly at D2004.

96. *Shea I*, 28 Fla. L. Weekly at D2004; FLA. STAT. § 768.16-.27 (2002). A parent or parents of a deceased child can recover for mental pain and suffering when the minor’s injury occurs. § 768.21(4). Jacobs also attempted to file a wrongful death suit against Global, but the Fourth District Court of Appeal affirmed the trial court’s ruling holding that Jacobs had to arbitrate her claims against Global. *See Shea I*, 28 Fla. L. Weekly at D2004; *Jacobs v. Global Travel Mktg., Inc.*, 796 So. 2d 1183 (Fla. 4th Dist. Ct. App. 2001); Cunningham, *supra* note 7. Jacobs is currently in arbitration with Global. Bierman & Hutchinson, *supra* note 81.

97. § 768.17.

98. *Shea v. Global Travel Mktg., Inc.*, No. 01-10128, 2002 WL 215330, at *1 (Fla. 17th Cir. Ct. Feb. 5, 2002) [hereinafter *Shea III*]. Global made an alternative motion to dismiss the case pursuant to the arbitration agreement. *Id.*

99. *Id.*

100. *See id.* at *4.

101. *Id.* at *5. Shea argued that he should not have been bound to the agreement because he did not sign the release. *Shea III*, 2002 WL 215330, at *5. The trial court agreed. *See id.* However, the court reasoned that since Shea did not bring a cause of action in an individual capacity, the trial court found that Shea “stood” in Garrit’s shoes by bringing suit on behalf of Garrit’s estate. *Id.* Therefore, since Garrit was bound to the arbitration provision, the estate’s personal representative was also bound. *Id.*

102. *Shea I*, 28 Fla. L. Weekly at D2004.

IV. THE FOURTH DISTRICT COURT OF APPEAL'S ANALYSIS IN *SHEA*: PUBLIC POLICY AND *PARENS PATRIAE*

Since arbitration is strictly a creature of contract,¹⁰³ the *Shea* court applied Florida contract law to assess the arbitration agreement.¹⁰⁴ The court addressed the validity of the provision in *Shea* by focusing its analysis on the public policy concerns of parents contracting for their children.¹⁰⁵ Under Florida law, a contract that violates public policy runs counter to the “public right or the public welfare”¹⁰⁶ or an established societal interest.¹⁰⁷ The court believed that the ability of parents to contract away the potential legal claims of their children under circumstances not supported by public policy—including commercial travel—was not acceptable under Florida law.¹⁰⁸ Per-

103. 1 OEHMKE, *supra* note 2, at § 5:2; McLaughlin, *supra* note 68, at 931; *see also* Accomazzo v. CEDU Educ. Servs., Inc., 15 P.3d 1153, 1155 (Idaho 2000) (“The question of arbitrability is a question of law properly decided by the court.”).

104. *Shea I*, 28 Fla. L. Weekly at D2005. Global attempted to persuade the court that Maryland contract law should have been used in the case under the doctrine of *lex loci contractus*. *See* Appellee’s Answer Brief at 19–21, *Shea II*, 28 Fla. L. Weekly at D1009 (No. 4D02-910). *Lex loci contractus* denotes the law of the jurisdiction where the contract was made and also signifies what law governs the contract. BLACK’S LAW DICTIONARY 911 (6th ed. 1990). Global asserted that since Jacobs and Shea were residents of Maryland and all of the material events concerning the tour contract took place in Maryland, that state’s law should govern the agreement. *See* Appellee’s Answer Brief at 20–21, *Shea II*, 28 Fla. L. Weekly at D1009 (No. 4D02-910). The appellate court rejected Global’s claims because Global never made the argument at trial. *Shea I*, 28 Fla. L. Weekly at D2004; *see* Appellant’s Reply Brief at 1, *Shea II*, 28 Fla. L. Weekly at D1009 (No. 4D02-910).

105. *Shea I*, 28 Fla. L. Weekly at D2005. The substantive definition of public policy was first outlined in *City of Leesburg v. Ware*, 153 So. 87, 89 (Fla. 1934) (adopting the opinion of Wannamaker, J., in *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. Kinney*, 115 N.E. 505, 506–07 (Ohio 1916)). Under Florida law, public policy is the common sensibility and conscience of communities across the state as it pertains to matters of health, safety, welfare, and morals. *Ware*, 153 So. at 89 (adopting *Kinney*, 115 N.E. at 507).

