J-S22017-13

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37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,
in the Court of Common Pleas of Schuylkill County,
Civil Division, at No.: S-1735-2011

BEFORE: DONOHUE, ALLEN, and PLATT*, JJ.

MEMORANDUM BY ALLEN, J.: **FILED JUNE 05, 2013**

J.P. ("Father") appeals from the order entered on November 2, 2012, which granted the "Petition for Clarification" of W.P. ("Mother"), and amended the trial court's custody order dated August 24, 2012, and docketed August 27, 2012.

Mother and Father were previously married, and are the parents of two children: G.P., born in December of 2002, and T.P., born in February of 2006 ("Children"). The parties were divorced on July 27, 2011. Mother and Father initially agreed to shared custody of the Children. In August of 2011, Mother filed a petition for special relief, seeking primary physical custody of

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* Retired Senior Judge assigned to the Superior Court.

the Children. The custody matter was litigated in the Schuylkill County Court of Common Pleas, and on August 27, 2012, the trial court entered a final order. The order granted Mother legal custody of the Children, granted Mother primary physical custody of the Children, and granted Father partial physical custody of the Children, with a specific holiday/vacation schedule.

The holiday/vacation schedule included the following paragraph, which states: "Each party shall be entitle [sic] to three (3) consecutive weeks of vacation periods with the children each year, or additional time as agreed upon by the parties. Each party shall provide thirty (30) day notice of said vacation period." Order, 8/27/12, ¶ 4g. This provision is the basis for the present appeal.

Forty-five days after the entry of the trial court's order, on October 11, 2012, Mother filed her "Petition for Clarification of August 24, 2012 Custody Order of Court."[1] Mother's petition states:

> 7. Mother believes, and therefore avers, that it is in the best interest of the children for paragraph 4g of the August 24, 2012 Order of Court to state that the parties shall be entitled to three (3) "non-consecutive weeks of vacation with the children each year."
>
> 8. Additionally, the parties have historically taken one of their weeks of vacation during the school year, and Mother requests that the Custody order dictate that the parties are permitted to

[1] The trial court entered its order on the docket on August 27, 2012. The order is dated August 24, 2012. The parties frequently reference the order by the date on the order, rather than the date it was docketed; the "August 24, 2012 order" and the August 27, 2012 order are the same.

> exercise one of their three (3) weeks of vacation period of custody during the children's school year.

Mother's Petition for Clarification, 10/11/12, at 2-3. Father filed a response on October 26, 2012, arguing that Mother's "Petition for Clarification" was in fact a petition for modification. Father argued that modification was not warranted, but did not contest the court's jurisdiction to modify the order. Father's Response to Mother's Petition for Clarification, 10/26/12, at 1-3 (unpaginated).

On November 2, 2012, sixty-seven days after the entry of the custody order, the trial court entered its order granting Mother's Petition for Clarification, and "correcting" the language of paragraph 4g of the August 27, 2012 order. The November 2, 2012 order stated in part:

> WHEREAS, this [c]ourt is not going to revisit the merits of the respective position of the parties because of the extensive review of the custody matter, the [c]ourt recognizes its error and directs that the proper wording of the Order should be "three (3) non-consecutive weeks" noting that the proposed Order of Plaintiff, Exhibit No. 47, and the proposed orders of the Defendant, Exhibit Nos. 124 and 125, suggested non-consecutive weeks which the [c]ourt followed but inadvertently omitted the prefix "non"; and,
>
> WHEREAS, this [c]ourt believes that three (3) weeks of consecutive vacation time with one parent is 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 the ages and emotional states of these children; and
>
> WHEREAS, the intent of the [c]ourt was to allow each parent three (3) weeks of non-consecutive time to be exercised at his or her discretion with proper notice.
>
> NOW, THEREFORE, it is hereby ORDERED:

> 1. Paragraph 4g of the Custody Order dated August 24, 2012, shall be corrected to read: Each party shall be entitled to three (3) non-consecutive weeks of vacation period with the children each year, or additional times as agreed upon by the parties. Each party shall provide thirty (30) days' notice of said vacation period.
>
> 2. All other provisions of the Custody Order dated August 24, 2012 , shall remain in full force and effect.
>
> 3. [Mother]'s Petition for Clarification is GRANTED to the extent that paragraph 4g is corrected to add the prefix non to make the phrase non-consecutive noting that the prefix was inadvertently omitted in the Order of August 24, 2012.

