IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: SC03-1704

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

Appellant,

vs.

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

Appellee.
_____/

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL, FLORIDA
CIVIL ACTION

BRIEF OF APPELLANT
GLOBAL TRAVEL MARKETING, INC.

Rodney E. Gould
Brad A. Compston
RUBIN, HAY & GOULD, P.C.
205 Newbury Street
P.O. Box 786
Framingham, MA 01701
(508) 875-5222

Edward S. Polk
Conroy, Simberg, Gannon, Krevans
&
Abel, P.A.
3440 Hollywood Blvd
2nd Floor
Hollywood, Florida 33021
(954) 961-1400

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

INTRODUCTION AND STATEMENT OF THE CASE

This Appeal addresses the enforceability of an agreement to arbitrate entered into between Global Travel Marketing, Inc., d/b/a The Africa Adventure Company ("Africa Adventure"), and Mark Garrity Shea ("Garrity Shea"), by and through his mother, Molly Bruce Jacobs ("Jacobs") as a condition of her and Garrity Shea's participation in a safari to Southern Africa. The safari was arranged by Africa Adventure. The agreement to arbitrate provided that any claim against Africa Adventure arising out of or relating to the safari would be settled by binding arbitration. During the course of that safari, Garrity Shea tragically was killed by a hyena.

On or about June 11, 2001, Mark R. Shea ("Mark Shea" or "Shea"), as Personal Representative of the Estate of Mark Garrity Shea, filed a complaint in the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County against Africa Adventure seeking damages for the death of Garrity Shea. Pursuant to a motion filed by Africa Adventure, the Circuit Court stayed the matter and ordered arbitration pursuant to the parties' agreement. (Appendix ("App.") A)[1]. The Circuit Court held that Garrity Shea could be bound to the agreement on two

[1] The portions of the Record from the lower courts cited to in this brief are reproduced in the Appendix being filed with this Brief.

theories. First, it found he could be viewed as a third party beneficiary of the contract and therefore was bound by the contract. (Id.) Alternatively, it found that parents may bind children to agreements of this type on the basis of "a well established principle that parents have a fundamental liberty, interest in the care, custody and management of their offspring." (Id.) On the basis of this interest, the court found that "a parent has certain inherent authority in making decisions on behalf of his or her child." (Id.)

Shea appealed that decision, arguing that Garrity Shea's mother could not, pursuant to Florida law, agree to arbitration on his behalf. The Fourth Circuit District Court of Appeal reversed the order of the Circuit Court, stating that "ultimately, the question of whether parents can contract on behalf of their children is determined on public policy grounds." (App. B) On the basis of public policy, namely the state's interest in protecting children, the Court of Appeal concluded "that a parent, under these circumstances, does not have the authority to bind a minor child to arbitrate potential personal injury claims." (Id.) Following an order of the Court of Appeal certifying the question in this case as one of great public importance, Africa Adventure timely sought an appeal of

that ruling to this Court. On September 29, 2003, this Court ordered
briefing of the issue.

STATEMENT OF FACTS

Mark Shea is a resident of Maryland. (App. G). He is the father of Garritty Shea, who also was a resident of Maryland. (Id.) He was appointed personal representative of the Estate of Mark Garrity Shea in Maryland. (Id.). Molly Bruce Jacobs, Garrity Shea's mother and a lawyer, at all relevant times, also was a resident of Maryland. (Id.) In or about the beginning of 2000, she contacted Africa Adventure from Maryland about arranging a safari to Africa for Garitty Shea and herself. (App. C, 3).

Africa Adventure was, and is, a corporation duly organized and existing under the laws of the State of Florida, with its headquarters and principal place of business in Fort Lauderdale, Florida. (App. C, 1). Africa Adventure was, and currently is, a tour operator specializing in African safaris. (Id.) As a tour operator, Africa Adventure plans and arranges the various elements of safaris throughout Africa. (Id.)

At Jacobs' request, Africa Adventure arranged a safari for Jacobs and her son to Botswana and Zimbabwe. (Id. at 2) The safari began on July 3, 2000, and was scheduled to end on July 28, 2000. (Id.) On July 4, 2000, Garrity Shea and Jacobs arrived in Maun, Botswana. (Id.) The following morning they boarded a private charter flight to Xai Xai, Botswana, where they

began their safari and camping. (Id.) On July 17, 2000, they arrived at the Xakanaxa airstrip in the Moremi Reserve in Botswana. (Id.) After spending the first night of this segment of their safari camping on an island in the Xakanaxa area of the Delta within the Reserve, they were taken to a mobile camp. (Id.) On July 19, 2000, while at this camp, the incident at issue occurred. (Id.)

The safari in which Garritty Shea was participating was not a standard safari. (App. C, 2-3). To the contrary, it was a customized, private trip, each element of which Jacobs specifically selected. (Id.) Independent contractors located in Africa operated each element of the safari. When they booked the trip, on or about March 10, 2000, Jacobs, who is an attorney, signed, on behalf of both herself and Garritty Shea, a Release of Liability and Assumption of Risk form (the "Release") explicitly acknowledging and accepting the risks

involved as a condition of participating in the safari. (App. C, 3).

The Release includes a provision mandating that all disputes between Jacobs and/or Garritty Shea and Africa Adventure be settled by binding arbitration:

> 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.

(App. C, 3-4,6).[2]

---

[2] In addition to the agreement to arbitrate, the Release provides, in part:

> IN CONSIDERATION OF being accepted for the adventure vacation that I am participating in under the auspices of THE AFRICA ADVENTURE COMPANY, its agents, associates, assigns, employees, officers, licensees, and successors in interest (hereafter The Africa Adventure Company), I hereby agree as follows:
>
> I have been informed and am aware that ADVENTURE TRAVEL CAN BE DANGEROUS and includes certain risks and dangers, including but not limited to . . . dangers of wild animals, forces of nature . . . and evacuation difficulties, should I be injured or disabled. I accept the inherent risks of the proposed trip and acknowledge that the enjoyment of adventuring beyond normal safety of home and work is in part the reason for my participation on this trip.
>
> I HEREBY RELEASE, WAIVE, INDEMNIFY, and AGREE NOT TO SUE THE AFRICA ADVENTURE COMPANY for any or all liability to the undersigned, his/her personal representatives, heirs, assigns, and next of kin, for any and all losses, damages, or injuries or any claim or demand on account of injury or emotional trauma to the person . . . or on

Jacobs signed the contract on her own behalf and on behalf of her son. The relevant portion of the Release provides:

> 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.

(App. C, 4).