106. *Atl. Coast Line R.R. Co. v. Beazley*, 45 So. 761, 774 (Fla. 1907). Ironically, the court in *Atlantic Coast Line Railroad Co.* held that contracts that are violative of public policy “encourages negligence . . . it would have a tendency to induce the employment of men less prudent and careful, which would tend to endanger the lives of travelers.” *Id.*

107. *Ware*, 153 So. at 89 (adopting *Kinney*, 115 N.E. at 507).

108. *Shea I*, 28 Fla. L. Weekly at D2006. The court recognized that health care, health insurance, and “commonplace” or “school supported” activities as the types of functions where parental waivers would be supported by public policy. *Id.* The court ruled that “[w]e need not decide, here, what additional circumstances would support such a waiver.” *Id.* However, the *Shea* panel, basing its reasoning on *Zivich v. Mentor Soccer Club, Inc.*, 696 N.E.2d 201 (Ohio 1998), also found that “non-profit entities, their employees and volunteers do not fall within the ambit of this opinion” because of the benefits those organizations and individuals provide to children. *Shea I*, 28 Fla. L. Weekly at D2004. In *Zivich*, the Supreme Court of Ohio validated the use of exculpatory agreements for “community recreational activi-

mitting parental waivers in these circumstances, the court reasoned, would defy public policy because minors would not have an opportunity to seek legal relief.¹⁰⁹

In reaching its conclusion, the *Shea* court's public policy analysis of the arbitration provision and application of *parens patriae* relied on holdings from other jurisdictions assessing the validity of parental waivers binding children to exculpatory agreements.¹¹⁰ The panel followed the reasoning of *Cooper v. Aspen Skiing Co.*,¹¹¹ where the Supreme Court of Colorado held that the state's public policy prevented parents from releasing their children's potential claims either before or after suffering a personal injury via an exculpatory agreement.¹¹² The court in *Cooper* stated: "children still must be protected against parental actions—perhaps rash and imprudent ones—that foreclose all of the minor's potential claims for injuries caused by another's negligence."¹¹³ The Fourth District Court of Appeal was persuaded by the Supreme Court of Colorado's "overarching policy"¹¹⁴ that protected minors regardless of the actions of their parents.¹¹⁵

Adopting the reasoning in *Cooper*, the panel then relied on Florida statutory law and state case law.¹¹⁶ The statutory basis for the court's ruling focused on state law that prohibited parents, as the natural guardians of their children,¹¹⁷ from binding their children to settle claims over \$15,000.¹¹⁸ The

ties" since they "serve an important function" for children and the community. *Zivich*, 696 N.E.2d at 205.

109. See *Scott v. Pac. W. Mountain Resort*, 834 P.2d 6, 12 (Wash. 1992) (stating that "the child would have no recourse against a negligent party to acquire resources needed for care and this is true regardless of when relinquishment of the child's rights might occur."); *Shea I*, 28 Fla. L. Weekly at D2005.

110. See *id.* at D2005-06.

111. 48 P.3d 1229 (Colo. 2002).

112. *Id.*; accord *Scott*, 48 P.3d at 11-12; *Hawkins v. Peart*, 37 P.3d 1062, 1066 (Utah 2001). In *Cooper*, a minor lost vision in both eyes when he was injured in a skiing accident. *Cooper*, 48 P.3d at 1232. Before the Supreme Court of Colorado's ruling in the case, the trial and appellate courts both held that the teenager could not bring action against his coach and the Aspen Ski club for his injuries because of a release signed by the child's mother. *Id.* at 1231-32.

113. *Cooper*, 48 P.3d at 1234.

114. *Id.*

115. See *Shea I*, 28 Fla. L. Weekly at D2005.

116. *Id.*

117. *Id.* Section 744.301(1) of the 2002 *Florida Statutes* states, "[t]he mother and father jointly are natural guardians of their own children and of their natural guardians of their own children and of their adopted children, during minority." FLA. STAT. § 744.301(1) (2002).