Order, 11/2/12, at 2-3 (emphasis in original).

On November 2, 2012, Father filed his notice of appeal. We note that Father failed to simultaneously file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(a)(2)(i) and (b). On November 27, 2012, the trial court directed Father to file his statement within twenty-five days. On December 10, 2012, Father filed his concise statement of errors complained of on appeal. Despite Father's failure to satisfy the simultaneous filing requirement of Pa.R.A.P. 1925(a)(2)(i), we proceed to address Father's issues on appeal. ***See In re K.T.E.L.***, 983 A.2d 745, 747 (Pa. Super. 2009) ("[T]here is no *per se* rule requiring quashal or dismissal of a defective notice of appeal . . . .").

Father raises three issues for our review:

> 1. Did the trial court commit an error of law and abuse its discretion in modifying Paragraph 4g of the Custody Order dated August 24, 2012 without considering the merits of Mother's Petition for Clarification of the August 24, 2012

> Custody Order of the Court or Father's Response to Mother's Petition, as Mother's Petition and Father's Response to Mother's Petition both introduced new facts and evidence not already in the record, and, as such, Mother's Petition was for Modification, not Clarification of the Custody Order?
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> 2. Did the trial court commit an abuse of discretion and error of law when modifying Paragraph 4g of the Custody Order dated August 24, 2012 in failing to consider that such modification is not in the best interests and welfare of the children?
>
> 3. Did the Trial Court commit an abuse of discretion and error of law when the Honorable Judge Miller maintained jurisdiction over the above-captioned matter when at the same time he was presiding over, and continues to preside over, another unrelated case involving Mother, and particularly as the Honorable Judge Miller specifically stated that "this Court has not had any written or oral communication whatsoever with [Mother], based on the facts and evidence presented? [sic]

Father's Brief at v.

Preliminarily, we find that Father's third issue is not properly before us. Father filed his motion for recusal on July 16, 2012. The trial court denied Father's motion on July 23, 2012. The order denying recusal was, in this case, an interlocutory order, and was not appealable at the time of the order. ***See Rohm and Haas Co. v. Lin***, 992 A.2d 132, 149 (Pa. Super. 2010). Upon entry of a final order, a party may properly appeal the propriety of any prior interlocutory orders. ***K.H. v. J.R.***, 826 A.2d 863 (Pa. 2003). Here, the trial court's denial of Father's motion for recusal became appealable upon the entry of the court's final order, on August 27, 2012. However, Father did not file his notice of appeal within thirty days of the

entry of that order. ***See*** Pa.R.A.P. 903(a). As a result, Father's third issue is waived.

We next consider Father's first and second issues. Because these issues are interrelated, we address them together. In addressing these issues, we observe that the trial court's November 2, 2012 order, which amended the final August 27, 2012 custody order, was entered sixty-seven days after the August 27, 2012 custody order. For reasons discussed below, we therefore raise the issue of subject matter jurisdiction *sua sponte*.

> We recognize that neither [f]ather nor the trial court specifically addressed the issue of subject matter jurisdiction. However, "[i]t is well-settled that the question of subject matter jurisdiction may be raised at any time, by any party, or by the court *sua sponte*." ***Grom v. Burgoon***, 448 Pa. Super. 616, 672 A.2d 823, 824–25 (1996).
>
> Furthermore, where "[t]he issue for review centers on the question of subject matter jurisdiction . . . . this question is purely one of law, our standard of review is de novo, and our scope of review is plenary." ***Commonwealth v. Jones,*** 593 Pa. 295, 929 A.2d 205, 211 (2007).

B.J.D. v. D.L.C., 19 A.3d 1081, 1082 (Pa. Super. 2011).

In her trial court filings, Mother characterized her petition as a "Petition for Clarification," and in her brief on appeal, argues that she "did not seek a modification of the trial court's earlier custody determination," but instead, "simply sought clarification as to the meaning of the court's prior order and additional specificity regarding the right to take vacations with the [C]hildren during the school year." Mother's Brief at 10.

