

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

W.P.,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
J.P.,	:	
	:	
Appellant	:	No. 2087 MDA 2012

Appeal from the Order entered November 2, 2012,
Court of Common Pleas, Schuylkill County,
Civil Division at No. S-1735-2011

BEFORE: DONOHUE, ALLEN and PLATT*, JJ.

DISSENTING MEMORANDUM BY DONOHUE, J.: **FILED JUNE 05, 2013**

After careful consideration of the thoughtful analysis developed by the learned Majority, I am constrained to disagree with both its rationale and result. In my view, the Majority creates a tortured distinction between *types* of modifications in custody actions. The Custody Act is clear – it provides that custody orders are always subject to modification to serve the best interests of the child and that a party may file a petition for modification at any time. **See** 23 Pa.C.S.A. § 5338 (“Upon petition, a court may modify a custody order to serve the best interest of the child.”); ***Kassam v. Kassam***, 811 A.2d 1023, 1025 (Pa. Super. 2002) (“Child custody orders are temporary in nature and always subject to change ... [a trial court] may always entertain an application for modification and adjustment of custodial rights.”). I believe that making the distinction that the Majority discerns will

*Retired Senior Judge assigned to the Superior Court.

lead to unintended consequences and unduly complicate the litigation of custody cases. Instead of operating under the clear directive of the Custody Act that petitions for modifications may be filed at any time, the Majority's approach requires a trial court to scrutinize the substance of the petition to determine whether it requests what the Majority calls a "Custody Act modification", or whether it seeks only "corrective modification." I do not agree that such a distinction is called for under the Custody Act, and so I would find that Mother's petition, as well as any petition for modification in a custody action, should be treated as a petition filed pursuant to 23 Pa.C.S.A. § 5338. It is unclear to me when and how Mother can petition the court to modify the vacation schedule in the August 27, 2012 custody order without offending the Majority's timing analysis.

Regardless of the timing of a petition for modification, the paramount concern in custody actions is the best interests of the child. ***S.M. v. J.M.***, 811 A.2d 621, 623 (Pa. Super. 2002). Considering Mother's petition for modification, the trial court in the present case expressly found that three weeks of consecutive vacation are "not in the best interest of the children since it would deprive the other parent of physical contact for 21 days which is not recommended given [their] ages and emotional states[,]" and on that basis, it modified the custody order. Trial Court Opinion, 11/2/12, at 2. Integrating the trial court's rationale from its August 29, 2012 opinion (which address the statutory factors) with the rationale expressed in the

order presently under review, I would find that the trial court considered “all relevant factors” as required by the Custody Act in making its decision. **See** 23 Pa.C.S.A. § 5328 (providing that the trial court must consider the factors enumerated in this provision as well as any other factors that affect the best interests of the child when making a custody determination). Accordingly, I must dissent because I would affirm the trial court’s order.