118. *Shea I*, 28 Fla. L. Weekly at D2004. Section 744.387(2) of the *Florida Statutes* requires the court to appoint a legal guardian to a minor when the child's settlement claim will

panel also based their rationale on Florida cases holding that parents could not release their child's ability to file compulsory counterclaims,¹¹⁹ waive their child's privilege concerning patient-psychotherapist confidentiality,¹²⁰ and enter into private agreements for child support and custody absent court approval.¹²¹ Interestingly, the panel did not provide great explanation or analysis on another Florida case that it relied upon that shared similarities with *Shea*.¹²² In *Dilallo v. Riding Safely, Inc.*,¹²³ the court held that a child who had been injured while horseback riding could file a cause of action against the defendant for its negligence although the minor had signed a release of liability.¹²⁴ Public policy, the *Dilallo* court reasoned, prevented children from being bound to contractual pre-injury waivers signed by minors and also allowed children to pursue legal claims.¹²⁵

V. THE *SHEA* COURT'S RULING WAS PROPER UNDER PUBLIC POLICY AND *PARENS PATRIAE*

The ruling in *Shea* has drawn criticism on some fronts as being inappropriate, impractical—and unconstitutional¹²⁶—intermeddling into parents' decision-making and authority.¹²⁷ Detractors may assert that the verdict reflects the court's distrust for parental discretion.¹²⁸ However, “[p]ublic pol-

exceed \$15,000. § 744.301(2)-(3). If the settlement amount is less than \$15,000, then the child is bound to the settlement amount negotiated by the child's parents. *Id.*

119. See *Romish v. Albo*, 291 So. 2d 24, 25 (Fla. 3d Dist. Ct. App. 1974).

120. See *Attorney ad Litem for D.K. v. Parents of D.K.*, 780 So. 2d 301, 308 (Fla. 4th Dist. Ct. App. 2001) (holding that a seventeen-year-old girl had patient-psychotherapist privilege that could not be waived or asserted by parents).

121. *Shea I*, 28 Fla. L. Weekly at D2005; see also *Gammon v. Cobb*, 335 So. 2d 261, 267 (Fla. 1976) (holding that an illegitimate minor's right to child support cannot be released by mother's contract because the child's rights and benefits are affected).

122. Like *Shea*, the case of *Dilallo v. Riding Safely, Inc.*, 687 So. 2d 353, 356 (Fla. 4th Dist. Ct. App. 1997) was also a case of first impression in Florida and was heard by the Fourth District Court of Appeal. *Id.*

123. *Id.*

124. *Id.* at 357.

125. See *id.*

126. Appellee's Answer Brief at 24, *Shea I*, 28 Fla. L. Weekly at D2004 (No. 4D02-910). On appeal, Global argued that the “fundamental due process rights to raise and control their children” were at issue in *Shea*. *Id.* Global asserted that a parent's right included the ability to choose the activities for their children, “whether it be participating on a soccer team or traveling on an African safari.” *Id.* at 26. Agreeing to arbitrate or release a minor's claims, Global claimed, were the rights parents “must have” to raise their children. See *id.*

127. Cunningham, *supra* note 7.

128. See Brian A. Dominic, Note, *The Children [and the Timorous May] Stay At Home: Hawkins v. Peart*, 2002 UTAH L. REV. 601, 618.

icy is the cornerstone—the foundation—of all constitutions, statutes, and judicial decisions; and its latitude and longitude, its height and its depth, greater than any or all of them.”¹²⁹ The primary principle of public policy is justice.¹³⁰

When a parent agrees to arbitrate the personal injury claims suffered by their children and deprive the minor of the right to a jury trial—or in *Shea*, the estate of a child to seek legal relief—when the child is injured as a result of another party’s tortious act or negligence, there is an injustice.¹³¹ The parents are allowing a liable party to escape any harsh repercussions from their tortious or negligent actions.¹³² Regardless of their intentions and motivations,¹³³ when a parent forecloses his or her child’s right to recover¹³⁴ “carte blanche,”¹³⁵ the need for commercial enterprises to adhere to the reasonable standard of care loses its significance.¹³⁶ After the court’s ruling in *Shea*, however, businesses in Florida will not be able to use arbitration agreements to prevent juries from hearing the personal injury claims brought by minors.¹³⁷ Commercial enterprises will also be more vigilant to prevent children from being injured as a result of the company’s negligence.¹³⁸

Parents often have to decide whether to release their child’s claims against potential tortfeasors and other negligent parties.¹³⁹ However, parents may not fully understand the significance or the legal repercussions for their children when parents—including parents who are also attorneys¹⁴⁰—bind minors to arbitrate potential causes of action.¹⁴¹ Parents must address the

129. *City of Leesburg v. Ware*, 153 So. 87, 89–90 (Fla. 1934) (adopting and quoting opinion from *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. Kinney*, 115 N.E. 505, 506–07 (Ohio 1916)).

130. *See Ware*, 153 So. 87 at 89.