Nevertheless, we find that Mother's petition sought a modification of the trial court's August 27, 2012 order.

While not binding upon this Court, the Court of Civil Appeals of Alabama artfully explained:

> A "motion for clarification" is just what the name implies: a request for an explanation from the trial court as to the meaning of a prior, allegedly unclear, order. A "motion for clarification" does not seek to persuade the trial court that a prior judgment should be changed, modified, or invalidated. If it does seek to do any of those things, then it is not a "motion to clarify" a judgment, but a motion to alter, amend, or vacate a judgment. . . . **If a trial court's response to a "motion for clarification" is to explain, rather than to alter, amend, or vacate a prior order, then that response is a strong indicator that the motion was, in fact, one seeking clarification.**

Moss v. Mosley, 948 So.2d 560, 565 (Ala. Civ. App. 2006) (emphasis added). As Mother's petition in the instant case sought a change in the trial court's order, rather than an explanation, we proceed to address Mother's "Petition for Clarification" by its nature, *i.e.*, as a petition for modification of an order.

Whether the trial court had jurisdiction to rule on Mother's petition for modification depends on whether Mother's petition for modification sought a "modification" pursuant to Section 5338 of the Custody Act, or whether it seeks a "modification" pursuant to Section 5505 of the Judicial Code. As discussed in the remainder of this opinion, the Judicial Code imposes limits on a court's jurisdiction to make modifications to a prior order, while the

Custody Act removes those limitations on jurisdiction, where modification of custody is sought pursuant to that Act.

This question requires statutory interpretation. As such, our standard of review is as follows: "The interpretation and application of a statute is a question of law that compels plenary review to determine whether the court committed an error of law. As with all questions of law, the appellate standard of review is *de novo* and the appellate scope of review is plenary." ***B.K.M. v. J.A.M.***, 50 A.3d 168, 172 (Pa. Super. 2012) (citations and quotation marks omitted).

The Custody Act provision on the modification of orders, states:

> **§ 5338. Modification of existing order**
>
> **(a) Best interest of the child.—**Upon petition, a court may modify a custody order to serve the best interest of the child.
>
> **(b) Applicability.—**Except as provided in 51 Pa.C.S. § 4109 (relating to child custody proceedings during military deployment), this section shall apply to any custody order entered by a court of this Commonwealth or any other state subject to the jurisdictional requirements set forth in Chapter 54 (relating to uniform child custody jurisdiction and enforcement).

23 Pa.C.S.A. § 5338.

Separately, the Judicial Code specifies the following, with regard to the modification of orders:

> **§ 5505. Modification of orders**
>
> Except as otherwise provided or prescribed by law, a court upon notice to the parties may modify or rescind any order within 30 days after its entry, notwithstanding the prior

> termination of any term of court, if no appeal from such order has been taken or allowed.

42 Pa.C.S.A. § 5505.

In coalescing these two—ostensibly overlapping—provisions our legislature provides guidance:

> **§ 1933. Particular controls general**
>
> Whenever a general provision in a statute shall be in conflict with a special provision in the same or another statute, the two shall be construed, if possible, so that effect may be given to both. If the conflict between the two provisions is irreconcilable, the special provisions shall prevail and shall be construed as an exception to the general provision, unless the general provision shall be enacted later and it shall be the manifest intention of the General Assembly that such general provision shall prevail.

1 Pa.C.S.A. § 1933.

In seeking to give effect to both provisions at issue here, we observe a distinction between a modification sought pursuant to Section 5338 of the Custody Act, and the type of modification sought in this case.

We recently noted that the Custody Act provides no definition for "modification." We observed, "While many of our cases have discussed instances in which a custody modification is necessary, there is a dearth of authority specifying what constitutes a modification." ***P.H.D. v. R.R.D.***, 56 A.3d 702, 706 (Pa. Super. 2012). In ***P.H.D.***, we found persuasive the definition of modification provided by the Uniform Child Custody Jurisdiction and Enforcement Act, 23 Pa.C.S.A. §§ 5401–5482 ("UCCJEA"). ***See id.*** ("Even though this is not a UCCJEA case, we may, in the absence of other

governing authority, afford that definition persuasive value. ***See*** 1 Pa.C.S.A. § 1921(c)(5).")

