



Filed

Supreme Court of Guam, Clerk of Court

IN THE SUPREME COURT OF GUAM

MELANIE RENEE PALOMO,
Plaintiff-Appellee,

v.

ALFREDO BUSTAMANTE,
Defendant-Appellant.

OPINION

Cite as: 2019 Guam 5

Supreme Court Case No.: CVA15-027
Superior Court Case No.: DM0291-07

Appeal from the Superior Court of Guam
Argued and submitted on November 22, 2016
Hagåtña, Guam

Appearing for Defendant-Appellant:
Alfredo Bustamante, *pro se* (briefed)
929 S. Marine Corps Dr.
Tamuning, GU 96913

Curtis C. Van de veld, *Esq.* (argued)
The Vandeveld Law Offices, P.C.
123 Hernan Cortes Ave.
Hagåtña, GU 96910

Appearing for Plaintiff-Appellee:
Daniel S. Somerfleck, *Esq.*
Somerfleck & Associates, PLLC
Nelson Bldg.
866 Rte. 7, Ste. 102
Maina, GU 96932

E-Received

6/7/2019 9:43:00 AM

BEFORE: ROBERT J. TORRES, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; KATHERINE A. MARAMAN, Associate Justice.¹

PER CURIAM:

[1] Defendant-Appellant Alfredo Bustamante appeals from a trial court judgment awarding sole legal and physical custody of his minor child to the child’s mother, Plaintiff-Appellee Melanie Palomo. Bustamante argues the trial court abused its discretion in awarding sole custody to Palomo, violated his due process rights by failing to timely rule on his motion to modify custody and by awarding custody to Palomo when he was not found to be unfit, discriminated against him based on sex, and erred in not finding that the child was subjected to “parental alienation syndrome.” For the reasons below, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] The facts are extensive. Defendant-Appellant Alfredo Bustamante and Plaintiff-Appellee Melanie Palomo had a child together, F.B., in November 2006. After a bench trial and per agreement of the parties, the Superior Court awarded the parties joint legal and joint physical custody of F.B. Record on Appeal (“RA”), tab 77 at 1 (Custody Decision, May 23, 2008). Palomo was granted primary residential custody during F.B.’s “tender years,” with more custodial days and nights than was granted to Bustamante. *Id.* at 1-2. The court noted that the custodial and visitation order needed to be “flexible enough to consider increases in time spent with each parent, and expand[] as the child grows and matures.” *Id.* at 1.

[3] When F.B. was three-and-a-half years old, Bustamante filed a Motion to Increase Custody to Actual Joint Physical Custody (“2010 Motion to Increase Custody”). RA, tab 114 at 1 (Mot. Increase Custody to Actual Joint Physical Custody, May 27, 2010). Citing the court’s

¹ The signatures in this opinion reflect the titles of the Justices at the time this matter was considered and determined.

2008 custody decision, Bustamante reasoned that because F.B. was no longer an infant, it would be appropriate for her to have equal time with both parents, on a week-on, week-off basis. *Id.* at 1-3. Palomo opposed the motion, arguing that Bustamante misunderstood the court's 2008 custody decision to be temporary and that he did not make a persuasive showing of changed circumstances affecting the child. RA, tab 117 at 2-4 (Opp'n Mot. Increase Custody & Mem. P. & A., July 23, 2010).

[4] The trial court issued an Order for Custody Study, ordering the Department of Public Health and Social Services to conduct "an investigation and report concerning the care, welfare and custody of [F.B.]" to assist the court in deciding on Bustamante's 2010 Motion to Increase Custody. RA, tab 120 at 1 (Order for Custody Study, July 29, 2010). That same day, the court issued an order *pendente lite* modifying the previous custody arrangement. RA, tab 121 at 1 (Order After Hr'g, July 29, 2010). The order stated that "the parties shall share joint legal and physical custody" of F.B., alternating physical custody between the parties, with Palomo continuing to have custody for a greater amount of time than Bustamante. *See id.* at 1-2.

[5] At the continued motion hearing, the court denied Bustamante's 2010 Motion to Increase Custody, noting to Bustamante that "as [his] child matures, [he] will get more time." RA, tab 131 at 2 (Min. Entry, Jan. 6, 2011).²

[6] Nearly two years later, Bustamante filed a Motion for Permanent Custody Order. RA, tab 153 (Mot. Permanent Custody Order & Mem. P. & A. in Supp. of Mot., Oct. 25, 2012). He again requested equal time with F.B., who at the time was one month shy of her sixth birthday.