131. *See Cooper v. Aspen Skiing Co.*, 48 P.3d 1229, 1237 (Colo. 2002); *Scott v. Pac. W. Mountain Resort*, 834 P.2d 6, 9 (Wash. 1992).

132. *See Cooper*, 48 P.3d at 1237.

133. Angeline Purdy, Note, *Scott v. Pacific West Mountain Resort: Erroneously Invalidating Parental Releases of a Minor’s Future Claim*, 68 WASH. L. REV. 457, 474 (1993) (criticizing the Supreme Court of Washington’s ruling in *Scott v. Pac. W. Mountain Resort*, 834 P.2d 6 (Wash. 1992)).

134. *Hawkins v. Peart*, 37 P.3d 1062, 1066 (Utah 2001).

135. *Shea I*, 28 Fla. L. Weekly at D2006.

136. *Hawkins*, 37 P.3d at 1066.

137. *See Olmeda*, *supra* note 81.

138. *See Stephanie Francis Cahill, No Signing Safety Away*, A.B.A. J. E-REPORT, July 12, 2002, available at 2002 WL 1 No. 26 ABAJEREP 3.

139. *See Cooper*, 48 P.3d at 1234; Cahill, *supra* note 138.

140. *See Bierman & Hutchinson*, *supra* note 81. Garrit’s mother Molly Bruce Jacobs is an attorney. *Id.*

141. *See Cahill*, *supra* note 138; Andrew Murr, *Sports Waivers: An Exercise in Futility?*, 31 J.L. & EDUC. 114, 120 (2002).

repercussions of signing parental agreements, conferring arbitration provisions on a daily basis.¹⁴² A parent's decision to release the tortfeasor of liability undermines the parent's responsibility to protect the welfare of his or her child.¹⁴³ Children need to be shielded from the sometimes unsophisticated and naive decisions made by their parents.¹⁴⁴ The state has an obligation to care and protect the interests of minors,¹⁴⁵ and the courts zealously have to assert their role under *parens patriae* to ensure the welfare of children.¹⁴⁶ As illustrated by its reliance on statutory and case law favoring the protection of children,¹⁴⁷ the *Shea* panel properly recognized and invoked its paramount rights under *parens patriae*.¹⁴⁸

Before their children can participate in athletic activities, school clubs, and community organizations, parents are generally required to waive their child's legal right to seek relief.¹⁴⁹ A majority of jurisdictions hold that parental waivers for these activities are not valid without prior judicial or statutory approval¹⁵⁰ and are violative of public policy.¹⁵¹ However, when the detriments of parental waivers containing arbitration provisions for commonplace children's activities are balanced with the social benefits of participation in these functions, "[p]ublic policy does not forbid such an agreement. In fact, public policy supports it."¹⁵² The courts and legislatures may prohibit exculpatory agreements in common children's activities, but parental waivers for child-oriented activities promote public policy.¹⁵³ There is a

142. Stephanie Levy, *Parent Cannot Contract Away Child's Right to Sue*, TRIAL, Feb. 2002, at 97 (discussing *Hawkins v. Peart*, 37 P.3d 1062, 1062 (Utah 2001)).

143. *Cooper v. Aspen Skiing Co.*, 48 P.3d 1229, 1237 (Colo. 2002); *Hawkins*, 37 P.3d at 1067.

144. *Contra* Robert S. Nelson, Comment, *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, 568 (2002).

145. *See* *Scott v. Pac. W. Mountain Resort*, 834 P.2d 6, 11 (Wash. 1992); *Cooper*, 48 P.3d at 1234.

146. *See* McLaughlin, *supra* note 68, at 930.

147. *See* *Shea I*, 28 Fla. L. Weekly at D2005.

148. *See* Appellant's Brief at 15, *Shea II*, 28 Fla. L. Weekly at D1009 (No. 4D02-910) (citing *Hancock v. Dupree*, 129 So. 822, 823 (Fla. 1930) (holding that "[t]he court, when asked to restore an infant, is not bound by any mere legal right of parent or guardian, but is to give it due weight as a claim founded on human nature, and generally equitable and just")).

149. *See* Schalley, *supra* note 1, at 200; Nelson, *supra* note 144, at 560; Melinda Smith, Note, *Tort Immunity for Volunteers in Ohio: Zivich v. Mentor Soccer Club, Inc.*, 32 AKRON L. REV. 699, 714 (1999).

150. *Id.* at 714-15.

