IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE
FLORIDA FAMILY LAW RULES
OF PROCEDURE (RULE 12.635
AND RELATED FORMS) CASE NO.: SC06-2513

COMMENT OF THE FAMILY LAW SECTION OF THE FLORIDA BAR

THE FAMILY LAW SECTION OF THE FLORIDA BAR, by and through its Chair, Allyson Hughes, Esquire, and its Chair of the Relocation Subcommittee, Jeffrey A. Weissman, Esquire, hereby files this Comment of the Family Law Section of The Florida Bar to Proposed Rule 12.635, and states:

A. BRIEF OVERVIEW AND IMPRESSIONS OF RULE 12.635

Rule 12.635 was prepared and drafted by the Rules Committee of the Florida Bar. It seeks to define the procedure that is to be employed in relocation cases pursuant to Section 61.13001, Florida Statutes. The Rules Committee did a commendable job in many respects; however, certain provisions of the rule are inconsistent with the statute. Such inconsistencies often cause the rule to conflict with the statute which, for sure, was unforeseen and unintended by the drafters. On Tuesday, August 28, 2007, the Executive Council of the Family Law Section voted 26-0 in opposition to proposed Rule 12.635. Thus, the Family Law Section of The Florida Bar strenuously opposes the adoption of proposed Rule 12.635 in its current form and would graciously accept any invitation to work collaboratively with the Rules Committee in an effort to promptly correct the noted deficiencies.

B. ANALYSIS OF RULE 12.635

Issue 1 – Subsection (a) Application:

This provision should be amended to clarify that the rule applies to all proceedings to relocate the principal residence of a minor child under the Section 61.13001, and, more specifically, the applicability provisions thereof found in Section 61.13001 (11). Further, language should be added to clarify that the rule only applies in cases where there is an existing cause of action, judgment or decree because the statute does not, and cannot, legislate what people must do who have never invoked the jurisdiction of the court.

Issue 2 – Subsection (b) Pleadings and Papers

This subsection uses the word "privacy" instead of "confidentiality" when referring to Rule 12.280. However, Rule 12.280 uses the word "confidentiality." Consequently, it is recommended that the word "privacy" be changed to "confidentiality" so that the proposed rule is consistent with the existing rule that it references.

Issue 3 – Subsection (j) Relocation of Minor Child by Agreement:

Relocation by agreement is the first substantive provision of the statute, currently found in subsection (2) (a). In contrast, the rule addresses relocation by agreement much later in subsection (j). Its placement so far down in the rule is confusing to anyone, particularly to pro se litigants, because one cannot easily read the statute and rule side-by-side. It is our opinion that the structure of the rule should mirror the statute and that relocation by agreement should be addressed much earlier. It is recommended that relocation by agreement be moved up to subsection (c) with the subsequent subsections appropriately re-lettered.

Substantively, this provision of the rule conflicts with the applicable provision of the statute and the public policy in support thereof. The rule requires that court approval must be obtained *even in* the absence of any existing cause of action, judgment or decree (emphasis added). This is error. Subsection (2) (b) of the statute only requires that any relocation agreement be ratified by court order if there is an existing cause of action, judgment or decree of record pertaining to the child's primary residence or visitation. The reason for this is fairly simple: the statute does not apply to persons who have never invoked the jurisdiction of the court. The rule, in contrast, improperly obligates individuals to invoke the jurisdiction of the court whenever they want to relocate. The rule also requires that a supplemental petition, or a motion, be filed *even if* no action has ever been initiated (emphasis added). The statute does not require such filing in the absence of any existing cause of action, judgment or decree of record, again because the statute does not apply to persons who have never invoked the jurisdiction of the court. Moreover, assuming that there is an existing cause of action, judgment or decree of record, and the parties reach an agreement regarding relocation, the rule requires that a supplemental petition, or a motion, must be filed when the preferred methodology would be to merely file an agreed final judgment regarding relocation or an agreed final judgment of modification regarding relocation. Chapter 28 of Florida Statutes was amended expressly to avoid the necessity of having to pay a reopening fee to accommodate a scenario of amicable resolution by agreement. The rule, however, clearly undermines this intent by requiring, in all instances, that litigants file a supplemental petition or motion.