On or about November 21, 2000, Jacobs filed a suit for damages arising out of this incident. Africa Adventure moved to stay that suit and to compel arbitration pursuant to the agreement to arbitrate Jacobs signed. The trial court found that the arbitration agreement was valid, binding on Jacobs, and that it encompassed the claims arising out of her son's death. (App. D). Accordingly, it granted Africa Adventure's motion. A decision was affirmed on appeal. (App. E).[3]

STATEMENT OF JURISDICTION

> account of death resulting from any cause, including negligence (but not the reckless, willful, or fraudulent conduct) of THE AFRICA ADVENTURE COMPANY or others while the undersigned is participating in a tour or any travel or other arrangements made by THE AFRICA ADVENTURE COMPANY.

(App. C, 3, 6).

[3] The parties in the Jacobs matter are currently in arbitration.

In its opinion of August 27, 2003, the Fourth District Court of Appeal certified the issue in this case as one of great public importance. There can be no question of the importance of this issue. As we explain more completely in Point III, parts C
and D, the implications of the decision in this case are profound. The decision reached in this case could have deep impact to the fundamental rights of parents and on the role of the family in raising, educating and controlling the experiences of their children.

Additionally, the result in this case will greatly affect the operations of the courts in Florida. Under the approach adopted by the Court of Appeal, courts will be placed in the position of determining the best interests of children not, as now, in those few circumstances where parents are unable to do so, but on a daily basis. Courts will be called upon to weigh a child's interests against the risks associated with a given activity and asked to decide whether the child's rights to a jury trial or his or her substantive rights should be waived. Moreover, the courts will be asked to do so hundreds if not thousands of times on a daily basis, as parents seek court authorization for their children to play little league, join

the Girl Scouts, join their parents on a canoe trip and otherwise go about daily life.

Likewise, Florida businesses that deal with minors, including major industries such as tourism, travel, theme parks and transportation will be severely impacted if minors, through their parents, can no longer enter into enforceable agreements to arbitrate and/or to release entities. Many Florida businesses depend on the validity of agreements to arbitrate, forum selection clauses and/or releases of liability in their methods of operation, pricing of goods and services, and costs of insurance coverage. These businesses will, at minimum, be forced to reevaluate entirely the way in which they operate if such agreements are declared invalid. It is reasonable to expect that many of these businesses will henceforth refuse to serve children and/or families or will increase their prices for doing so dramatically. Many others, voluntarily or involuntarily, likely will cease operating either because they cannot afford to do so, cannot attract sufficient business at the new, higher prices they are forced to charge, or cannot obtain needed insurance coverage due to the uncertainty created by the Court of Appeal's ill-considered rule.

It is vital that this Court consider this issue at this time. The uncertainly facing businesses until this issue is addressed by this court and until the decision of the Court of Appeal is reversed will continue to grow. Rather than allow the issue to go undecided, meaning that businesses throughout the state will not know if their releases and agreements to arbitrate are valid or whether the prices they are charging for their goods and services accurately reflect the costs and risks being borne by the business, this Court should address this issue at this time.

POINTS ON APPEAL

1. THE FEDERAL ARBITRATION ACT GOVERNS THIS MATTER AND REQUIRES ENFORCEMENT OF THE PARTIES' AGREEMENT TO ARBITRATE.

2. THE COURT OF APPEAL ERRED IN REFUSING TO ENFORCE THE AGREEMENT ON PUBLIC POLICY GROUNDS

3. EVEN IF CONSIDERATION OF PUBLIC POLICY WAS PROPER, THE AGREEMENT TO ARBITRATE SHOULD BE ENFORCED BECAUSE FLORIDA LAW AND PUBLIC POLICY FAVOR ENFORCEMENT OF THESE TYPES OF AGREEMENTS.

SUMMARY OF ARGUMENT

The issue on appeal relates to the enforceability of an agreement to arbitrate entered into by a parent on behalf of

her child. Resolution of this issue is governed by the Federal Arbitration Act (the "FAA"), which strongly favors the enforcement of arbitration agreements and creates a presumption of arbitrability. This presumption exists both where the question before a court is whether a person or entity is a party to the agreement and where the issue is whether grounds exist to refuse to enforce the agreement entered into by the parties.

Under the FAA, resolution of these issues is resolved by looking to generally applicable contract law principles of the state. The state may not consider is own public policies or state interests in determining whether to enforce an arbitration agreement, as state laws contrary to or inconsistent with the FAA's presumption of arbitrability and the federal policy
favoring arbitration are preempted.

There is no question that Garrity Shea was a party to the agreement to arbitrate. Numerous decisions recognize the right of parents to contract on behalf of their children. This right in encompassed by the fundamental right of parents to direct and control the upbringing, education and experiences of their children. Even absent such overriding parental rights, the

agreement is enforceable against Garrity Shea as a third party beneficiary of the contract.

Based on the foregoing, it was error for the Court of Appeal to refuse to enforce the arbitration agreement. There are no generally applicable contract law principles justifying the decision, nor did the Court of Appeal suggest there were any such principles applicable to the case. On the contrary, the Court of Appeal expressly based its decision on public policy grounds, concluding that the state interest in protecting children outweighed the presumption of arbitrability of the FAA. This approach is prohibited by the FAA, as the state public policy considerations were preempted by the FAA and its overriding public policy to favor arbitration.

Even if consideration of public policy issues was proper, the Court of Appeal made the wrong choice in this case. The overriding interest applicable to this matter is the fundamental right of parents to direct the upbringing, education and experiences of their children. This right, alternatively viewed as a privacy right of families, is paramount, and this Court has held that courts should not second-guess parental decision making or attempt to determine the “best interests” of children absent

an absolute need to do so. While the Court may determine a child's interests where a parent is found to be unfit, or where a

parent's interests conflict with the interests of a child, it may not do so where such circumstances do not exist.

Finally, the Court of Appeal's decision to supplant the judgment of parent's with its own judgment concerning the best interests of children in Florida creates an unworkable system. Under that system, parents may be able to sign agreements to arbitrate or substantive releases for a child to participate in school trips or "commonplace" sports and activities, but may not do so in the context of family trips or unique or unusual events. Thus, before a child may participate in such activities parents will be forced to seek court approval. The Courts are ill-equipped to deal with a daily influx of hundreds of parents seeking approval for their trip to Disney World.

Similarly, innumerable businesses which deal with families and children, and require agreements to arbitrate or releases, as a fundamental part of their business, will be forced to cease operations, radically re-price their goods and services or radically change their operations. Major industries, particularly industries such as the travel, tourism, and

transportation industries will be significantly impacted by a decision that parents cannot agree to arbitration on behalf of their children.