151. Murr, *supra* note 141, at 114.

152. Nelson, *supra* note 144, at 560 (quoting *Zivich v. Mentor Soccer Club, Inc.*, 696 N.E.2d 201, 207 (Ohio 1998)).

153. *See* Murr, *supra* note 141, at 117.

need for recreational activities for children¹⁵⁴ because minors benefit from participating in organizations and functions that are conducted by schools, volunteers, and parents.¹⁵⁵ Although minors voluntarily give up their right to seek legal relief, community and school oriented activities provide children with the opportunity to learn life skills and team building skills.¹⁵⁶ In turn, the community at large benefits because community organizations, athletic associations, and school-sponsored clubs can continue to operate and provide opportunities for children.¹⁵⁷

However, there are possible concerns relating to the *Shea* court's validation of parental waivers with arbitration provisions for children's community activities. Validating parental waivers for school-related functions and organized sports leagues could cause youth organizations to lower the standard of care that ensures the safety of minors because these entities can escape potential liability.¹⁵⁸ Allowing these organizations to avoid possible liability contravenes public policy because children could be subjected to unnecessary hazards produced by negligent actions and a lack of accountability.¹⁵⁹ The issue of parental waivers with arbitration clauses for children's activities and the potential drop in the standard of care by youth organizations is a topic that will have to be monitored by the courts. Until then, however, "[e]very learning experience involves risk."¹⁶⁰

VI. INADEQUACIES OF THE COURT'S RULING IN *SHEA*

Like the panel in *Shea*, courts routinely apply public policy as the foundation for their holdings when there is not a statutory or constitutional basis for their decisions.¹⁶¹ Since *Shea* was a case of first impression, the Fourth

154. Purdy, *supra* note 133, at 475.

155. *Hohe v. San Diego Unified Sch. Dist.*, 274 Cal. Rptr. 647, 649 (4th Ct. App. 1990); *Zivich*, 696 N.E.2d at 205. In *Hohe*, a fifteen-year-old girl was injured when she volunteered to participate in a hypnotism show sponsored by her school's parent-teacher-student association. *Hohe*, 274 Cal. Rptr. at 648. Although the minor and her father had signed a waiver form as a condition to her participation in the show, the father still attempted to hold the school, the association, and the school district liable for her injuries. *Id.* However, the appellate court ruled that the release was not void against public policy. *Id.* at 649. For a summary of *Zivich*, see 696 N.E.2d at 205.

156. See *Hohe*, 274 Cal. Rptr. at 649; *Zivich*, 696 N.E.2d at 205.

157. *Hohe*, 274 Cal. Rptr. at 649; *Zivich*, 696 N.E.2d at 205.

158. Mark Seiberling, Note, *Icing on the Cake: Allowing Amateur Athletic Promoters to Escape Liability in Mohney v. USA Hockey, Inc.*, 9 VILL. SPORTS & ENT. L.J. 417, 418 (2002). *Contra Purdy*, *supra* note 133, at 475-76.

159. See Seiberling, *supra* note 158, at 417-18, 448.

160. *Hohe*, 274 Cal. Rptr. at 649.

161. Purdy, *supra* note 133, at 464.

District Court of Appeal's public policy decision will now serve as the source for other similar rulings in the state unless the Supreme Court of Florida decides to hear the case as a matter of great public importance and render an opinion.¹⁶² Since the value of public policy is a variable concept,¹⁶³ a court has a duty to clearly assert the principles that underlie its decision to ensure that future rulings will remain consistent.¹⁶⁴ Verdicts that lack conviction or are vague make it difficult to apply and gauge legal standards.¹⁶⁵

The *Shea* panel articulated its public policy rationale as it related to parents contracting on behalf of their children.¹⁶⁶ However, in applying its public policy rationale, the court was ambiguous in some portions of its legal analysis. Specifically, the court was silent—or was not clear—on the standard used to gauge the arbitration provision in *Shea*.¹⁶⁷ If the Federal Arbitration Act (“FAA”)¹⁶⁸ did not apply to the provision, then the Florida Arbitration Code¹⁶⁹ should have governed the agreement.¹⁷⁰ However, the district court did not provide a governing standard of arbitration.

The court was also correct in its validation of parental waivers for “commonplace child oriented . . . or school supported activities.”¹⁷¹ However, the Fourth District Court of Appeal did not specify what activities would fall under the ambit of the panel's opinion.¹⁷² The lack of clarity used by the *Shea* panel in its rationale has created uncertainty¹⁷³ and casts doubt on the legality of the court's verdict.¹⁷⁴ For the sake of legal consistency, the court should have engaged and fully articulated the basis for its ruling.¹⁷⁵

A. *The Court's Silence on an Arbitration Standard*

The irony of the district court's silence on applying an arbitration standard in *Shea* is that both the Florida Arbitration Code and the FAA were

162. *See id.*

163. *City of Leesburg v. Ware*, 153 So. 87, 89 (Fla. 1934).