² Although Bustamante ordered transcripts of the proceedings below, he never paid for them. This court issued an order giving Bustamante a deadline in which to make a 50% deposit on the transcripts or the case would proceed without transcripts. *Palomo v. Bustamante*, CVA15-027 (Order at 2 (Feb. 19, 2016)). After the deadline passed without payment, this court issued an order that it would proceed with the appeal without Bustamante's ordered transcripts. Order at 2 (Mar. 23, 2016). Thus, we are without the benefit of transcripts for the various motion and status hearings below, other than the limited statements captured in the trial court's minute entries for those hearings.

Id. at 3. Palomo opposed the motion, arguing that Bustamante did not meet his burden of showing changed circumstances. RA, tab 159 at 2-3 (Opp'n Mot. Permanent Custody Order, Dec. 28, 2012). At a status hearing after a judge reassignment, Bustamante withdrew his 2012 Motion. RA, tab 167 (Min. Entry, Mar. 22, 2013).

[7] Two months later, Bustamante filed a Motion to Increase Parenting Time (“2013 Motion to Increase Parenting Time”). RA, tab 170 (Mot. Increase Parenting Time & Mem. P. & A. in Supp. of Mot., May 9, 2013). Noting that as he was already given joint legal and physical custody of F.B. in 2008 (and this was reiterated in the court’s July 29, 2010 order), he was not moving to modify “custody,” but only to increase his parenting time to 50/50. *Id.* at 4. Bustamante argued that because he was not seeking to modify custody, the standard was the best interest of the child, not whether there has been a change in circumstances. *Id.* at 4-5 (citing *Enrique v. Angelina*, 18 Cal. Rptr. 3d 306, 315 (Ct. App. 2004)). He argued that more time in his care would allow F.B. to develop her relationship with her brothers from his marriage to Monica Bustamante, and to become fluent in Spanish. *Id.* at 6-7. In the alternative, Bustamante argued that should showing a change in circumstances be necessary, that F.B. was now seven years old and in elementary school, that Bustamante is self-employed and has a flexible schedule, that he is married and is raising three other children, and that he has matured as a parent, are substantial changed circumstances since the court’s 2008 and 2010 orders. *Id.* at 9-10.

[8] Palomo opposed Bustamante’s 2013 Motion to Increase Parenting Time, arguing that showing a change in circumstances applied to Bustamante’s request. RA, tab 172 (Opp'n Mot. Increase Parenting Time & Mem. P. & A., June 19, 2013). Palomo argued that it was not in F.B.’s best interest to spend equal time with Bustamante because in the past she had missed

scheduled school and extracurricular activities that fell on Bustamante's custody days, and that while in Bustamante's custody, F.B. "is constantly dropped off late at school." RA, tab 173 at 1-2 (Decl. of Pl., June 20, 2013). Bustamante responded in a declaration that while in Palomo's custody, F.B. focuses on extracurricular activities during weekdays, and that she constantly misses assignments and has low test grades. RA, tab 174 at 2 (Decl. of Alfredo Bustamante, June 21, 2013). He also asserted that for the past several months he has been dropping F.B. to school early. *Id.*

[9] At a hearing on the 2013 Motion to Increase Parenting Time, after receiving testimony from the parties, the trial court declined to modify the current schedule but noted that the best interests of the child required that soon, the schedule be modified. RA, tab 178 at 8 (Min. Entry, Sept. 13, 2013). The court noted that the 2008 custody decision dealt with F.B. while she was in her tender years, and that now she was a seven-year-old with an activity schedule and would benefit from more time with each parent. *Id.* Addressing the parties, the court stated:

Neither of these parents are [sic] capable of working together for the best interest of the child. Your child is growing and you are both still in 2007. . . . It is clear that it is the minor child delivering information and is the mechanism of communication between [her] parents. I have fit parents; as a parenting team, the two of you are not working well.

Id. at 9. The court ordered parenting counseling for both parents to develop a parenting plan, communications plan, and discipline plan, and to attend counseling sessions on blended parenting. *Id.*

[10] At a status hearing, Bustamante told Palomo in open court, "This is all about money. If you want my daughter then I offer you to take her now and I will pay no child support. My daughter will come to me when she is 18." RA, tab 198 at 2 (Min. Entry, June 13, 2014). Palomo's attorney responded, "We accept that Your Honor. Case closed." *Id.* A week later, the

parties submitted a Stipulated Judgment of Custody terminating Bustamante's parental rights. RA, tab 200 at 1 (Order, June 25, 2014). The court noted that under Guam law, a separate petition to terminate parental rights must be filed setting forth the authorized causes for termination under the statute, which the stipulated judgment did not set forth. *Id.* at 2. The court construed the submission of the proposed judgment as a withdrawal of Bustamante's 2013 Motion to Increase Parenting Time. *Id.* The court ordered the suspension of existing orders for visitation pending a refiling of Bustamante's motion to increase parenting time or the entry of a separate judgment for the termination of parental rights. *Id.*

