IN THE SUPREME COURT OF GUAM

NOELLA CARTER HOWERTON,
Plaintiff-Appellee,

v.

JOHN W. HOWERTON,
Defendant-Appellant.

OPINION

Filed: May 11, 2004

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Supreme Court Case No.: CVA03-003
Superior Court Case No.: DM0419-02

Appeal from the Superior Court of Guam
Argued and submitted on November 4, 2003
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; FRANCES M. TYDINGCO-GATEWOOD, Associate Justice; RAMONA V. MANGLONA, Justice *Pro Tempore*.

TYDINGCO-GATEWOOD, J.:

[1] The Defendant-Appellant, John W. Howerton ("Howerton"), appeals from an order granting him joint legal and physical custody of his minor child. Howerton argues that the lower court erred in granting him joint physical custody but failing to order equal custodial time between him and the child's mother, the Plaintiff-Appellee Noella Carter Howerton[1] ("Carter"). Howerton further argues that in giving more custodial time to Carter, the lower court erroneously applied the "tender years doctrine." We find that under a joint physical custody plan, equal time, while preferred, is not required, and that in considering deviation from an equal time arrangement, the trial court may properly consider the best interests of the child. We find that the custody order was supported by substantial evidence. We further find that the trial court did not apply the tender years doctrine in this case. Accordingly, we affirm the lower court's decision.

I.

[2] The instant appeal arises out of a divorce-related dispute concerning custody of the parties' minor child. Carter and Howerton were married on Guam in 1998. Howerton is employed with the United States Army with the rank of Lieutenant Colonel, and is the Inspector General for the Guam National Guard. Carter is a senior flight attendant for Continental Micronesia. Together they have one child who was born on April 22, 1999. Carter has two other children from previous relationships. Howerton does not have any other children. The parties separated on July 3, 2002, and sought a divorce on the ground of irreconcilable differences. They agreed to everything with

[1] The case caption identifies the Plaintiff-Appellant as Noella Carter Howerton. During a hearing regarding this matter, the Plaintiff-Appellant informed the court that her name has been changed to Noella Carter.

the exception of the custody of their child. The court, at an Order to Show Cause hearing on September 20, 2002, ordered visitation *pendente lite*, giving Howerton visitation with the child on Tuesdays and Thursdays after work, and from Saturday mornings until Sunday evenings on weekends that he was not working. Carter was given custody of the child during the remaining time.

[3] At a bench trial on January 31, 2003, the court accepted testimony on the issue of custody. Carter argued for sole legal and physical custody, while Howerton proposed a joint physical custody plan wherein the child would live with each parent on a week on, week off basis. The lower court announced its decision regarding custody from the bench, and thereafter, on February 27, 2003, issued an Interlocutory Decree of Dissolution [with] Findings of Facts [and] Conclusions of Law, incorporating its prior bench ruling. As set forth in the Interlocutory Decree, the court found that the parties were "equally fit to serve as parents of the minor child with respect to finances, maturity, and emotional support." Appellant's Excerpts of Record, Tab A, p. 3 (Interlocutory Decree of Dissolution, Findings of Fact, Conclusions of Law, Feb. 27, 2003). The court ordered that both parents shall have "joint legal and physical custody of their minor child," and further ordered that custody be as follows: The child would reside with Carter, with Howerton "having visitation in accordance with the following schedule:"

> [1] Tuesday and Thursday Evening from 5:00 pm until 8:00 pm
> [2] Weekends, when [Howerton] . . . does not have drill or other full time duty, from 9:30 am Saturday until 8:00 pm on Sunday
> [3] Weekends, when [Howerton] has drill or full time duty, Saturday and Sunday from 5:00 pm until 8:00 pm

Appellant's Excerpts of Record, Tab A, pp. 5-6 (Interlocutory Decree of Dissolution, Findings of Fact, Conclusions of Law, Feb. 27, 2003). The court's custody decision was essentially the same as the custody arrangement which was imposed *pendente lite*.

[4] A Final Decree of Dissolution of Marriage was filed on February 27, 2003, which incorporated the Interlocutory Decree by reference. *See* Appellant's Excerpts of Record, Tab B, p. 1 (Final Decree of Dissolution of Marriage, Feb. 27, 2003). Both the Interlocutory and Final Decrees were entered on the lower court's docket. Howerton appealed both decrees.

II.

[5] "This court has jurisdiction over appeals from child custody orders" pursuant to Title 7 GCA § 3107(b). *Lanser v. Lanser*, 2003 Guam 14, ¶ 8 (citing *Flores v. Cruz*, 1998 Guam 30, ¶ 8).

III.