164. *Purdy*, *supra* note 133, at 465.

165. *See id.*

166. *Shea I*, 28 Fla. L. Weekly at D2006.

167. *See Cunningham*, *supra* note 7.

168. 9 U.S.C. §§ 1-16 (2000).

169. FLA. STAT. § 682.01-.22 (2002).

170. *See Bagot & Henderson*, *supra* note 2, at 427.

171. *Shea I*, 28 Fla. L. Weekly at D2006.

172. *See Cunningham*, *supra* note 7.

173. *Id.*

174. *See Purdy*, *supra* note 133, at 465.

175. *See id.*

applicable.¹⁷⁶ The *Shea* panel stated that Florida law would determine which parties had entered into a valid binding arbitration agreement.¹⁷⁷ Based on the court's language, it would appear that the district court was applying the Florida Arbitration Code¹⁷⁸ to govern the controversy. The Florida Arbitration Code applies to any written agreement or contractual provision between two or more parties where the parties agree to arbitrate any dispute that may arise during their transaction.¹⁷⁹ Agreements under the state's arbitration laws are "valid, enforceable, and irrevocable"¹⁸⁰ unless the parties stipulate that the Florida Arbitration Code will not apply to the dispute,¹⁸¹ or if the agreement states that arbitration will take place in another jurisdiction.¹⁸²

Jacobs and Global agreed to arbitrate any controversy that arose from the tour contract; the arbitration provision did not expressly state that the Florida Arbitration Code would not apply to the controversy.¹⁸³ The provision also stated that arbitration would be held in Fort Lauderdale,¹⁸⁴ which gave the district court jurisdiction under the Florida Arbitration Code.¹⁸⁵ All of these elements allowed the district court to utilize the Florida Arbitration Code in its analysis. However, the court refused or was reluctant to do so.¹⁸⁶ The *Shea* panel's silence on the Florida Arbitration Code indicates that the court did not believe it was necessary to factor in the state's arbitration laws into its analysis or to be clear on its application of relevant state law.

The Florida Arbitration Code was not applied in *Shea* because, *arguendo*, a court's analysis of an arbitration provision and a motion to compel arbitration are the same under Florida law and federal law.¹⁸⁷ In addition,

176. See also *Cross v. Carnes*, 724 N.E.2d 828, 833 (Ohio 11th Ct. App. 1998) (stating that the Ohio arbitration statute and FAA were referable to arbitration action).

177. *Shea I*, 28 Fla. L. Weekly at D2005.

178. FLA. STAT. § 682.01-22 (2002).

179. § 682.02.

180. *Id.*

181. *Id.*; see also *Wickes Corp. v. Indus. Fin. Corp.*, 493 F.2d 1173, 1175 (5th Cir. 1974) (ruling that the Florida Arbitration Code does not apply to contract when parties expressly agree that statute will not be applied).

182. See *Damora v. Stresscon Int'l, Inc.*, 324 So. 2d 80, 81-82 (Fla. 1975) (holding that the provision to arbitrate future controversies in New York City did not apply to and was outside the authority of the Florida Arbitration Code).

183. See Appellant's Brief at 5, *Shea I*, 28 Fla. L. Weekly at D2006 (No. 4D02-910).

184. *Id.*

185. See *Damora*, 324 So. 2d at 81-82.

186. *Shea I*, 28 Fla. L. Weekly at D2004.

187. *Benedict v. Pensacola Motor Sales, Inc.*, 846 So. 2d 1238, 1241-42 (Fla. 1st Dist. Ct. App. 2003) (citing the Supreme Court of Florida's analysis in *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 636 (Fla. 1999)). The existence of a valid written arbitration agreement, the existence of arbitrable issues, and the possible waiver of the right to arbitrate are the three factors

since section two of the FAA is applicable in state and federal courts,¹⁸⁸ the FAA preempts Florida law because of the national policy favoring arbitration.¹⁸⁹ The preemptive power of the FAA is limited to maritime transactions and contracts involving interstate commerce.¹⁹⁰ The transaction in *Shea* did involve interstate commerce—Maryland residents entered into the arbitration agreement with a Florida corporation¹⁹¹ as part of a contract for a safari in two African countries.¹⁹² The elements at bar allowed the district court to utilize the FAA to govern the dispute in *Shea*.¹⁹³ However, the *Shea* panel never addressed nor articulated the issue of the applicability of the FAA.¹⁹⁴