[11] Approximately two weeks later, Bustamante filed a *pro se* Motion to Increase Custody ("2014 Motion to Increase Custody"). RA, tab 204 (Mot. Increase Custody, July 9, 2014). Bustamante sought to increase his parenting time to a 50/50 basis, alternating weekly. *Id.* at 3. To support his motion, he reiterated the several reasons he gave in his prior motions to increase parenting time. *See id.* at 6-11. He also argued that in Palomo's previous marriage, from which she has teenage daughters, "the same signs of Parental [A]lienation Syndrome were noticed where [Palomo] made several decisions without consulting with the biological father." *Id.* at 11. Palomo opposed the motion, citing Bustamante's earlier desire to terminate his parental rights and her intent to file a separate action for the termination of Bustamante's parental rights. RA, tab 208 at 2 (Opp'n Mot. Increase Custody & Mem. P. & A., Aug. 7, 2014).

[12] Palomo filed, in a separate action (Superior Court Case No. SP0125-14), a Petition for Termination of Parent-Child Relationship. Bustamante objected to this petition.

[13] At a hearing in the original custody proceeding (DM0291-07), Palomo called two witnesses, Dr. Lisa Baza and Hope Pangelinan Cortez, to testify about what happened during what would have been Bustamante's last meeting with F.B. because of his earlier agreement to

give up his parental rights. RA, tab 226 (Min. Entry, Dec. 12, 2014). Cortez testified that Bustamante was yelling and at one point raised his hand with his palm open.³ *Id.* at 4. Baza testified that F.B. appeared traumatized during the incident. *Id.* at 3-4.

[14] Two months later, the court in DM0291-07 stayed the custody case pending resolution of the petition to terminate parental rights filed in SP0125-14. The court in SP0125-14 eventually issued a Decision and Order dismissing Palomo's petition. The court found that a plain reading of 19 GCA § 4303 provides that such petitions must be filed by the parent seeking to relinquish his or her rights, or if adversely filed, must be supported by one of the enumerated assertions in section 4303, which Palomo's petition failed to so do.

[15] A few days later, Bustamante filed a Motion to Restore Legal and Physical Custody of Minor Child F.B. RA, tab 232 (Mot. Restore Legal & Physical Custody of Minor Child F.B., Feb. 18, 2015). He requested that the parties resume the prior custodial schedule pending a decision on his motion to increase parenting time. *Id.* at 2. Palomo opposed the motion.

[16] The court held an evidentiary hearing. RA, tab 261 (Min. Entry, June 15, 2015). Bustamante called character witnesses who testified about his relationship with F.B., and his wife's relationship with the child. Some of his witnesses were not aware of his earlier agreement to terminate his parental rights, but all agreed that it did not change their opinion of him. *See id.* at 3, 4, 8-9. Bustamante also called Palomo's ex-husband, who testified that he and Palomo share 50/50 custody of their two daughters, that he and Palomo "don't communicate very well," that "[s]he definitely has a way of expressing herself," and that "often times I defer to her opinion, then when I decide not to, it gets argumentative, then I just stop." *Id.* at 7. Bustamante also called his pastor, who testified that he believed that Bustamante's decision to terminate his

³ It is unclear from the minutes toward whom Bustamante was alleged to have raised his hand.

parental rights “was to protect [F.B.] from the anguish of being pulled back and forth in a custody dispute.” *Id.* at 8.

[17] Palomo called one of F.B.’s former teachers, Monica Park, who testified that when F.B. was in her class two years ago, she struggled in the first part of the year, and at times was “messy looking,” but she could not remember which parent had F.B. at the time. *Id.* at 9. Park testified that F.B. “concentrates more now and seems happy,” that “[h]er teacher this year said she is doing pretty good,” and that she was tutoring F.B., which is how she concluded that F.B. was doing better. *Id.* at 9-10.

[18] Palomo then called Agnes Siendo as a witness. Siendo testified that she has known Palomo since 1985. *Id.* at 10. She said that she lost touch with Palomo when Palomo met Bustamante, and that she “later found out it was because Mr. Bustamante would hide [Palomo’s] phone or try to control her, not let her see her friends.” *Id.* Siendo further testified that about six months after Palomo gave birth to F.B., Palomo called her saying she was afraid because Bustamante had threatened to kill her. *Id.* According to Siendo, Bustamante “even jumped the back of my house to look for her. My ex-husband found him in our back yard. After she left him, we went into hiding because he is scary. I know he was looking for his child and his girlfriend.” *Id.* at 10-11.