ARGUMENT

POINT I

THE FEDERAL ARBITRATION ACT GOVERNS THIS MATTER AND REQUIRES ENFORCEMENT OF THE PARTIES' AGREEMENT TO ARBITRATE.

A. The Federal Arbitration Act applies to the contract between the plaintiff and Africa Adventure.

Analysis of the issues in this case must begin with recognition of the fact that the Federal Arbitration Act, 9 U.S.C. § 1, et seq. governs this case. The FAA creates "a body of federal substantive law of arbitrability" and represents "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)(underlining added). See also Doctor's Assocs., Inc. v. Distajo, 107 F.3d 126, 130 (2d Cir. 1997). The pertinent section of the FAA provides as follows:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration, the court in which such suit is

> pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3. The FAA must be applied in state court in order to prevent forum-shopping and assure uniform results in all cases, whether filed in federal or state courts. Allied-Bruce Terminix Cos. v. Dobson (1995) 513 U.S. 265, 273-74, 279. "Under the FAA, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation or waiver, delay, or a like defense to arbitrability." Moses H. Cone Mem. Hosp., 460 U.S. at 24-25. See also Coenen v. R.W. Pressprich & Co., 453 F.2d 1209, 1211-12 (2d Cir. 1972), cert. denied, 406 U.S. 949 (1972); American Recovery Corp. v. Computerized Thermal Imaging Inc., 96 F.3d 88, 92 (4th Cir.
1996); Howard Elec. & Mech. Co. v. Frank Briscoe Co., 754 F.2d 847, 849-50 (9th Cir. 1985). "[A court] may not deny a party's request to arbitrate an issue 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'"

American Recovery Corp., 96 F.3d at 92 (quoting United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960)). See also Mehler v. Terminex Int'l Co. L.P., 205 F.3d 44, 49 (2d Cir. 2000).

The FAA preempts contrary provisions of state law. Southland Corp. v. Keating, 465 U.S. 1, 10-16 (1984).[4] The preemption is broad; any state arbitration act or ruling that treats contracts to arbitrate specially or differently from contracts generally is pre-empted if, as applied, such law is inconsistent with the FAA. See Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681 (1996).

The FAA's presumption of arbitrability and preemption doctrines are applicable both where the issue is whether an agreement to arbitrate is enforceable and whether one should be considered a party to an agreement to arbitrate. See Employers Ins. of Wausau v. Bright Metal Specialties, Inc., 251 F.3d 1316, 1322 (11th Cir. 2001). Cases enforcing arbitration agreements against nonsignatories have repeatedly recognized the applicability of this presumption. See, e.g., Cross v.

[4] The FAA's legislative history makes clear that Congress intended "a broad reach of the act, unencumbered by state law restraints." Southland Corp. v. Keating, 465 U.S. at 13.

Carnes, 724 N.E.2d 828, 836 (Ohio 1998) (enforcing arbitration agreement signed by parent against minor child "in light of Ohio's policy favoring the settlement of disputes through arbitration"); Doyle v. Giuliucci, 62 Cal. 2d 606, 401 P.2d 1, 6-7 (1965) (enforcing arbitration agreement signed by parent against minor); Leong v. Kaiser Found. Hosps., 71 Haw. 240, 249, 788 P.2d 164, 169 (1990) (same); MS Dealer Svc. Corp. v. Franklin, 177 F.3d 942 (11th Cir. 1999)(enforcing arbitration agreement against nonsignatory to agreement; "as a general rule, therefore, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability").

For the FAA to apply to the contract between the plaintiff and Africa Adventure, it must, of course, be shown that the contract involves "commerce" as defined by the Act.[5] The FAA defines "commerce," in part, as "commerce among the several States or with foreign nations. . . ." 9 U.S.C. § 1.

The Release containing the arbitration clause was entered into between Jacobs and Garrity Shea -- residents of Maryland

[5]"A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

at the time of the booking of their safari and at the time of the safari itself -- and Africa Adventure, a Florida corporation.

The Release was part of the plaintiff's registration for the July, 2000 safari to Botswana and Zimbabwe. Thus, the contract between the plaintiff and Africa Adventure clearly implicates interstate commerce and therefore the FAA because it involves commerce between citizens of different states. See Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 277-82, 115 S. Ct. 834, 841-43 (1995) (adopting the "commerce in fact" standard).

B. Under the FAA, there are no grounds to refuse to enforce the arbitration clause applicable to the claims in this case.

The proper analysis when a court is confronted with a motion to compel arbitration is well settled. First, the court should ask whether the party against whom arbitration is sought is a party to the agreement to arbitrate under established state contract and agency principles. See E.I. Dupont De Nemours and Co. v. Rhone Poulenc Fiber and Resin Intermediates, S.A.S., 269 F.3d 187, 194 (3rd Cir. 2001). If the court finds that the

person is a party to the agreement to arbitrate, it should ask whether the agreement is broad enough to encompass the dispute.

See MS Dealer Service Corp. v. Franklin, 177 F.3d 942 (11th Cir. 1999).

Assuming the Court answers these questions in the affirmative, it next must consider whether there exists grounds to refuse to enforce the agreement. In so doing, the FAA is clear that a court should consider only generally applicable contract law principles and that any state law that treats contracts to arbitrate specially or differently from contracts generally is pre-empted if, as applied, such law is inconsistent with the FAA. See Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681 (1996). See also First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995). In considering a claim that an arbitration agreement is invalid, under the FAA a court should look to the applicable state law and "should apply ordinary
state-law principles that govern the formation of contracts."

Finally, a court faced with a claim that an agreement to arbitrate is not enforceable must consider the validity of only the arbitration agreement, not the contract as a whole. While there is also a general release signed on behalf of Garrity Shea, the enforceability of the release or of the contract as a whole

is not before this Court, only the enforceability of the arbitration agreement. See Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967); Cross v. Carnes, 132 Ohio App. 3d 157, 724 N.E.2d 828, 833 (1998) ("When faced with broad arbitration clauses such as the one found in the instant case, courts are not permitted to consider allegations that the general agreement containing the provision is invalid, and must instead limit their inquiries to allegations that the separate arbitration agreement within the general agreement is invalid"). The enforceability of the release itself must, of course, be decided by the arbitrator. See Stinson-Head, Inc. v. City of Sanibel, 666 So.2d 119 (Fla. 2d DCA 1995) (arbitrator must decide statute of limitations defense); Jacobs v. Global Travel Marketing, Inc., Case No. 00-19881 05, slip op. (Fla. Cir. Ct., Broward Co. Feb. 2, 2001), aff'd, Case No. 4D01-811 (Fla. 4th DCA Oct. 3, 2001) (App. D)("[w]hether the Release exculpates
Defendant from the claims alleged herein is a question for the arbitrator and, of course, the Court makes no findings on this issue").