The court's silence or lack of clarity on an arbitration standard carries legal significance because it involves the "severability" of *Shea's* arbitration provision.¹⁹⁵ When arbitration clauses are governed by the FAA, state courts are allowed to sever the arbitration provision "from the contracts in which they are embedded."¹⁹⁶ However, state courts are only permitted to determine the validity of the arbitration clause but cannot consider the validity of the entire contract.¹⁹⁷ If the district court first decided that the arbitration

Florida courts use in their analyses of a motion to compel arbitration under the Florida Arbitration Code or the FAA. *Seifert*, 750 So. 2d at 636.

188. See *Southland Corp. v. Keating*, 465 U.S. 1, 14–15 (1984); Bagot & Henderson, *supra* note 2, at 427.

189. See *Keating*, 465 U.S. at 10; Bagot & Henderson, *supra* note 2, at 427.

190. 9 U.S.C. § 2 (2000); Bagot & Henderson, *supra* note 2, at 419–20. Under the FAA, commerce is defined in part as:

Commerce among the several states or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation

9 U.S.C. § 1.

191. *Shea III*, 2002 WL 215330, at *2. The tour contract was signed by Jacobs, who also signed the agreement on Garrit's behalf. *Shea I*, 28 Fla. L. Weekly at D2005. Global is a Fort Lauderdale-based corporation. See *id.*

192. Appellee's Answer Brief at 12, *Shea I*, 28 Fla. L. Weekly at D2004 (No. 4D02-910).

193. See *Shea III*, 2002 WL 215330, at *2. Aside from *Accomazzo v. CEDU Educ. Servs.*, 15 P.3d 1153 (Idaho 2000), all of the other cases involving binding arbitration and the personal injury/tort claims of minors previously discussed in this Note did utilize the FAA. See *Fleetwood Enter., Inc. v. Gaskamp*, 280 F.3d 1069, 1073 (5th Cir. 2002); *Costanza v. Allstate Ins. Co.*, No. CIV.A.02-1492, 2002 WL 31528447, at *1 (E.D. La. Nov. 12, 2002); *Troshak v. Terminix Int'l Corp., L.P.*, No. CIV.A.98-1727, 1998 WL 401963, at *1 (E.D. Pa. July 2, 1998); *Cross v. Carnes*, 724 N.E.2d 828, 832 (Ohio 11th Ct. App. 1998).

194. See *Cunningham*, *supra* note 7.

195. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402–03 (1967). "[T]he question of 'severability' is one of state law . . ." *Id.* at 403. The Florida Arbitration Code does allow issues subject to arbitration to be severed. FLA. STAT. § 682.03(3) (2002).

196. *Prima Paint Corp.*, 388 U.S. at 402.

197. *Cross*, 724 N.E.2d at 833; see *Prima Paint Corp.*, 388 U.S. at 404.

clause in the tour contract was not valid, it would have been proper for the court to then determine the validity of the entire agreement.¹⁹⁸ The *Shea* panel did not clearly articulate if it was severing the arbitration provision from the rest of the tour contract to determine its validity.¹⁹⁹ Nevertheless, the district court concluded that the arbitration provision was not valid because the contract—i.e., the parental waiver—lacked validity.²⁰⁰ If the court did apply the FAA to the dispute, did sever the arbitration provision from the tour contract, and found that the arbitration clause was not valid because of the contract's invalidity, then the *Shea* panel contravened precedent.²⁰¹

B. *The Court's Ambiguity Concerning Children's "Commonplace Child Oriented or School Supported Activities"*²⁰²

The ruling in *Shea* delivers a clear statement that the courts will be vigilant to safeguard the well-being of children.²⁰³ However, aside from parental waivers for medical services and insurance coverage, the district court did not clearly specify other circumstances where judicial vigilance will be present.²⁰⁴ The panel did allow for waivers for school sponsored and community activities, but it stopped short of articulating what particular functions would be permitted under the court's ruling.²⁰⁵ The ambiguity of the decision adds to the "confusion and inconsistency that currently plagues"²⁰⁶ parental waivers and arbitration agreements.²⁰⁷ The ruling does not provide any guidelines for parental discretion for certain activities,²⁰⁸ and the legality of parental consent forms containing arbitration provisions for various activities—field trips, scuba diving, camping, horseback riding, and theme parks,²⁰⁹ for example—will consistently be called into question.²¹⁰ This un-

198. See *Cross*, 724 N.E.2d at 835.

199. See *Shea I*, 28 Fla. L. Weekly at D2004. The district court's only detectable analysis of the severability issue concerns its acknowledgement of the trial court's decision to sever the arbitration clause from the parental release. See *id.* at D2005.