The UCCJEA provides the following definition of modification:

> "**Modification.**" A child custody determination that changes, replaces, supersedes or is otherwise made after a previous determination concerning the same child, whether or not it is made by the court that made the previous determination."

23 Pa.C.S.A. § 5402.

Here, in reading Section 5338 and Section 5505 together, we turn again to this definition. We observe that a Custody Act "modification" is of a different nature, and permitted for different reasons, than the more general modification of a final order made pursuant to Section 5505 of the Judicial Code.

A petition for modification of custody, pursuant to Section 5338, seeks to modify a prior determination of a trial court, and requests that a court make a new determination of the best interests of a child. ***See*** 23 Pa.C.S.A. § 5338; 23 Pa.C.S.A. § 5402. This type of modification is unique to custody orders—it may be made at any time, as child custody orders are temporary in nature, and are always subject to change. ***See Kassam v. Kassam***, 811 A.2d 1023, 1025 (Pa. Super. 2002).

A petition for modification of a custody order that seeks to merely amend the language of an order, such as to correct an alleged inadvertency, however, requests no new determination of a child's best interests. Instead, a petition for a corrective modification of a custody order is indistinguishable

from an effort to modify orders in other types of civil actions, and seeks only to give effect to the intent of a court's original determination. In reading Section 5338 and Section 5505 together, as we must, we are convinced that this more general type of modification, which involves nothing unique to custody, is made pursuant to Section 5505 of the Judicial Code. In reading the statutes this way, effect is given both to the general provision of the Judicial Code and the specific provision of the Custody Act. ***See generally*** 1 Pa.C.S.A. § 1933.

Here, Mother specifically denied that she sought a modification of an earlier determination. Mother's Brief at 10. Instead, Mother sought an amendment to the language of the trial court's order. In response, the trial court entered an order, correcting its "error" by implementing its "proper wording." Order, 11/2/12, at 2-3. In light of our holding in this case, we find that Mother's petition for modification of an order, sought a Section 5505 "modification" rather than a Section 5338 "modification," and that the trial court sought to effect a modification pursuant to Section 5505 by its November 2, 2012 order. We proceed accordingly.

Under the strict language of Section 5505, a trial court lacks subject matter jurisdiction to amend, modify, or correct its order more than thirty days after the entry of that order. ***See*** 42 Pa.C.S.A. § 5505. In the present case, sixty-seven days passed between the entry of the trial court's August 27, 2012 final custody order, and the entry of the trial court's November 2,

2012 amending order. Consequently, by November of 2012, the trial court was without jurisdiction to modify its August 27, 2012 order.

We are aware, however, that the limits of jurisdiction, prescribed in Section 5505, namely its timeliness provision, do not impinge on the inherent power of courts to correct "patent and obvious" errors. ***See***, ***e.g.***, ***Commonwealth v. Holmes***, 933 A.2d 57 (Pa. 2007). Nevertheless, "This exception to the general rule of Section 5505 cannot expand to swallow the rule." ***Id.*** at 66-67.

In the family law context, and prior to ***Holmes***, this Court held:

> The only other time a trial court may modify an order after thirty days is to correct a clerical error or other formal error which is clear on the face of the record and which does not require an exercise of discretion.

Stockton v. Stockton, 698 A.2d 1334, 1337 n.3 (Pa. Super. 1997) (citing ***First Pennsylvania Bank, N.A. v. National Union Fire Ins. Co. of Pittsburgh, Pa.***, 580 A.2d 799 (Pa. Super. 1990)) (applying pre-***Holmes*** law). More recently, though in the criminal context, in ***Commonwealth v. Borrin***, this Court considered whether a trial court had the inherent authority to change the terms of an original sentencing order to correct a purported clerical error. ***Commonwealth v. Borrin***, 12 A.3d 466 (Pa. Super. 2011) (*en banc*), *allocator granted*, 22 A.3d 1020 (Pa. 2011).