There is no dispute that the arbitration agreement in this case is broad enough to encompass the plaintiff's claims (the

second question under the FAA analysis), as neither the plaintiff nor the Court of Appeal considered this issue. Consequently, this issue will not be further briefed. We address below the other issues that may be considered under the FAA.

1. Garrity Shea was a party to the agreement to arbitrate.

As the first step in determining whether to allow a motion to compel arbitration, a court must determine whether an arbitration agreement is enforceable against a party. In so doing, the FAA requires consideration only of general state contract and agency law principles to determine whether an arbitration agreement is enforceable against a party. See E.I. Dupont De Nemours and Co. v. Rhone Poulenc Fiber and Resin Intermediates, S.A.S., 269 F.3d 187, 194 (3rd Cir. 2001). A court should not consider or make public policy judgments on whether the enforcement of the agreement is in the public interest, as Congress already made that judgment in enacting the FAA and in providing for preemption of contrary state law.

In this case, it is clear that under general contract and agency principles, Garrity Shea is a party to the agreement to arbitrate. He, and therefore his Estate, is bound by the agreement on any number of different theories. Indeed, in

declining even to discuss these grounds in its decision, and focusing instead on its views on public policy, the Court of Appeal recognized as much.

In granting the motion to compel arbitration, the Circuit Court correctly found that Garrity Shea was a party to the agreement to arbitrate. First, the Court recognized the many cases upholding "the ability of a parent to bind a child to arbitration." (App. A); see Cross v. Carnes, 132 Ohio App. 3d 157, 724 N.E.2d 828, 836 (1998) (holding that parent may bind child to contractual agreement to arbitrate); Doyle v. Giuliucci, 401 P.2d 1 (Cal. 1965) (enforcing arbitration agreement agreed to by father for child in context of health care coverage); Leong v, Kaiser Foundation Hospitals, 788 P.2d 164 (Hi. 1990) (minor bound by arbitration provision in health insurance policy as a third party beneficiary); Pietrelli v. Peacock, 13 Cal. App. 4th 943 (Cal. 1st App. Dist. 1993) (unborn child bound by arbitration agreement).

Indeed, it is well-settled in most contexts parents may contract on behalf of their children. See Phillips v. Nationwide Mutual Ins. Co., 347 So. 2d 465 (Fla. 2d DCA 1977)(recognizing right of father to enter into a contingency agreement on behalf

of minor child); Hohe v. San Diego Unified School Dist., 224 Cal. App. 3d 1559 (1990)("a parent may contract on behalf of his or her children"). See also Sharon v. City of Newton, 769 N.E.2d 738 (Mass. 2002) (parent may sign a release of liability on behalf of child); but see Gammon v. Cobb, 335 So. 2d 261 (Fla. 1976)(parent may not contract away child's right to child support). A rule otherwise would make no sense where the law refuses to enforce most contracts entered into by persons under the age of 18. See Fla. Stat. § 743.07. If parents cannot contract for their children, and children cannot enter into contracts themselves, they will not have access to contractual services. Accordingly, the Florida Courts have previously recognized that a parent may enter into a contract for a child.

The Circuit Court also correctly held that Garrity Shea was a party to the agreement to arbitrate because he was a third party beneficiary of the contract. See E.I. Dupont De Nemours and Co. v. Rhone Poulenc Fiber and Resin Intermediates, S.A.S., 269 F.3d 187, 194 (3rd Cir. 2001); Allgor v. Travelers Ins. Co., 654 A.2d 1375 (N.J. App. 1995)(minor bound to contractual agreement to arbitrate contained in contract entered by father because minor was a third party beneficiary of the contract);

Leong v. Kaiser Foundation Hospitals, 788 P.2d 164 (Haw. 1990)(minor bound to agreement to arbitrate as a third party beneficiary).

Florida decisions are fully consistent with this principle. See Martha A. Gottfried, Inc. v. Paulette Koch Real Estate, Inc., 778 So. 2d 1089 (Fla. 4th DCA 2001)(third party beneficiary,
having accepted the benefits of contract, bound by agreement to arbitrate); Orion Ins. Co. v. Magnetic Imaging Systems I, Ltd.,

696 So. 2d 475 (Fla. 3d DCA 1997); Terminix Int'l Co. LP v. Ponzio, 693 So. 2d 104 (Fla. 5th DCA 1997).

Similarly, it is a well settled rule that one family member may bind another to a contractual term in the context of a commercial travel agreement. See Harden v. American Airlines,
178 F.R.D. 583 (M.D. Ala. 1998) (customers, including two minors, who traveled on cruise were bound by contract printed on tickets where parent paid for tickets and accepted them and minors participated in trip); Ciliberto v. Carnival Cruise Lines, Inc., 1986 AMC 2317 (E.D. Pa. 1986) (plaintiff bound by contract on cruise line ticket where she never saw ticket, which was arranged for and obtained by traveling companion);

Lemoine v. Carnival Cruise Lines, 854 F. Supp. 447 (E.D. La. 1994) (plaintiff bound to contract where brother received and held cruise line tickets); Hodes v. S.N.C. Achille Lauro ed Altri-Gestione, 858 F.2d 905 (3d Cir. 1988), cert. dismissed, 490 U.S. 1001 (1989) (plaintiff bound by contractual provision in contract retained by travel agent).

Along similar lines, numerous decisions have recognized that nonsignatories to a contract may be bound by an agreement to arbitrate. See e.g., McBro Planning & Dev. Co. v. Elec. Constr. Co., Inc., 741 F.2d 342 (11th Cir. 1984) (where the claims against a nonsignatory are "intimately founded in and intertwined with the underlying contract obligations" or where there is a close relationship between the entities involved, a nonsignatory may enforce an agreement to arbitrate); Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753 (11th Cir. 1993) ("the nexus between Sunkist's claims and the license agreement, as well as the integral relationship between SSD and Del Monte,

leads us to the conclusion that the claims are 'intimately founded in and intertwined with' the license agreement").

Finally, the Circuit Court correctly noted that parents are authorized to contract on behalf of their children based on the "well established principle that parents have a fundamental liberty interest in the care, custody and management of their offspring." (App. A). This Court has "on numerous occasions recognized that decisions relating to child rearing and education are clearly established as fundamental rights within the Fourteenth Amendment of the United States Constitution." Von Eiff v. Azicri, 720 So. 2d 510 (Fla. 1998). Indeed, the United States Supreme Court has noted that this parental liberty interest "is perhaps the oldest of the fundamental liberty interests recognized by this Court." Troxel v. Granville, 530 U.S. 57, 65 (2000).

