IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

ROBERT W. WING, Former Husband,

Appellant,

v.

MONICA D'ARCIO WING, Former Wife,

Appellee.
_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D13-1591

Opinion filed December 20, 2013.

An appeal from the Circuit Court for Duval County.
Linda F. McCallum, Judge.

Stephanie A. Sussman, Samuel S. Jacobson, and Kenneth B. Wright of Bledsoe, Jacobson, Schmidt, Wright & Wilkinson, Jacksonville, for Appellant.

Corrine A. Bylund and Elliot Zisser of Zisser, Brown, Nowlis & Cabrey, P.A., Jacksonville, for Appellee.

SWANSON, J.

Robert W. Wing ("Former Husband") appeals from a non-final order raising four points for reversal. See Fla. R. App. P. 9.130(a)(3)(C)(iii). We affirm Point

IV without further comment. We need not address Points II and III, as we are compelled to reverse on Point I, which challenges the trial court's decision to allow Monica D'Arcio Wing ("Former Wife") to relocate with the parties' minor children to her native country of Italy. The trial court's ruling was an error of law insofar as it failed to apply the explicit directives in section 61.13001(3), Florida Statutes (2009).

While we do not disagree with our dissenting colleague's point that Former Husband was knowledgeable of Former Wife's desire to relocate as early as her first counter-petition for dissolution of marriage filed in 2003, we cannot endorse the undeniable effect of his conclusion, which grafts onto the provisions of section 61.13001(3) a rule of substantial compliance that may be overcome only by proof of prejudice. The mandate in section 61.13001(3) is clear: The parent seeking to relocate "*must* file a petition to relocate and serve it upon the other parent"; "[t]he pleadings *must* be in accordance with this section"; "[t]he petition to relocate *must* be signed under oath or affirmation under penalty of perjury"; the petition "must" include an enumerated list of information as well as contain a notice statement, set out in bold capital letters, and concerning how a response to the petition objecting to relocation "*must*" appear and on whom it "*must*" be served; and "[t]he petition to relocate *must* be served on the other parent and on every other person entitled to access to and time-sharing with the child." § 61.13001(3)(a) & (b), Fla. Stat.

(2009) (emphasis added). "When a court construes a statute, its goal is to ascertain legislative intent, and if the language of the statute under scrutiny is clear and unambiguous, there is no reason for construction beyond giving effect to the plain meaning of the statutory words." Crutcher v. Sch. Bd. of Broward Cty., 834 So. 2d 228, 232 (Fla. 1st DCA 2002) (citing Aetna Cas. & Sur. Co. v. Huntington Nat'l Bank, 609 So. 2d 1315, 1317 (Fla. 1992)). See also Saunders v. Saunders, 796 So. 2d 1253, 1254 (Fla. 1st DCA 2001); but see State Farm Mut. Auto. Ins. Co. v. O'Kelley, 349 So. 2d 717, 718 (Fla. 1st DCA 1977) (holding "[w]hile courts are not at liberty to resort to rules of statutory interpretation where the language of the statute is plain and unambiguous . . . where the words are ambiguous the cardinal rule of construction is to interpret the statute in such a way that effect be given to the intention of the legislature").

We cannot ignore the legislature's use in the statute of the emphatic "must" in order to achieve a more convenient result. See Raulerson v. Wright, 60 So. 3d 487 (Fla. 1st DCA 2011). While the facts in Raulerson, might have presented a greater imperative for the strict application of the mandatory notice terms of section 61.13001(3), as the dissent argues, we cannot conclude the facts of this case demand any less strict application. Section 61.13001(3) says what it says, and we are impelled by its clarity to give effect to its terms. See also Milton v. Milton, 113 So. 3d 1040 (Fla. 1st DCA 2013). In the present case, because there was no

valid agreement between the parties regarding the children's relocation, as described in section 61.13001(2), Florida Statutes (2009), Former Wife was obliged to comply strictly with the requirements of section 61.13001(3). The numerous references to relocation in the parties' respective pleadings did not excuse her duty under the statute. Raulerson, 60 So. 3d at 490.

Consequently, we reverse that portion of the trial court's order granting Former Wife's permission to relocate with the children.

AFFIRMED, in part, and REVERSED, in part.

RAY, J., CONCURS and THOMAS, J., DISSENTS WITH OPINION

THOMAS, J., DISSENTING WITH OPINION.

I respectfully dissent.

Two days before the first day of a bench trial during which the issue of Former Wife's relocation to Italy with the parties' children was to be litigated, Former Husband, for the first time, raised the issue of Former Wife's failure to file a petition that strictly complied with section 61.13001, Florida Statutes. Yet Former Husband was fully aware of Former Wife's desire to relocate, from the time she filed the first of her counter-petitions for dissolution of marriage in **2003** and throughout the ensuing divorce litigation. The relocation issue was also the subject of discovery, including deposition testimony, and the issue was listed on the pre-trial stipulation. On appeal, Former Husband has failed to identify any prejudice as a result of Former Wife's failure to strictly comply with the statute.

In fact, at the beginning of the trial, Former Husband's counsel told the court: "Upon a review of the pleadings in this case, I realized that there has not been compliance with the relocation statute. And the statute has obviously changed in form throughout the years that this case has been pending." Thus, although Former Husband's counsel was prepared to go to trial on the issue, upon realizing on the eve of trial that Former Wife had not strictly complied with a pleading requirement, he moved to strike that issue.

In response to this last-minute maneuver by Former Husband's counsel,

Former Wife's counsel filed an amended version of her counter-petition that complied with the statutory pleading requirement in all respects except that it lacked Former Wife's signature under oath. But as previously noted, Former Wife was deposed about the issue, thus, there could be no prejudice to Former Husband regarding Former Wife's prior sworn statement regarding relocation.

Juxtapose the facts here with those in Raulerson v. Wright, 60 So. 3d 487 (Fla. 1st DCA 2011). There, the parent seeking to relocate with the parties' child verbally notified the father of her intent just days before a previously scheduled hearing, and then hand delivered an unsworn notice of her intent to relocate. Id. at 488. The prejudice to the father in Raulerson was obvious on its face. Here, however, notice was never an issue, as the issue of relocation has been extensively litigated over a period of years. Thus, there was no prejudice, and Former Husband can identify no prejudice.

Thus, under these particular circumstances, the trial court correctly found that "the requirement for a formal 'Petition for Relocation' as defined by the statute [was] unnecessary in the instant case due to the date the dissolution was filed in 2003, the knowledge of the parties, prior to the trial, of all the factors which would have been sworn to under oath in a petition, and the lack of prejudice to the Husband." Even if the trial court erred, the trial court's ruling certainly was not an abuse of discretion under these facts, where no prejudice to Former

Husband occurred. Consequently, I would affirm.