[19] Siendo also testified that “[o]ne time [F.B.] showed me bruises on her arm and told me that Mr. Bustamante’s wife had caused it,” and that “[o]nce she told me that Monica had slapped her face.” *Id.* at 11. Siendo also claimed that Bustamante had once tried to run her off the road. *Id.* According to Siendo, before June 2014, F.B. “would cry and get clingy to her mom and say she didn’t want to go, she would say Monica is mean to me. Now she is better, attitude and personality are different. She is a happy kid.” *Id.*

[20] Palomo called Bic Sobti, who testified about an incident earlier that year. After coming home and parking his car, Sobti was confronted by Bustamante. *Id.* at 13-14. Bustamante knocked on Sobti's passenger window and yelled and screamed at him to move his car because Bustamante had a new tenant. *Id.* Sobti testified he "felt threatened for [his] life." *Id.* He called the police afterward, but he "let it go." *Id.* Sobti testified that he "was very nervous and very scared," and sat in his car until Bustamante left. *Id.*

[21] Palomo testified that F.B. "has done really well" since June 2014,⁴ that she made the "A" Honor Roll, and that she has not asked to see Bustamante. *Id.* at 15. Palomo also testified that F.B. "doesn't cry a lot [sic] anymore; not the same level of anxiety like before; she tells me she is very happy." *Id.*

[22] Subsequently, the trial court issued its Findings of Fact and Conclusions of Law; Judgment of Custody. RA, tab 287 (Finds. Fact & Concl. L.; Judgment of Custody, Oct. 28, 2015). The court found that Client Services and Family Counseling ("CSFC") noted the difficulty in developing a communication and discipline plan between the parties and the "capricious nature of the parties [sic] relationship." *Id.* at 3. The court found that Bustamante and Palomo "individually are considered fit parents, but [they] continue to fail to communicate or cooperate with each other." *Id.*

[23] The court also found that Palomo "provided evidentiary support showing that the minor child's overall attitude and demeanor is improved under [Palomo's] care and supervision," and that F.B. is doing well in school under Palomo's care. *Id.* at 3, 4. The court also noted that Palomo had called a "witness to describe an incident in which he felt so threatened by [Bustamante] that he had to contact the police." *Id.* at 4.

⁴ The minutes say "June 2015," but this appears to be a typo or a misstatement. From the context of Palomo's testimony, it is clear she meant June 2014, *i.e.*, the last time Bustamante had contact with F.B. prior to the hearing.

[24] The court concluded that though an award of joint legal custody is preferred in Guam, “this preference is always secondary to the best interest of the child.” *Id.* at 5 (citing *Flores v. Cruz*, 1998 Guam 30 ¶ 12). The court noted the many factors used in determining the best interests of the child, including:

- (1) Parents [sic] character and propensities as evidence [sic] by their past conduct;
- (2) the associations and influences to which the child is most likely to be exposed in the alternatives afforded, both positive and negative;
- (3) and where is the greater likelihood of an environment for the child of love, warmth, stability, support, consistency, care and concern, and physical and spiritual nurture
- and (4) the ability of the Parties to work with each other and to facilitate a continued and close working relationship between the two Parties for the interests of the child.

Id. (omission in original) (citing *Howerton v. Howerton*, 2004 Guam 8 ¶¶ 25-26).

[25] The court further concluded that “[t]he parents’ ability to communicate and cooperate is crucial in considering whether joint legal custody is proper.” *Id.* (quoting *Mehler v. Martin*, 440 S.W.3d 529, 536 (Mo. App. 2014); *Pasternak v. Pasternak*, __ S.W.3d __, 2015 WL 4929927 (Mo. 2015) (en banc)). According to the court, “[p]arents must be capable of cooperating for a court to order joint custody.” *Id.* (citing *Thames v. Thames*, 170 So. 3d 1264 (Miss. 2015)).

[26] The court then concluded:

In this case, since the inception of these proceedings in 2007, [Palomo] and [Bustamante] have not been able to communicate or work together in court ordered mediation, Erica’s House supervised visitations, or [CSFC]’s co-parenting agreement. The lack of cooperation with each other is evident due to the length of this current litigation.

The continual dispute between both [Palomo] and [Bustamante] is at a point where the parents cannot “cooperate and communicate in the child’s best interest.” *Red Elk v. McBride*, 344 P.3d 818 (Alaska 2015).

[Palomo] has provided evidentiary support of a “greater likelihood of an environment of . . . stability, support, consistency, care and concern, and physical and spiritual nurture for the minor child.” *Howerton v. Howerton*, 2004 Guam 8 ¶ 26.

Therefore, the Court finds that [Palomo] will have legal and physical custody of the parties' minor child.

Id. at 5-6. The court granted Bustamante “extensive visitation rights,” *i.e.*, weekends and every other holiday. *Id.* at 6.

[27] Bustamante timely filed a Notice of Appeal.