Consistent with the foregoing recommendation, the related proposed form, AGREEMENT FOR MODIFICATION TO PERMIT RELOCATION WITH MINOR CHILD(REN) INCLUDING OR NOT INCLUDING MODIFICATION OF CHILD SUPPORT, should contain the following notice in all capital letters:

"THIS AGREEMENT MAY BE RATIFIED BY THE COURT WITHOUT THE NECESSITY OF AN EVIDENTIARY HEARING THEREON, AS IT SHALL BE PRESUMED THAT THIS AGREEMENT IS IN THE BEST INTERESTS OF THE MINOR CHILD(REN). NOTWITHSTANDING, EITHER OR BOTH PARTIES MAY SEEK AN EVIDENTIARY HEARING REGARDING THE RELOCATION AGREEMENT BY REQUESTING SAME, IN WRITING, WITHIN 10 DAYS AFTER THE AGREEMENT IS FILED WITH THE COURT."

Issue 4 – Subsection (c) Mandatory Disclosure:

Based upon our prior recommendations, this subsection should be re-lettered as (d). Procedurally, the rule, as written, states that mandatory disclosure does not (and seemingly cannot) apply to relocation cases. However, the statute requires that the court evaluate several factors, some of which are financially based, when determining whether to grant or deny a request to relocate. Furthermore, the statute allows for a claim of attorney's fees and costs under certain circumstances. Consequently, it is our recommendation that the rule should be revised to state that, "Rule 12.285 shall not automatically apply to proceedings to relocate the principal residence of a minor child under Section 61.13001, Florida Statutes; however, a party may affirmatively request that limited or complete mandatory disclosure shall apply as might be warranted under the particular facts and circumstances of the case."

Issue 5 – Subsection (d) Notice of Intent to Relocate:

This subsection should be re-lettered as (e). Procedurally, provision (e) (1), should be entitled Applicability. It should be made perfectly clear that the Notice of Intent to Relocate requirement does not apply to relocation by agreement. We therefore suggest that the applicability provision state that a Notice of Intent to Relocate shall be applicable to a parent or person having primary residential responsibility for, or who is entitled to timesharing with, a minor child who seeks to relocate the minor child's principal residence under Section 61.13001, Florida Statutes, and who has been unable to otherwise procure relocation by agreement pursuant to Section 61.13001 (2) (a), Florida Statutes.

The Service provision should be re-lettered to (e) (2) and should be entitled Service of Notice of Intent to Relocate with Minor Child(ren). Subparagraph (A) seemingly requires service of a Notice of Intent to Relocate *even in* the absence of any existing cause of action, judgment or decree (emphasis added). However, as previously stated, the statute does not apply to persons who have never invoked the jurisdiction of the court. Simply, the statute does not, and the rule cannot, legislate what people must do before they ever invoke the jurisdiction of the court. Therefore, the Notice of Intent to Relocate requirement should only apply whenever there is any existing cause of action, judgment or decree. A simple fix to this problem would be to reword the beginning of the sentence of Subparagraph (A) to read, "If an action concerning the child is not then pending with the court but is to be simultaneously filed, or if there is an existing judgment or decree, the copy of the notice of intent …" In the situation where someone seeks to relocate or has already relocated in a pre-suit context, and the other party objects

or has objected in a pre-suit context, then the objecting party has certain available remedies such as initiating litigation and seeking injunctive relief and/or compelling the return of the minor child(ren), which, if successful, might then trigger the statutory criteria and application of the rule in any subsequent proceedings. However, in the absence of an existing cause of action, judgment or decree it is improper to trigger application of the rule. In addition, subparagraph (A) mistakenly only allows for service by certified mail, restricted delivery, return receipt requested. The statute requires service to be made pursuant to Chapter 48 and 49, or by certified mail, restricted delivery, return receipt requested

Another sub-provision, (e) (3), should be added and should be entitled Certificate of Service of Notice of Intent to Relocate. This provision will need to state that the certificate is to be served and filed with the court at the same time pursuant to the statute.