On the basis of these decisions, the Circuit Court properly found that general contract principles bound Garrity Shea to the agreement to arbitrate. The Court of Appeal did not find otherwise. Rather, it found that despite Garrity Shea being a party to the contract, it nevertheless would decline to enforce the agreement on the basis of public policy considerations.

2. There is no valid reason to refuse to enforce the agreement to arbitrate.

Since there can be no question but that under general Florida contract and agency law, Garrity Shea was a party to the agreement to arbitrate, he is bound by that agreement unless

there exists reasons to find the agreement unenforceable. Under the FAA, the only reason a Court may refuse to enforce the agreement is if it may do so based upon "ordinary state-law principles that govern the formation of contracts." First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995). These ordinary contract principles would encompass fundamental claims such as duress, unconscionability, or fraud in the inducement of the agreement to arbitrate or other principles applicable to all contracts. See Doctor's Assoc., Inc. v. Casarotto, 517 U.S. 681, 687 (1996).

The plaintiff conceded, *sub silentio*, before both the Circuit Court and the Court of Appeal that there exists no reason to refuse to enforce the agreement to arbitrate on the basis of ordinary state contract law applicable to all contracts. Rather, he argued to the Court of Appeal that the contract was unenforceable on public policy grounds applicable only to agreements to arbitrate. The Court of Appeal, too,

failed to identify any general contract principle to justify its decision.

On the contrary, that Court acknowledged that the issue was "determined on public policy grounds," not on general contract law. This approach violates clear federal law for the reasons set forth in Point II.

POINT II

THE COURT OF APPEAL ERRED IN BASING ITS DECISION ON ITS VIEW OF FLORIDA STATE PUBLIC POLICY

In adopting the FAA, Congress made an explicit policy decision in favor of "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. Moses H. Cone Mem. Hosp. v, Mercury Constr. Corp., 460 U.S. 1, 24 (1983). This policy judgment is the Supreme Law of the Land, and preempts contrary state laws or policies that might otherwise refuse to enforce contractual agreements to arbitrate. See Southland Corp. v. Keating, 465 U.S. 1, 10-16 (1984).

Section 2 of the FAA provides that an agreement to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (underlining added).

Construing this statute, the Supreme Court repeatedly has held that:

> '[s]tate law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with' the text of § 2.

Doctor's Assoc., 517 U.S. at 685 (quoting Perry v. Thomas, 482 U.S. 483, 493, n.9 (1987)). The Supreme Court decisions in this area consistently hold that only "generally applicable contract defenses, such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2." See Doctor's Assoc., 517 U.S. at 687. See also Allied-Bruce Terminix v. Dobson, 513 U.S. 265, 281 (1995); Rodriguez de Quijas v. Shearson/American Express, 490 U.S. 477, 483 (1989). "Courts may not, however, invalidate arbitration agreements under state laws applicable only to arbitration provisions." See Doctor's Assoc., 517 U.S. at 687.

Instead of generally applicable contract principles, the Court of Appeal based its decision here on public policy specifically regarding agreements to arbitrate.[6] Despite

[6] The Court's reasoning would apply to releases of substantive rights as well as to agreements to arbitrate but it clearly would not apply to bar a parent's basic right to contract on behalf of his or her child. The Court of Appeal erred in addressing not only the enforceability of the

recognizing the authority of parents to contract for their children in other contexts, the Court of Appeal decided that "commercial" agreements to arbitrate fell into a special category of types of contracts that parents should not be permitted to make. By placing arbitration agreements into that category, the Court of Appeal ran afoul of the FAA and a vast body of Supreme Court precedent.

In preempting contrary state laws, Congress barred state legislatures and courts from substituting their judgment, and/or state policies and priorities, for the federal policy of favoring arbitration. Under the Supremacy Clause, the Court of Appeal could not decide that certain state policy trumps the federal policy mandating enforcement of agreements to arbitrate. Its decision to do so despite the mandates of the FAA was error.

POINT III

EVEN IF CONSIDERATION OF PUBLIC POLICY WAS PROPER, THE AGREEMENT TO ARBITRATE SHOULD BE ENFORCED BECAUSE FLORIDA LAW AND PUBLIC POLICY FAVOR ENFORCEMENT OF THESE TYPES OF AGREEMENTS.

---

agreement to arbitrate, but also arguably substantive releases of liability since that issue was not before the court. See Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967). In any event, the decision certainly was not applicable to all contracts entered into by parents on behalf of their children, and therefore is preempted.

While it was improper for the Court of Appeal to have concluded that its view of Florida public policy[7] outweighs the federal policy to promote arbitration agreements, even if consideration of such factors was proper, the Court reached the wrong result in this case. Sound public policy favors recognition of the parental right to consent to arbitration on behalf of a minor child.

---

[7] The Court of Appeal determined that it should consider Florida's interest in protecting children's rights and Florida law relating to this issue despite the fact that the plaintiff, Garrity Shea and Jacobs all lived in Maryland at all relevant times, dealt with Africa Adventure from Maryland and never visited Florida. Before the Court of Appeal, Africa Adventure asserted that if any state law or state interest should be considered, it should be that of Maryland. The Court of Appeal held that because the choice of law issue was not briefed in the Circuit Court, it was waived. It then proceeded to apply Florida law. This conclusion was incorrect. Before both the Court of Appeal and the Circuit Court, Africa Adventure argued, as it does now, that the matter was governed by the FAA, not Florida or Maryland law. To the extent a court may consider general principles of state contract law to invalidate the agreement to arbitrate, there was no reason to address the choice of law issue, as there exists no substantive difference in the common law contract principles of the states. Only when the Court determined, incorrectly, that it could consider state interests and public policy to decide whether to enforce the agreement to arbitrate, an argument advanced by the plaintiff for the first time on appeal, did it become necessary to consider which state's interests and laws should factor into the enforceability question.

A. The fundamental rights and interests of parents in raising <u>their children justifies enforcement of the agreement</u>.