II. JURISDICTION

[28] This court has jurisdiction over an appeal from final judgment entered in the Superior Court. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw current through Pub. L. 116-19 (2019)); 7 GCA §§ 3107(b), 3108(a), 25102(a) (2005); *see also Koji v. Neves*, 2016 Guam 36 ¶ 11.

III. STANDARD OF REVIEW

[29] This court reviews child custody orders for an abuse of discretion, keeping in mind the best interests of the child. *Howerton*, 2004 Guam 8 ¶ 6 (citations omitted). “Under this standard, [this court does] not substitute [its] own judgment for that of the trial court; instead [it] determine[s] ‘whether substantial evidence supports the trial court’s decision.’ ‘Substantial evidence is relevant evidence that a reasonable person may accept as sufficient to support a conclusion, even if inconsistent conclusions may be drawn from the evidence.’” *Id.* (quoting *Lanser v. Lanser*, 2003 Guam 14 ¶¶ 15, 18).

[30] “The question as to whether a constitutional right has been violated is reviewed *de novo*.” *Coffey v. Gov’t of Guam*, 1997 Guam 14 ¶ 6 (citing *United States v. Michael R.*, 90 F.3d 340, 343 (9th Cir. 1996)).

IV. ANALYSIS

A. The Trial Court Did Not Abuse its Discretion in Granting Sole Legal and Physical Custody to Palomo

[31] “The primary consideration when determining custody is the best interests of the child[.]” *Lanser*, 2003 Guam 14 ¶ 16 (citing 19 GCA § 8404; *Flores*, 1998 Guam 30); *see also Howerton*,

2004 Guam 8 ¶ 6 (noting that standard of appellate review of child custody orders is abuse of discretion, “keeping in mind the best interests of the child” (citations omitted)). “[U]nder Guam law there is a preference for both joint legal and joint physical custody arrangements. The preference for either type of joint custody, however, ‘is always secondary to the best interests of the child.’” *Howerton*, 2004 Guam 8 ¶ 14 (quoting *Flores*, 1998 Guam 30 ¶ 12). It is legislative policy that children spend more or less equal time with each of their parents, when the parents are not living together. 19 GCA § 8404(a)(8) (2005) (reflecting subsection/sub-item designations added by the Compiler in 2016). However, even where joint custody is ordered, “a joint custody plan does not *require* an equal division of time between the parents.” *Howerton*, 2004 Guam 8 ¶ 16 (citing *Lanser*, 2003 Guam 14 ¶ 13).

[32] “Any custody award shall be subject to modification or change whenever the best interests of the child require or justify such modification or change” 19 GCA § 8404(a)(6). “[T]o justify ordering a change in custody there must generally be a persuasive showing of changed circumstances affecting the child.” *Lanser*, 2003 Guam 14 ¶ 9 n.2 (alteration in original) (quoting *In re Marriage of Carney*, 598 P.2d 36, 38 (Cal. 1979)).

[33] The trial court determined that joint custody was no longer in F.B.’s best interest. To support its custody determination, the court cited to evidence of the tumultuous nature of the parties’ relationship and the improvements seen in F.B.’s overall demeanor since she was in her mother’s sole care and custody. *See generally* RA, tab 287 (Finds. Fact & Concl. L.; Judgment of Custody).

[34] Although some testimony contradicts the evidence put forth by Palomo, “it is within the purview of the trial court to weigh the credibility of witnesses and their testimony.” *Lanser*, 2003 Guam 14 ¶ 18 (quoting *Nissan Motor Corp. in Guam v. Sea Star Grp. Inc.*, 2002 Guam 5 ¶

32). “Rather than reweighing the evidence, we look only to see whether substantial evidence exists to support the trial court’s decision.” *Id.* (citing *People v. Tuncap*, 1998 Guam 13 ¶ 13; *In re Marriage of Meegan*, 13 Cal. Rptr. 2d 799, 801 (Ct. App. 1992)).

[35] The trial court’s decision to award sole legal and physical custody to Palomo is supported by substantial evidence. The court heard from F.B.’s former teacher, Monica Park, who testified that F.B. had improved in school and that she “concentrates more now and seems happy.” RA, tab 261 at 9 (Min. Entry, June 15, 2015). Palomo testified that F.B.’s grades improved since June 2014,⁵ and that F.B. reports being “very happy.” *Id.* at 15. Palomo’s friend, Agnes Siendo, testified that before June 2014, F.B. “would cry and get clingy to her mom and say she didn’t want to go, she would say Monica is mean to me; now she is better, attitude and personality are different. She is a happy kid.” *Id.* at 11. Siendo also testified about instances of aggressive behavior by Bustamante a few months after F.B. was born. *Id.* at 10-11. Bic Solti testified about an incident in which he felt so threatened by Bustamante that he called the police. *Id.* at 14.