The current (d) (2) will need to be re-lettered to (e) (4).

Issue 6 – Subsection (e) Objection to Notice of Intent to Relocate:

This should be re-lettered to subsection (f).

Issue 7 – Subsection (f) Waiver of Right to Object:

This should be re-lettered to subsection (g).

Issue 8 – Subsection (g) Pleadings:

This should be re-lettered to subsection (h). Procedurally, subsection (h) (1) needs to be re-worded. We suggest the following language: "If an objection is timely filed by the non-relocating parent or other person who is entitled to timesharing with a minor child who is the subject of a notice of intent to relocate, then no relocation may occur absent court order. Should the parent seeking to relocate still wish to relocate after

an objection has been timely filed, he or she must file with the court, and serve upon the objecting party, the following:"

[proceed with current (A), (B), (C) and (2)]

Issue 9 – Subsection (h) Hearings:

This should be re-lettered to subsection (i). Subsection (h) (1) in its current form is very troubling. It grossly misinterprets the statute and should be stricken in its entirety. There is no such thing as a right to a hearing on an objection. Once an objection is filed, the burden falls back on the parent seeking to relocate to file an appropriate pleading seeking the permission of the court to relocate. The statute then allows for hearings to take place on a temporary and permanent basis. Subsection (h) (3) in its current form needs to be re-worded as follows: "If no timely objection to the notice of intent is filed, the party seeking to relocate with the minor child may submit and request entry of an expedited order without the necessity of a hearing. Absent good cause the court is obliged to enter the expedited order."

We would recommend that an additional sub-provision be incorporated which allows for a party to seek an expedited hearing so that the underlying pleading is accorded priority on the court's calendar. Such a sub-provision would be consistent with the statute.

Issue 10 – Subsection (i) Orders:

This should be re-lettered to (j). Subsection (i) (1) in its current form does not comport with the statute. The best interests standard is not the standard employed pursuant to the statute; rather, the statute itself sets forth the appropriate standard for temporary relocations. Consequently, the entire provisions should be stricken and

reworded as follows: "The court may grant temporary relief restraining the relocation of a child, or ordering the return of a child if a relocation has previously taken place, permitting temporary relocation, or other remedial relief pending disposition at trial or final hearing." Subsection (i) (2) in its current form suffers from the same problem and should be reworded as follows: The court may enter a partial or final judgment or order granting the relocation.

Issue 11 – Subsection (k) Notice of Withdrawal of Intent to Relocate:

This should be re-lettered to (l). Procedurally this section needs to be revised. It requires a litigant to file a Notice of Withdrawal of Intent to Relocate if the litigant ever decides to abandon the pursuit of litigation after serving the Notice of Intent to Relocate. However it does not require the Notice of Withdrawal of Intent to Relocate to be served upon the other party, which was of course an inadvertent omission. Consequently, it needs to be revised to require service of the Notice of Withdrawal of Intent to Relocate, both in situations where service is required to be made pursuant to Chapters 48, 49 or certified mail, and where service is required to be made in accordance with the rules.

C. ANALYSIS OF FORMS REFERENCED IN RULE 12.635

The title of the NOTICE OF INTENT TO RELOCATE WITH CHILDREN should be amended to include the word MINOR in the title. In addition, paragraph 6 should reflect that completion thereof is mandatory.

The MOTION FOR ORDER PERMITTING RELOCATION OF MINOR CHILD(REN) should be amended to delete the phrase *EX PARTE* replaced with (NO OBJECTION). It should also provide for a notary public jurat.

WHEREFORE, THE FAMILY LAW SECTION OF THE FLORIDA BAR respectfully files this Comment in opposition to proposed Florida Family Law Rule of Procedure 12.635.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that the original and nine copies of the foregoing Comment have been filed with the Clerk and a true copy has been served via Federal Express on The Honorable Raymond T. McNeal, 2640 S.E. 45th Street, Ocala 34480, this _____ day of August, 2007.

Respectfully submitted,

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