Most courts that have considered this issue have upheld the parent's right and ability to consent to arbitration on behalf of a minor child.[8] Recently, in <u>Sharon v. City of Newton</u>, 769 N.E.2d 738 (Mass. 2002), a decision not even considered by the Court of Appeal, the Massachusetts Supreme Judicial Court held that a release of liability signed by a parent on behalf of a child as a condition of the child's participation in cheerleading was enforceable. Citing Supreme Court precedent, including the decision in <u>Parham v. Dept. of Human Resources of Georgia</u>, 442 U.S. 584,(1978), that "with respect to matters relating to their care, custody, and upbringing [parents] have a fundamental right to make those decisions for them," the Massachusetts Court explained:

---

[8] Only a handful of decisions specifically address the validity of agreements to arbitrate in these circumstances. Other decisions have addressed whether parents may waive rights of their children, but in the context of the release of <u>substantive</u> rights, not the purely <u>procedural</u> rights at issue in the context of an arbitration agreement. These cases are not strictly analogous to the present one, since substantive releases do not enjoy the same presumption of enforceability under the FAA as arbitration agreements. However, to the extent this Court determines that it may consider public policy in this case, many of the public policy considerations in those cases are the same ones that would be applicable here. For this reason, we discuss the reasoning of these cases.

> In the instant case, Merav's father signed the release in his capacity as parent because he wanted his child to benefit from participating in cheerleading, as she had done for four previous seasons. He made an important family decision cognizant of the risk of physical injury to his child and the financial risk to the family as a whole. In the circumstance of a voluntary, nonessential activity, we will not disturb this parental judgment. This comports with the fundamental liberty interest of parents in the rearing of their children.

Sharon, 769 N.E.2d at 746-47.

For similar reasons, a California court, in Hohe v. San Diego Unified School Dist., 224 Cal. App. 3d 1559 (1990), affirmed the validity of a release signed by a parent permitting a child to volunteer to be hypnotized during a school show. That Court noted that "every learning experience involves risk. In

this instance Hohe agreed to shoulder that risk. No public policy forbids the shifting of that burden." Id. at 1564. See also Zivich v. Mentor Soccer club, Inc. 696 N.E.2d 201 (1998)(mother had authority to bind minor child to exculpatory agreement).

The few cases to consider the issue in the context of an arbitration agreement, which obviously involves procedural rather than substantive rights, are nearly uniform in allowing

parents to bind their children. In Cross v. Carnes, 132 Ohio App. 3d
157, 724 N.E.2d 828 (1998), for example, the Supreme Court of Ohio considered the enforceability of an arbitration agreement a mother signed on behalf of her daughter. Finding the daughter's defamation and fraud claims subject to arbitration, the court rejected as irrelevant cases cited by the plaintiff relating to general releases. 724 N.E.2d at 836. See also Fischer v.
Rivest, 2002 Conn. Super. LEXIS 2778 (Aug. 15, 2002) (App. F)(release signed by father as part of child's participation in hockey league enforced against minor); Doyle v. Giuliucci, 62 Cal. 2d 606, 401 P.2d 1 (1965) (enforcing an arbitration agreement signed by parent against minor); Leong v. Kaiser Found. Hosp., 71 Haw. 240, 788 P.2d 164 (1990) (same). See also Paster v. Putney, 1999 U.S. Dist. LEXIS 9194 (C.D. Cal. 1999) (enforcing forum selection clause against minor); Premier Cruise Lines, Ltd.

V. Sup. Ct. of Los Angeles County, 1997 AMC 2797, 2809 (enforcing forum selection clause against minor).

Explicitly or implicitly, these cases are premised on the overriding fundamental interest and right of parents to direct

the upbringing of their children. This fundamental right has been upheld repeatedly by the Supreme Court. See Parham, 442 U.S. at 602-03 (upholding constitutionality of involuntary commitment procedures allowing a parent to commit a child against a child's wishes and notwithstanding the child's "substantial liberty interest in not being confined unnecessarily for medical treatment").

In Troxel v. Granville, 530 U.S. 57 (2000), the Supreme Court affirmed this fundamental constitutional right by holding that only a parent should decide when and if a child's grandparents could visit the child, without second-guessing by a court as to the child's best interests. The court said:

> The liberty interest in this case – the interest of parents in the care, custody and control of their children – is perhaps the oldest of the fundamental liberty interests recognized by this Court. . . . We explained in *Pierce* that 'the child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.'

Id. at 65 (underlining added) (citing Pierce v. Society of Sisters, 268 U.S. 510 (1925)). The Court went on to state that "so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best

decisions concerning the rearing of that parent's children." Id. at 69. "The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required in making life's difficult decisions." Parham, 442 U.S. at 602.

Similarly, in Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925), the court again affirmed the right of parents to oversee the raising of their children, emphasizing that "the child is not the mere creature of the State." "It is cardinal

.

. . that the 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." Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

It is based on these fundamental rights that courts have repeatedly upheld the right and ability of parents to make important, life-altering decisions on behalf of their children. Whether in the context of releasing prospective claims, agreeing to arbitration, or making decisions regarding medical care, see

In re: Guardianship of Barry, 445 So. 2d 365 (Fla. 2d DCA 1984), these rights are of paramount importance and must be

respected by the courts. Florida courts have repeatedly recognized the fundamental nature of this interest. See Von Eiff v. Azicri, 720 So. 2d 510 (Fla. 1998). This Court has stated that "[t]he individual's interest in making decisions in these areas of privacy, characterized as the 'right of decisional autonomy,' is implicit in the 'concept of ordered liberty,' and may not be intruded upon absent a compelling state interest." Id. at 513. (citing Shevin v. Byron, Harless, Schaffer, Reid & Assocs., Inc., 379 So. 2d 633, 636 (Fla. 1980). Other decisions have emphasized that the state may intervene in this fundamental parental right only upon "a showing of demonstrable harm to the child." Id.; Kazmierazak v. Query, 736 So. 2d 106 (Fla. 4th DCA 1999).

Notably, this fundamental right includes decisions relating to "child rearing and education." Von Eiff, 720 So. 2d at 513.

B. The Court of Appeal erred in considering only secondary state interests rather than these fundamental parental interests.

The Court of Appeal gave no consideration or weight to parental interests and rights. Instead, the Court focused solely on "Florida's public policy favoring protection of minors," to conclude that Florida public policy prohibits a parent from agreeing to arbitration of potential tort claims on

behalf of his or her minor child in the context of "a commercial travel contract." (App. B, 4-5)

The Court cited as analogous to this case decisions such as Romish v. Albo, 291 So. 2d 24 (Fla. 3d DCA 1974), holding that a

parent may not waive a compulsory counterclaim without court approval, Attorney ad Litem for D.K. v. Parents of D.K., 780 So. 2d 301 (Fla. 4th DCA 2001), prohibiting a parent from waiving child's privilege in the confidentiality of communications with a psychotherapist where parent is involved in the litigation, and Gammon v. Cobb, 335 So.2d 261 (Fla. 1976), barring parents from entering into private agreements without court approval in the context of child support or custody cases. Notably absent from the Court's reasoning were any cases offering a rationale for refusing to enforce the contract on the basis of generally applicable contract principles.