In ***Borrin***, we held that where the record does not demonstrate the patent and obvious nature of a purported error, the error is not subject to later correction. ***Id.*** at 475. We explained:

> Were this Court to hold otherwise, we would permit a trial court to retroactively alter a defendant's sentence to conform to the court's "intentions" when those intentions are not clearly expressed on the record. As noted by our Supreme Court, this is problematic: "[W]e are of the opinion that such alleged inadvertence [concerning a trial court's unexpressed intentions during a sentencing hearing] cannot be tolerated as a matter of public policy. The possibility of abuses inherent in broad judicial power to increase sentences outweighs the possibility of windfalls to a few prisoners." ***Commonwealth v. Allen***, 443 Pa. 96, 277 A.2d 803, 807 (1971) (citation and internal quotation marks omitted). Accordingly, we cannot accept the trial judge's proclamation of his own intentions because those intentions were only known to the trial judge himself and do not appear on the face of the sentencing transcript.

Id.

In the custody context, like in the sentencing context, trial court judges are granted broad discretion in making their determinations. ***See C.R.F., III v. S.E.F.***, 45 A.3d 441, 443 (Pa. Super. 2012) ("In reviewing a custody order, our scope is of the broadest type and our standard is abuse of discretion."). Thus, while ***Borrin*** concerned sentencing, it is the breadth of discretion granted to trial court judges, both in sentencing and in custody, which guides our review of a Section 5505 modification.

Accordingly, we must next inquire, pursuant to this exception to Section 5505, whether the trial court's correction in this case applied to a "patent and obvious" error. ***See Holmes***, 933 A.2d at 66.

Here, the trial court explained that its exclusion of the word "non" in the phrase "non-consecutive" was the result of an "inadvertent omission" and that "the intent of the Court was to allow each parent three (3) weeks of

non-consecutive time to be exercised at his or her discretion with proper notice." Order, 11/2/12, at 2-3.

Following our holding in ***Borrin***, however, "we cannot accept the trial judge's proclamation of his own intentions because those intentions were only known to the trial judge himself." ***Borrin***, 12 A.3d at 475. Instead, we look to the record to determine whether an error is "patent and obvious." ***Holmes, supra***.

Our review of the record reveals no indication of the trial court's intention. No transcript for the hearing held on August 17, 23, and 24, 2012 was made part of the record. The trial court's opinion in support of its August 27, 2012 order discusses the court's reasons underlying its award of primary physical custody to Mother, highlights the court's concerns regarding communication between the parties, and explains the basis for the court's belief that Father should relocate nearer to Mother. The court made no mention of its reasons or intentions for its award of vacation time. Trial Court Opinion, 8/29/12, at 1-13.

Prior to the entry of the trial court's custody order, both Father and Mother proposed non-consecutive weeks of vacation to the trial court. Mother's proposed custody order suggested that each party shall be entitled to "three non-consecutive week vacation periods" with the Children each year. Mother's Exhibit 47 at 3. Father's proposed custody order suggested that each party shall be entitled to a "two (2) non-consecutive week vacation

period with the minor children each year." Father's Exhibit 124; Father's Exhibit 125. The trial court, however, was not bound to accept either parent's proposal. As we noted above, trial courts are granted broad discretion in fashioning their custody awards. ***See C.R.F., III***, 45 A.3d at 443.

In light of that broad discretion, neither award—consecutive weeks of vacation, nor non-consecutive weeks of vacation—is patently or obviously counter to the record available to this Court. Nothing in the record, prior to the entry of the November 2, 2012 modifying order, suggests any intention at all of the trial court concerning vacation time. After review, we are constrained to find that the trial court's amendment, while purported to be "inadvertent", is not demonstrably so.

Accordingly, for the reasons stated above, and pursuant to Section 5505 and the relevant case law, we find that the trial court lacked subject matter jurisdiction to enter its November 2, 2012 order. We therefore vacate the order.

Order of November 2, 2012 vacated. Order of August 27, 2012 remains in effect. Jurisdiction relinquished.

Judge Donohue files a Dissenting Memorandum.

Judgment Entered.

Mary A. Troyer

Deputy Prothonotary

Date: 6/5/2013