A. Standard of Review.

[6] We review child custody orders for an abuse of discretion, keeping in mind the best interests of the child. *Lanser*, 2003 Guam 14 at ¶¶ 8, 15; *see also Flores v. Cruz*, 1998 Guam 30, ¶ 8; *see also In re Marriage of Condon*, 73 Cal. Rptr. 2d 33, 44 (Ct. App. 1998) ("The standard of appellate review of custody and visitation orders is the deferential abuse of discretion test."). Under this standard, we do not substitute our own judgment for that of the trial court; instead, we determine "whether substantial evidence supports the trial court's decision." *Lanser*, 2003 Guam 14 at ¶ 15; *see also Flores*, 1998 Guam 30 at ¶ 8. "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." *Lanser*, 2003 Guam 14 at ¶ 18 (quoting *B.M. Co. v. Avery*, 2002 Guam 19, ¶ 13); *see also Condon*, 73 Cal. Rptr. 2d at 44 (defining the test as "whether the trial court could have reasonably concluded that the order in question advanced the 'best interests' of the child") (citation omitted).

B. The Parties' Arguments.

[7] Howerton presents two issues on appeal relating to the trial court's decision regarding custodial time. The first is that the lower court erred in failing to give Howerton equal time with the child where the court awarded the parties joint physical custody. The second issue relates to the trial court's decision in granting Carter more time with the child. Howerton argues that in failing to grant equal time, the lower court erroneously applied the "child of tender years" standard, which according to Howerton, does not apply under Guam law. He further argues that even assuming the doctrine was applicable in Guam, the doctrine is inapplicable where the mother does not stay at home caring for the child. Howerton contends that the doctrine is inapplicable in this case because Carter is a career flight attendant and is not a stay-at-home mother.

[8] On appeal, Carter argues that the lower court's decision regarding custody was correct. Carter essentially re-asserts much of the testimony which was presented during the lower court hearing on the custody issue.[2]

C. Discussion.

1. Equal Time.

[9] Howerton argues that the lower court erred in finding that the parties should have joint physical custody but thereafter awarding him less than equal time with the child. In discussing the issue, it is first relevant to describe the various legally recognized joint custody arrangements, as well as the type of arrangements contemplated under Guam law.

[10] As this court has previously stated in *Flores v. Cruz*, joint custody is "generally understood as a custody arrangement that places both legal and physical custody of a child in the hands of both parents." *Flores*, 1998 Guam 30 at ¶ 9. The *Flores* court further described a joint custody

[2] For purposes of deciding this appeal, we do not consider any facts Carter raised in her brief and during oral argument which are not part of the lower court's record.

arrangement as permitting both parents to "participate in reaching major decisions affecting the child's welfare." *Id*. As defined in *Flores*, joint custody appears to include both physical and legal custody.

[11] It has been clarified that "properly analyzed, joint custody is comprised of two elements--legal custody and physical custody . . . ." *Pascale v. Pascale*, 660 A.2d 485, 491 (N.J. 1995) (quoting *Beck v. Beck*, 86 *N.J.* 480, 486, 432 *A.*2d 63 (1981)) (internal brackets omitted). Other courts have similarly held that "[e]mbraced within the meaning of 'custody' are the concepts of 'legal' and 'physical' custody." *Taylor v. Taylor*, 508 A.2d 964, 967 (Md. App. 1986). This court has discussed issues related to custody in *Flores v. Cruz*, 1998 Guam 30 at ¶¶ 3-7, and more recently in *Lanser v. Lanser*, 2003 Guam 14. Neither the *Lanser* court nor the *Flores* court differentiated between the concepts of joint *physical* and joint *legal* custody. *See Lanser*, 2003 Guam 14; *Flores*, 1998 Guam 30. Moreover, Guam statutes do not define either arrangement. *See Flores*, 1998 Guam 30 at ¶ 10 (identifying Title 19 GCA § 8404, entitled "Criteria and Procedure in Awarding Custody," as the "principle custody statute" under Guam law). The concepts of physical and legal custody are, in fact, distinct, and courts often find it "helpful to contrast joint legal custody with joint physical custody." *McCarty v. McCarty*, 807 A.2d 1211, 1213 (Md. Ct. Spec. App. 2002). For purposes of analyzing the issue in the present case, it is similarly helpful to distinguish the two. *Taylor*, 508 A.2d at 966 ("While it is clear that both parents in a joint custody arrangement function as 'custodians' in the sense that they are actually involved in the overall welfare of their child, a distinction must be made between sharing parental responsibility in major decision-making matters and sharing responsibility for providing a home for the child."); *see also Pascale*, 660 A.2d at 491 (reaffirming the importance in "break[ing] down the term joint custody into legal and physical custody in reviewing a court's determination of child support"); *Elsome v. Elsome*, 601 N.W.2d 537,

544 (Neb. 1999) ("Many, if not most, states that have defined joint custody differentiate between joint legal and joint physical custody.").