Moreover, the suggestion that those cases are somehow analogous to the present case is manifestly incorrect. In all of the cases cited by the Court, the parents' interests were adverse or potentially adverse to those of the child's, or involved situations where a parent obviously was placed in a position of balancing both his or her own interests with the

interests of the child. See McBride v. Jacobs, 247 F.2d 595, 596 (D.C. Cir. 1957)(parent may waive rights of child if waiver is intelligent and knowing and if "there is no conflict of interest between them). Here, Garrity Shea's mother was an attorney. There can
be no question but that the waiver should be considered "intelligent and knowing." Further, no conflict of interest exists in the case of a parent agreeing to arbitration of her own
and her child's purely prospective claims. Certainly the instant situation, unlike the cases cited by the Court of Appeal, does
not provide a basis to depart from the State's fundamental interest in protecting parents' rights to direct the upbringing and education of their children.

It is clear that the Court of Appeal's approach, substituting its judgment as to the best interests of a child for the judgment of parents without any finding of need or demonstrable harm is directly contrary to the pronouncements of this Court that parental rights to oversee and control the upbringing, experiences and education of their children are fundamental, and should be intruded upon only in situations

exhibiting the direst need. See Von Eiff, 720 So. 2d at 516. In Von Eiff, this Court warned against exactly this type of intrusion into the sphere of parental rights, stating:

> [i]ndeed there is an inherent problem with utilizing a best interest analysis as the basis for government interference in the private lives of a family, rather than requiring a showing of demonstrable harm to the child. It permits the State to substitute its own views regarding how a child should be raised for those of the parent. It involves the judiciary in second-guessing parental decisions. It allows a court to impose 'its own notice of the children's best interests over the shared opinion of these parents, stripping them of their right to control in parenting decisions.

Id. (citations omitted).

C. The Court of Appeal's reasoning invites unlimited state interference in the private lives of families.

The Court of Appeal in this case effectively adopted the opinion of the Colorado Supreme Court in Cooper v. Aspen Skiing Co., 48 P.3d 1229, 1231 (Colo. 2002). In that case, which dealt with a general release of liability rather than an agreement to arbitrate, the Colorado court held that a release signed by the minor plaintiff's mother as a condition of his participation in skiing with a skiing club was ineffective on the grounds that Colorado public policy afforded to children significant protections that precluded a parent from releasing prospective claims for negligence. The Court held that despite the fact

that:

> parents in the pre-injury setting have less financial motivation to sign a release than a parent in the post-injury setting . . . nonetheless, the protections accorded minors in the post-injury setting illustrate Colorado's overarching policy to protect minors, regardless of parental motivations, against actions by parents that effectively foreclose a minor's rights of recovery.

Id. at 1234.

In effect, the Cooper decision sets up a nearly limitless policy of the state of Colorado to second guess the decisions of parents with regard to the raising of their children. In addition to running directly afoul of the Supreme Court's

admonition that “there will normally be no reason for the State to inject itself into the private realm of the family to further
question the ability of that parent to make the best decisions concerning the rearing of that parent’s children,” see Troxel, 530 U.S. at 69, the decision is an invitation to chaos. First, under Cooper, no release of any kind would ever be valid. Parents may not sign a release in order to allow their children to go skiing or on a vacation, but they also cannot do so in
order to allow their children to take dance lessons, go on a school field trip, play little league sports, or even to obtain cosmetic surgery. Rather, only the courts would be permitted to authorize a release under the reasoning of Cooper.

Of course, there is no logical constraint limiting Cooper to the signing of a release or agreement to arbitrate. In effectuating its policy of “protecting children” and second-guessing parents concerning the best interests of a child, particularly where there is a financial component to the decision, the court’s reasoning extends to any parental decision. Thus, the decision here, like Cooper, paves the way for the State to reverse a parent’s judgment on everything from whether a child should receive braces (since such a decision

requires a parent to consider the severity of the child's dental problems, the benefit to the child from braces and the cost of the braces), to whether the child can go to a theme park with his or her friends.

The Court of Appeal in this case, acknowledging at least some of the flaws in the Cooper approach, already has sought to carve out limitations to its holding by acknowledging certain exceptions to the rule where it feels that countervailing policy considerations favor enforcement of agreements entered into by parents. According to the Court, "[c]ircumstances in which a waiver would be supported by a recognized public policy" include waivers in cases of obtaining medical care or insurance or for participation in "commonplace child oriented community or school supported activities." (App. B) It further recognized that additional exceptions would exist where circumstances warranted.

The problem with this approach is that, like Cooper, it provides an almost unlimited opportunity for the state to substitute its judgment for that of parents. And if the decision is construed narrowly to be limited to customized African
safaris, it is even more apparent that such a holding falls apart when placed next to the FAA's mandate that arbitration

agreements be reviewed only pursuant to principles applicable to contracts generally.

In any event, the distinction the Court of Appeal attempts to draw in this case between "commercial travel opportunities," where arbitration agreements will not be upheld, and commonplace "community or school supported activities," where they will be upheld, is nonexistent. Under the Court of Appeal's rule, an arbitration agreement signed as part of a school trip to Washington D.C. (run by a commercial entity as many if not most
of these types of trips are), for example, would be enforceable, while a family trip to Washington D.C. would not be. Indeed, since many if not most school trips of this type are arranged and operated by private tour companies, under the Court of Appeal's decision it is not even clear whether parental releases for these trips would be valid.

More importantly, the Court's decision places it in the position of attempting to identify, on a case by case basis, which experiences or opportunities are of great enough value to a child that a parent should be allowed to agree to arbitration (or to a waiver of liability) so that the child may have the benefit of that experience. Thus, the Court here concluded that "commercial travel opportunities" are not sufficiently

valuable to a child's education or the formation of the child's values and character, while it "concur[s] in the wisdom" of a rule allowing parents to sign a release in the context of volunteers and non-profit organizations operating local sports leagues because "[o]rganized recreational activities offer children the opportunity to learn valuable life skills." (App. B, 4, quoting Zivich v. Mentor Soccer Club, Inc., 696 N.E.2d 201, 205 (Oh. 1998)).

This is the precise hubris which the Supreme Court warned courts to avoid in Troxel v. Granville, 530 U.S. 57, 65 (2000), when it stated:

> the child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations. . . . [T]here will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children."

Id. at 69. Nevertheless, the Court of Appeal did exactly that. In its opinion, a school sponsored trip to the zoo to look at wild animals in cages is of sufficient value to a child's education and development that it should be promoted by allowing parents to agree to arbitration or to release claims as a condition of a child's participation in the trip to the

zoo. A trip to Africa to view those same animals in their natural habitat is not, in the view of the Court of Appeal, of sufficient worth to warrant the same support.