[36] The court also mentioned the parties’ difficulty in developing a communication and discipline plan and found that while “individually [they] are considered fit parents, [they] continue to fail to communicate or cooperate with each other.” RA, tab 287 at 3 (Finds. Fact & Concl. L.; Judgment of Custody). This finding is heavily supported by the record, replete with evidence of the parties’ constant disagreement and strife over how best to raise F.B. *See supra* ¶ 8; *infra* ¶ 37.

[37] In *Flores v. Cruz*, this court explained:

Generally, agreement and cooperation between the parties are the foundations upon which any joint custody arrangement rests. The absence of such makes decisions affecting the welfare of the child difficult and will

⁵ *See supra* note 4.

inevitably require recurring court intervention. Moreover, in situations where parents are embattled and embittered, a joint custody arrangement would only enhance familial chaos. Clearly, a joint custody arrangement absent minimal cooperation would not be in the best interest of a child.

However, “[t]he ability to cooperate does not require the absence of tension or hostility” Instead, it requires “that the parents put the interest of the child before their own interests (or anger).” If the parties have demonstrated that they are reasonable and willing to give priority to the child’s best interest, courts can determine whether the parents can separate and put aside their differences to cooperate for the benefit of their child. If the potential for cooperation exists, a successful joint custody arrangement can be achieved by instructing parents on what is expected and by setting ground rules of conduct.

1998 Guam 30 ¶¶ 20-21 (internal citations omitted).

[38] In *Flores*, this court reversed an award of sole custody to the mother because, despite their differences, the parties had shown the ability to cooperate with one another without attorney or court involvement throughout the period in which they had temporary joint custody. *Id.* ¶¶ 23-24, 28. Such circumstances do not exist here. It is clear from the record that Palomo and Bustamante have great difficulty communicating and cooperating with one another. Rather than resolving issues regarding visitation, scheduling, and travel on their own, the parties constantly seek the court’s involvement to resolve these matters. *See, e.g.*, RA, tab 145 (Min. Entry (Status Hr’g), Nov. 30, 2011) (court stating that it is “at a point where [the] court cannot babysit”); RA, tab 180 (CSFC Counseling Progress, Dec. 12, 2013) (noting dispute between parties as to transfer of F.B. on Thanksgiving Day and over how to handle make-up days when one parent misses his or her usual days with the child); RA, tab 196 (Status Report, June 12, 2014) (report filed by Bustamante noting issues regarding the specific location Palomo parks during exchanges, the proper pick-up time for birthday celebrations, and Palomo’s scheduling of appointments and extracurricular activities for F.B. during Bustamante’s custodial time). This lack of communication and cooperation, even on simple logistical matters, coupled with the

evidence of improvements in F.B.'s demeanor and education while under the sole care and supervision of Palomo, supports the trial court's determination that a joint custody arrangement no longer serves the child's best interests.

[39] Our decision today is difficult, for we do not take lightly Bustamante's clear willingness and desire to have a greater presence and role in his daughter's life. While mindful of this court's holdings that joint custody is preferred and the public policy that children spend more or less equal time with their parents, we cannot simply ignore the evidence demonstrating the detrimental effects of F.B.'s being caught between two parents who fail to put their differences aside for her wellbeing. In reaching our decision, we do not mean to convey that joint custody is inappropriate where there is animosity and a lack of communication and cooperation between parents, as the factual circumstances of each case must be carefully examined. We find that under the particular circumstances of this case, the trial court was within the bounds of its discretion when it decided that joint custody was no longer in F.B.'s best interest.

B. The Trial Court Did Not Violate Bustamante's Right to Due Process

[40] Bustamante argues that the trial court violated his right to due process by awarding sole legal and physical custody to Palomo without finding Bustamante an unfit parent, by unduly delaying its ruling on his 2013 Motion to Increase Parenting Time, and by discriminating against him based on sex. Appellant's Br. at 21-27 (June 13, 2016). We disagree.

1. A finding of unfitness was unnecessary in this case

[41] “[T]he right to parent is a fundamental liberty interest protected by the [D]ue [P]rocess [C]lause of the Fourteenth Amendment” *Coffey*, 1997 Guam 14 ¶ 7 (citing *Santosky v. Kramer*, 455 U.S. 745, 753-4 (1982)). Before terminating parental rights, due process requires

the state to support its allegations of parental unfitness by clear and convincing evidence. *See id.*; *Santosky*, 455 U.S. at 761-69.

[42] Bustamante argues that the trial court’s custody award violated his right to due process because there was not clear and convincing evidence he is an unfit parent. Appellant’s Br. at 26. Palomo counters that while this higher burden of proof is required in state actions to terminate parental rights, it is not required in custody disputes between two parents. Appellee’s Br. at 11-12 (July 13, 2016). In custody proceedings, Palomo contends, where both parents are presumed suitable, the primary consideration is the best interest of the child, and an unfitness analysis is unnecessary. *Id.* at 11-12.

