IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA **CIVIL ACTION**

K. M.,
Former wife,

vs. **Case No. XX DR XXXX N**
A. S. M.,
Former husband,

ORDER DENYING FORMER WIFE'S EXCEPTIONS, DENYING THE FORMER WIFE'S MOTION TO AMEND, AND CONTINUING HEARING ON FORMER HUSBAND'S MOTION FOR FEES

This matter having come before the court on 6/22/2012 on (1) the former wife's Exceptions filed 1/11/2012, to the Report and Recommended Order of the magistrate, filed 1/2/2012; (2) the former wife's motion to amend her supplemental petition, filed 4/26/2012; (3) the former husband's motion for attorney's fees, filed 6/17/2011,
it is ordered:

The Report recommends granting Count I of the former wife's petition, which asked that the parties' Georgia divorce judgment be domesticated in Florida. The Report recommends granting the former husband's motion for summary judgment on Count II.

Reviewing the Georgia judgment, the parties' settlement agreement, and the former wife's supplemental petition, the court finds that the magistrate's recommended findings and order are supported by this record. The recommended ruling is required by law.

Florida is an "ultimate fact" pleading jurisdiction. *See* Rule 1.140(b): "A pleading which sets for a claim for relief ... must state a cause of action and shall contain ... (1) ... the grounds upon which the court's jurisdiction depends ..., (2) a short and plain statement of *the ultimate facts showing* that the pleader is entitled to relief ..." (*Emphasis supplied.*)

So, a post judgment petition to modify a time-sharing schedule must allege ultimate facts that demonstrate (1) a substantial, material change in circumstances has occurred since the judgment was entered, which change was not contemplated at the time the judgment was entered, and (2) the best interest of the child requires that the judgment must be changed. *Wade v. Hirschman*, 903 So.2d 928 (Fla. 2005). It is not enough to allege in a conclusory statement that a "substantial change has occurred." Rather, the "facts showing" a substantial, material change must be alleged. Here, the facts alleged do not satisfy the first this first part of the *Wade* test, that is, a substantial, material change not contemplated by the judgment.

Bringing legal disputes to an end is a principal goal of a legal system. In family litigation, a child needs certainty and an end to the litigation, especially where the child's time-sharing schedule is concerned. Children need stability. A final judgment is the end of the legal dispute. It cannot be changed except for a substantial, material change in circumstances and when the best interest of the child require. That is the point of the standard in *Wade v. Hirschman*, 903 So.2d 928 (Fla. 2005).

Rule 1.140(b)(6) and (h)(2) provide that the defense of failure to state a cause of action can be raised by a motion to dismiss or by "*a motion for judgment on the pleadings* or at trial." (*Emphasis supplied.*) So, the defense of failure to state a cause of action can be raised once, twice or three times

during the course of any civil action. An interlocutory order is not a final order. Therefore, the magistrate's prior recommended order denying the petitioner's motion to dismiss does not preclude the respondent from raising this same defense again by a motion for judgment on the pleadings and again at trial. *Res judicata* applies only to the final judgment.

Although the former husband's motion is styled as a motion for summary judgment under Rule 1.510, it is actually a motion for judgment on the pleadings under Rule 1.140(h)(2). The basis of the motion is a failure to state a cause of action. The respondent's motion and the magistrate's ruling do not depend on any discovery or affidavits or any disputed fact. They depend on a reading of the former wife's supplemental petition.

The magistrate correctly determined that the former wife's supplemental petition should be dismissed as a matter of law. Her petition does not state a cause of action. She asks for an "equal" time-sharing schedule now that she is out of the Army and the parties are living near each other in Lee County, Florida. Formerly they lived in two different states. However, as the magistrate found, the parties' settlement agreement, which was incorporated into the Georgia judgment, provides for two, alternative time-sharing schedules: one with the parties living some distance from each other and the other with them living near each other. In both schedules, the child resides most of the days during the year with the father. So, the parties agreed upon an "unequal" time-sharing schedule in the circumstances of their present situation, that is, with them living 15 minutes apart. The fact that the mother was discharged from the Army is immaterial.

The former wife's petition also asks for shared parental responsibility. However, their agreement provides for "joint legal custody," which under Georgia law is the same as "shared parental responsibility" under Florida law.

So, the former wife's supplemental petition does not allege any facts that show a substantial, material change in the circumstances that were not contemplated by the Georgia judgment.

The magistrate assumed all of the facts alleged by the former wife were true and ruled that those facts do not meet the legal standard of *Wade, supra.* The magistrate's ruling is supported by the record.

For the foregoing reasons, the former wife's Exceptions are denied. The magistrate shall submit a Final Judgment Granting and Denying the Former Wife's Supplemental Petition, granting Count I, to domesticate the Georgia judgment, and denying Count II, citing Rule 1.140(h)(2) and the failure of the former wife's supplemental petition to state a cause of action for modification of the time-sharing order or the parental responsibility order.

Regarding the former wife's motion to amend, this motion was noticed for hearing before the court, not the magistrate. This motion was filed more than five months after the magistrate's hearing on 12/13/2011 and more than four months after her Report was issued. Rule 1.190 allows amendments to pleadings in various circumstances but none of those circumstances contemplate an amendment five months after the hearing and four months after the ruling.

More importantly, the ultimate facts alleged in the proposed amended supplemental petition - that the former wife and the former husband moved around and now they both live here and the former wife is no longer in the Army - do not amount to any additional factual allegations that are different from the facts in her original supplemental petition. The amended petition also does not state a cause of action.

Again, the mother's discharge from the Army is not material. In or out of the Army, they provided for a time-sharing schedule whether they were living near each other or far from each other.

Further, in the former wife's original and in her proposed amended supplemental petition, missing entirely are any allegations of ultimate facts showing that the best interest of the child requires

the judgment to be changed, which is the second requirement of *Wade, supra*. A pleading about the "best interest of the child" requires the pleader to allege facts under some or all of the factors in §61.13(3)(a) - (t), because facts under those factors are what is relevant at any trial at which the "best interest of the child" are at issue. The interest, desire, want or need of a parent is not one of those factors. *See also* §61.13(2)(c): "... modification of a parenting plan and time-sharing schedule requires a showing of a substantial, material, and unanticipated change of circumstances." *and* §61.13(2)(c)1.: "... There is no presumption for or against the father or the mother of the child or for or against any specific time-sharing schedule when creating or modifying the parenting plan of the child."

Regarding the former husband's motion for attorney's fees, this motion is continued for further hearing, upon notice of hearing being filed and served by either party. The hearing will be an evidentiary hearing regarding the parties' total fees and costs in this matter and their incomes, assets and liabilities and the factors in *Rosen*, *Wrona*, and §61.16.

Done and ordered in Fort Myers, Lee County, Florida, this _____

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R. Thomas Corbin, Circuit Judge

Copies provided to:
, Esq., and , Esq.
Magistrate Marianne Kantor