This position is simply indefensible. Even the plaintiff would likely agree that the above distinction is unsupportable, as his son, Garrity Shea had, by all accounts, become enthralled with Africa and with the animals he saw in the bush during a similar safari the year before his tragic death, returning from that safari to read up on those animals and study the matter exhaustively. The impact and importance of his experiences during that first safari could hardly be overstated. The Court of Appeal, however, would substitute its judgment for that of his mother's, denying Garrity Shea and countless other children like him the opportunity to enjoy unique, interesting and educational experiences because they are not sufficiently "commonplace" to warrant an exception to the court's rule.

In addition to being incorrect in judging one trip somehow superior to the other, the Court of Appeal's approach is flatly prohibited by this Court's decision in Von Eiff, warning of the "inherent problem with utilizing a best interest analysis as

the basis for government interference in the private lives of a family." 720 So. 2d at 516.

D. The Court of Appeal's rule is unworkable.

Perhaps the worst aspect of the Court of Appeal's decision is its likely impact on the lives of Florida families if upheld. Sound public policy requires consideration of society as a whole. Focusing solely on the need to "protect" a minor from waiver of his right to pursue an action in court rather than through arbitration, the Court of Appeal failed to consider the right of families in general to have access to services, activities, entertainment, and the like where arbitration agreements and/or releases from liability are a necessary part of offering the opportunity to the public at a reasonable price. Under Florida law, a minor cannot execute an enforceable waiver. Dilallo v. Riding Safely, Inc., 687 So.2d 353, 356-57 (Fla. Ct. App. 1997). Presumably, a minor cannot execute an enforceable agreement to arbitrate.[9]

[9] Thus, if in contrast to the facts in this case, Garrity Shea had himself executed the agreement to arbitrate, then the Court would be correct to refuse to enforce it based upon fundamental contract principles, because a minor's inability to enter into an enforceable contract applies to any contract, not solely applicable to agreements to arbitrate as a special category.

Florida businesses that deal with minors, including major industries such as tourism, travel, theme parks and transportation, depend on the validity of agreements to arbitrate, forum selection clauses and/or releases of liability. Their methods of operation, pricing of goods and services, and costs of insurance coverage will all be severely impacted if minors can no longer enter into enforceable agreements. These businesses will, at minimum, be forced to reevaluate entirely the way in which they operate. It is reasonable to expect that many of these businesses will henceforth refuse to serve children and/or families or will increase their prices for doing so dramatically. Many others, voluntarily or involuntarily, likely will cease operating either because they cannot afford to do so, cannot attract sufficient business at the new, higher prices they are forced to charge, or cannot obtain needed insurance coverage due to the uncertainty created by the Court of Appeal's ill-considered rule.

The Court of Appeal has created a vast area of uncertainty. On the one hand, it has pronounced "commercial travel" unworthy

of having contracts by a parent on behalf of a child enforced. From this ruling, many businesses such as travel agencies, tour operators, airlines, bus services, train services and the like may well conclude that they should no longer transport minors, or should do so only at dramatically higher prices.

On the other hand, under the Court of Appeal's decision, parents can make enforceable commitments on behalf of children only to permit them to engage in "commonplace" community and school activities. Even Florida schools and communities will no doubt be discomfited by this vague pronouncement. Henceforth, schools and other community institutions will be unable to offer field trips, athletic programs or other special events that require that the participants incur any risk that might be deemed after the fact to have been beyond the "commonplace."

Every business or institution operating somewhere between those two ill-defined guideposts of "commercial travel" versus "commonplace" must do so in a state of pure uncertainty. One may expect that they will, accordingly, operate under the assumption that they will not be able to enforce any release or agreement to arbitrate entered into by a parent or guardian on behalf of a child. These businesses will either raise their

rates to match their higher level of risk, refuse to serve families and children, or flee the State of Florida.

The alternative scenario is unimaginable chaos for Florida courts as Florida families are forced to seek court approval for every release, agreement to arbitrate, or consent to a forum clause. Every day the court system would be inundated with countless parents seeking court approval of releases or such agreements that would allow their children to go on family vacations or school trips, participate in special events and activities, and to go about their daily life. Even if it were desirable for courts to make these decisions rather than parents, it would simply be impossible for the courts to do so.

CONCLUSION

While the Court of Appeal's desire to protect children is understandable and laudable, "every learning experience involves risk." Hohe v. San Diego Unified School Dist.,224 Cal. App. 3d 1559, 1564 (1990). Certainly it would be nice if it were otherwise, but no court order or policy will eliminate that risk. Thus, the only question is whether a particular risk is one worth taking -- a decision that can be made only by weighing the particular risk against the anticipated benefits -- or one to be avoided. This judgment, which must be made on behalf of a child to varying degrees innumerable times on a daily basis, is one
that the courts are particularly ill-suited to make. Rather, the decision must fall to a child's parents both as a matter of necessity and/or right.

In any event, the result in this case is mandated not only by these practical considerations and by the enforcement of parental rights, but directly and conclusively by the FAA. The FAA precludes the state from substituting its own value judgments for the judgment of Congress that arbitration agreements should
be encouraged and enforced. For this reason, the arbitration agreement between Mark Garrity Shea, and by extension his

estate and the Personal Representative of his Estate, and Africa Adventure must be enforced and the decision of the Fourth District Court of Appeal should be reversed.

Dated: October 24, 2003

Respectfully submitted,
GLOBAL TRAVEL MARKETING, INC.,
By its attorneys,

_____
Rodney E. Gould
Brad A. Compston
RUBIN, HAY & GOULD, P.C.
205 Newbury Street
P.O. Box 786
Framingham, MA 01701
(508) 875-5222

_____
Edward S. Polk
Florida Bar No.: 239860
Edward S. Polk
Florida Bar No.: 239860
Conroy, Simberg, Gannon, Krevans & Abel, P.A.
3440 Hollywood Blvd
2nd Floor
Hollywood, Florida 33021
(954) 961-1400

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,
GLOBAL TRAVEL MARKETING, INC.,
By its attorneys,

_____

Edward S. Polk
Florida Bar No.: 239860
Conroy, Simberg, Gannon, Krevans & Abel, P.A.
3440 Hollywood Blvd
2nd Floor
Hollywood, Florida 33021
(954) 961-1400

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of October, 2003, a true and accurate copy of the foregoing has been served upon each other party in that action by first class mail, postage prepaid.

_____
Edward S. Polk