200. See *id.* at D2004–05.

201. See *Prima Paint Corp.*, 388 U.S. at 403; *Cross*, 724 N.E.2d at 833.

202. *Shea I*, 28 Fla. L. Weekly at D2006.

203. See Sara Hoffman Jurand, *Parent Cannot Sign Away Child's Rights, Colorado Court Rules*, TRIAL, Sept. 2002, at 82 (quoting Howard Davidson, director of the ABA Center on Children and the Law, after the Supreme Court of Colorado's ruling in *Cooper v. Aspen Skiing Co.*, 48 P.3d 1229 (Colo. 2002)).

204. See Cunningham, *supra* note 7.

205. *Id.*

206. Nelson, *supra* note 144, at 556.

207. See *id.*

208. Cunningham, *supra* note 7 (quoting family law attorney Richard Milstein).

209. *Id.*; Olmeda, *supra* note 81.

certainty will cause other courts to determine what is a commonplace activity for children,²¹¹ which will create a backlog in the court system.²¹²

The lack of clarity concerning children's community oriented and school supported functions also places an undue burden on businesses.²¹³ Service providers will not be aware or sure of the validity of the waivers and arbitration provisions they require parents to sign in order to avoid any liability.²¹⁴ It is fundamentally unfair for businesses not to know if their parental waivers will protect them from potential lawsuits.²¹⁵ Some businesses who are unsure about the legality of their exculpatory agreements and arbitration clauses may not allow minors to partake in their activities to avoid the risk of potential litigation.²¹⁶ As a result, children will be deprived of "recreational and adventuresome activities"²¹⁷ and various industries that cater to minors will suffer.²¹⁸

VII. CONCLUSION

As long as commercial arbitration continues to be a preferred method of settling disputes, cases like *Shea* will undoubtedly become commonplace in Florida and in other jurisdictions. However, the feasibility and appeal of arbitration in Florida will have to be reconsidered in light of the Fourth District Court of Appeal's groundbreaking ruling in *Shea*.²¹⁹ Regardless of the enterprise or activity, contracts entered into by parents on behalf of their children that have arbitration provisions now lack validity if *Shea*'s holding remains unscathed.²²⁰ The willingness of the Florida Legislature and judiciary to safeguard the legal interests of the state's children²²¹ will override the benefits arbitration offers litigants. Public policy and *parens patriae* should be paramount when minors are deprived of their procedural and substantive legal rights—often unknowingly—by their parents.

210. *Id.*; see Cunningham, *supra* note 7.

211. *Id.* (quoting Family Law Attorney Richard Milstein).

212. *Id.* (quoting Rodney Gould, attorney for Global).

213. See Nelson, *supra* note 144, at 556.

214. *Id.*

215. *Id.*

216. See *id.*; Purdy, *supra* note 133, at 475; Dominic, *supra* note 128, at 618.

217. Dominic, *supra* note 128, at 619.

218. See *id.*; Cunningham, *supra* note 7.

219. Olmeda, *supra* note 81.

220. See discussion *supra* note 12 (discussing *Shea*'s possible legal future).

221. See Legal Aid Society of Palm Beach County Inc.'s Brief as *Amicus Curiae* at 4, *Shea I*, 28 Fla. L. Weekly at D2004 (No. 4D02-910) ("Florida state courts have been strong proponents in establishing and protecting children's rights").

Until there is legislative action to amend Florida's existing arbitration laws, public policy and *parens patriae* should be inherent elements of a court's legal analysis when a child's potential causes of action are in question. However, in conducting their analyses, Florida courts, unlike the *Shea* panel, should clearly articulate and assess both the public policy and legal concerns involved.²²² Failing to do so will provide little guidance for courts that will have to address this emerging legal issue. The Supreme Court of Florida will see the need to resolve the issues raised in *Shea*, and in doing so, the court will find that public policy and judicial vigilance for the protection of the state's children will be the overriding factors in affirming the district court's ruling.

222. See *Shea I*, 28 Fla. L. Weekly at D2004.