[43] We agree with Palomo. An award of legal and physical custody to one parent does not necessarily equate to the termination of parental rights of the non-custodial parent. In *In re J.L.L.P.*, this court explained what it means for parental rights to be terminated:

“A termination of parental rights is a final and complete severance of the child from the parent and removes the entire bundle of parental rights.” *In re Interest of Amber G.*, 554 N.W.2d 142, 150 (Neb. 1996), *disapproved on other grounds by In re Lilly S.*, 903 N.W.2d 651, 663 (Neb. 2017). Parental rights are not terminated where the parents “have not lost ‘the entire bundle’ of parental rights” *In re P.F.*, 638 N.E.2d 716, 723 (Ill. App. Ct. 1994). “[W]here the father retains his visitation rights and there has been no authority given to consent to adoption, it is clear that all of the father’s parental rights regarding his children have not been severed.” *In re Interest of Amber G.*, 554 N.W.2d at 150.

In re J.L.L.P., 2004 Guam 3 ¶ 13; *see also* 19 GCA § 4310 (2005) (“An order terminating the parent-child relationship shall divest the parent and the child of all legal rights, privileges, duties and obligations, . . . with respect to each other.”); *cf.* 19 GCA § 4303(b) (2005) (listing substantial and continuous or repeated neglect as a condition that may support termination of parental rights); 19 GCA § 4202(i) (2005) (defining “residual parental rights and

responsibilities” as rights and responsibilities remaining with parent after transfer of legal custody and where parent-child relationship has not been terminated by judicial decree).

[44] Here, Bustamante’s parental rights were not terminated. Rather, the court modified the joint custody of the parties and awarded legal and physical custody to Palomo alone, with visitation to Bustamante. Neither 19 GCA § 8404 nor our caselaw requires a finding of unfitness for a sole custody award. Rather, we have repeatedly held that the primary consideration in custody decisions is the best interest of the child. *See Howerton*, 2004 Guam 8 ¶¶ 6, 14; *Lanser*, 2003 Guam 14 ¶ 16 (citing 19 GCA § 8404; *Flores*, 1998 Guam 30). Sometimes, both parents are equally fit, but other circumstances make a joint custody award unsuitable. The trial court found this to be the case here—while the court determined that “individually” Palomo and Bustamante are fit parents, the parties’ repeated failure to communicate and cooperate with one another was at a point where joint custody was no longer in F.B.’s best interest. RA, tab 287 at 3-6 (Finds. Fact & Concl. L.; Judgment of Custody). Under these circumstances, we find the custody award did not infringe on Bustamante’s due process rights.

2. The trial court did not unduly delay its ruling on Bustamante’s 2013 Motion

[45] “The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Bustamante asserts that it took the trial court 775 days to rule on his 2013 Motion to Increase Parenting Time (i.e., 775 days from the motion hearing held on September 13, 2013 to the trial court’s judgment of custody filed on October 28, 2015), and that the delay violated due process. Appellant’s Br. at 25.

[46] The delay was not nearly as long as Bustamante claims. Bustamante filed the Motion to Increase Parenting Time on May 9, 2013. RA, tab 170 (2013 Mot. Increase Parenting Time). At

the September 13, 2013 hearing on the motion, the trial court orally ruled that it would not modify the parenting schedule, but noted that “the best interest of [the] child require[d] that in [the] near future the schedule[] . . . should be modified,” pending the court’s receipt of more information on the parents’ ability to work together through their development of parenting, communications, and discipline plans. RA, tab 178 at 8-9 (Min. Entry, Sept. 13, 2013). On June 13, 2014, at a status hearing regarding visitation, Bustamante told Palomo he would relinquish his parental rights. RA, tab 198 at 2 (Min. Entry, June 13, 2014). The court construed the submission of the proposed judgment of termination as a withdrawal of Bustamante’s 2013 Motion to Increase Parenting Time. RA, tab 200 at 2 (Order, June 25, 2014).

[47] Thus, Bustamante overlooks that the trial court conditionally ruled on his motion in September 2013, while reserving the ability to make further determinations based on the parties’ ability to work more cooperatively together. Nine months later, while the parties were developing these plans, Bustamante offered to terminate his parental rights, and the court issued an order considering the motion to be withdrawn. Under these circumstances, we determine there was no undue delay in addressing Bustamante’s motion.

3. The trial court did not discriminate against Bustamante based on sex

[48] Bustamante argues that the trial court violated his rights to due process and equal protection under the Fifth and Fourteenth Amendments by discriminating against him based on sex. He argues that “[e]very child has a right to their biological father and every father has the equal right to raise their children.” Appellant’s Br. at 20, 24. He claims that the trial court’s decision is based on the notion that “[a] father[] cannot get equal time with [his] children, without showing that a wife is totally unfit.” *Id.* at 26.

[49] Paramount to the concept of equal protection is the requirement that “[t]he sovereign may not draw distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective. Specifically, it may not subject men and women to disparate treatment when there is no substantial relation between the disparity and an important state purpose.” *Lehr v. Robertson*, 463 U.S. 248, 265-66 (1983) (internal citations omitted).

[50] Bustamante does not appear to challenge the validity of 19 GCA § 8404 on equal protection grounds, but challenges the trial court’s custody decision as discriminating against him because of his sex. Title 19 GCA § 8404 is facially neutral; it sets forth no classifications and instead requires that custody determinations be based on the “best interest of the child.” *See* 19 GCA § 8404(a)(1) (“Custody should be awarded to *either parent* according to the best interest of the child.”); *cf. Rico v. Rodriguez*, 120 P.3d 812, 817 (Nev. 2005). As for Bustamante’s claim that the trial court based its decision on notions of favoring mothers over fathers in custody cases, he puts forth no factual basis for support. Bustamante does not point to anything in the record to show that the trial court’s ultimate decision turned on the sex of the parties, and we have found no such facts in our review of the record. *See Rico*, 120 P.3d at 817-18. Bustamante has failed to demonstrate a violation of his due process or equal protection rights.

C. Bustamante Failed to Develop the Claim that F.B. was Subjected to “Parental Alienation Syndrome”

[51] Bustamante argues that the trial court erred by allowing Palomo to subject F.B. to “Parental Alienation Syndrome,”⁶ which he claims “hurts children enormously by denying them good fathers for the revenge or control motives of moms.” Appellant’s Br. at 26. Palomo responds that Bustamante “provided no testimony regarding Parental Alienation Syndrome, put

⁶ “Parental alienation syndrome” is a theory generally referring to “when a child becomes an unwitting ally to the alienating parent” and “occurs when one parent campaigns successfully to manipulate his or her children to despise the other parent despite the absence of legitimate reasons for the children to harbor such animosity.” 127 Am. Jur. *Proof of Facts* 3d 237 (2012).

forward no expert testimony that Parental Alienation Syndrome is generally accepted within the scientific community or that the child is displaying any of the purported symptoms of Parental Alienation Syndrome.” Appellee’s Br. at 13. She cites to one case to argue that Parental Alienation Syndrome is not a scientifically reliable theory. *Id.* at 13-14.

[52] In the proceedings below, the first mention Bustamante makes of Parental Alienation Syndrome is in his 2014 Motion to Increase Custody. RA, tab 204 (Mot. Increase Custody, July 9, 2014). In the motion, he alleged that in Palomo’s previous marriage, “the same signs of Parental alienation Syndrome were noticed where [Palomo] made several decisions without consulting with the biological father.” *Id.* at 11. At the June 15, 2015 evidentiary hearing, Bustamante asked Palomo whether she had heard of the syndrome, to which she responded that she had not. RA, tab 261 at 15 (Min. Entry, June 15, 2015). Another witness testified that she has “heard of parental alienation,” but that it is “not something [she] deal[s] with,” and that she is “unable to define it.” *Id.* at 6.

[53] Other than the instances above, the record below contains no further development of Bustamante’s “parental alienation syndrome” claim. Bustamante cited no authority regarding parental alienation syndrome in his 2014 Motion to Increase Custody, and the two witnesses he questioned regarding the syndrome did not expound on the issue. His arguments on appeal are far more extensive than the mere passing references to this claim in the trial court and would require us to make factual determinations for the first time on appeal. *See Gov’t of Guam v. Gutierrez*, 2015 Guam 8 ¶ 21 (“[R]esolution of factual issues not evaluated by the trial court is not an appropriate function of an appellate court.” (citing *Kloppenburg v. Kloppenburg*, 2014 Guam 5 ¶ 27; *McNeil v. Pub. Def. Serv. Corp.*, No. 90-00044A, 1990 WL 320362, at *2 (D.

Guam App. Div. Oct. 30, 1990))). Because Bustamante failed to develop the claim below, we decline to address this issue.

V. CONCLUSION

[54] We hold that the trial court did not abuse its discretion in awarding sole legal and physical custody to Palomo. We also hold that Bustamante’s rights to due process and equal protection were not violated. We decline to address parental alienation syndrome because Bustamante failed to develop the claim below. For these reasons, we **AFFIRM**.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
KATHERINE A. MARAMAN
Associate Justice

/s/
ROBERT J. TORRES
Chief Justice