[12] Courts have defined joint legal custody as carrying with it "the right and obligation to make long range decisions involving education, religious training, discipline, medical care, and other matters of major significance concerning the child's life and welfare." *Taylor*, 508 A.2d at 967; *Pascale*, 660 A.2d at 491 ("Joint legal custody, mean[s] the authority and responsibility for making major decisions regarding the child's welfare.") (internal quotation marks and citation omitted). "Joint legal custody means that both parents have an equal voice in making those decisions, and neither parent's rights are superior to the other." *Taylor*, 508 A.2d at 967; *Brown v. Brown*, 621 N.W.2d 70, 77 (Neb. 2000) ("Joint legal custody has been generally defined as joint authority and responsibility for making 'major' decisions regarding the child's welfare.") (internal quotation marks and citation omitted).

[13] By contrast, joint physical custody "means the right and obligation to provide a home for the child and to make the day-to-day decisions required during the time the child is actually with the parent having such custody." *Taylor*, 508 A.2d at 967; *Brown*, 621 N.W.2d at 77 ("In contrast [to joint legal custody], joint physical custody has been described as joint responsibility for 'minor' day-to-day decisions . . . .") (internal quotation marks, citations and internal brackets omitted); *Pascale*, 660 A.2d at 491-92. Moreover, under a joint physical custody arrangement, there exists an "exertion of continuous physical custody by both parents over a child for significant periods of time." *Brown*, 621 N.W.2d at 77 (citation omitted); *Taylor*, 508 A.2d at 967 ("Joint physical custody is in reality 'shared' or 'divided' custody.").

[14] The child custody statutes are found in Title 19 of the Guam Code Annotated. Title 19 GCA § 8404 governs child custody in divorce cases. However, as was previously recognized by this

court, the section does not specifically address joint custody. *See Flores*, 1998 Guam 30 at ¶ 10. Rather, the section speaks in terms such as "custodial parent" and "non-custodial parent." *See* Title 19 GCA § 8404(h) (1994) ("[I]n determining visitation of minor children on Guam with *non-custodial parents* living on Guam, the court shall, to the greatest degree possible, order visitation for minor children (pendente lite and permanently) with non-custodial parents such that the children spend more or less equal amounts of time with the *custodial parent* and the *non-custodial parent* during non-working, non-sleeping, non-school time . . . .") (emphasis added). Although the statutes are silent as to joint custody arrangements, this court has previously found that a review of Title 19 of the GCA, entitled "Parental Relations," reveals a legislative policy favoring the preservation of the "sanctity of family life" by "the inclusion of both parents in the lives of their children." *Flores*, 1998 Guam 30 at ¶ 11; *see also Lanser*, 2003 Guam 14 at ¶ 12. In light of this legislative policy, we have held that joint custody arrangements are preferred under Guam law. *Flores*, 1998 Guam 30 at ¶ 12; *Lanser*, 2003 Guam 14 at ¶ 12. We herein clarify that under 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." *Flores*, 1998 Guam 30 at ¶ 12.

[15] The dispute in the present case involves the lower court's award of physical, as distinguished from legal, custody. Here, the trial court awarded joint physical custody to the parties. Appellant's Excerpts of Record, Tab A, p. 5 (Interlocutory Decree of Dissolution, Findings of Fact and Conclusions of Law, Feb. 27, 2003) ("The [p]arties shall have joint legal and physical custody of their minor child."); *see also* Appellant's Excerpts of Record, Tab B, p. 1 (Final Decree of Dissolution of Marriage, Feb. 27, 2003) (incorporating the Interlocutory Decree into Final Decree

by reference). Howerton argues that in light of this, the court erred in not giving the parties equal custodial time over the child.

[16] While the Guam statute which governs custody upon dissolution of marriage does not address joint custody arrangements (either physical or legal), *see* 19 GCA § 8404, it does address custodial arrangements where joint custody has not been awarded. In that context, the statute nonetheless favors equality of time between the custodial and the non-custodial parent. Title 19 GCA § 8404(h) specifically provides that, subject to various exceptions:

> It is legislative policy that children spend as much time with each of their parents as possible, when the "parents are not living together." Therefore, in "determining visitation of minor children" . . . the court shall, to the greatest degree possible, order visitation for minor children (pendente lite and permanently) with non-custodial parents *such that the children spend more or less equal amounts of time with the custodial parent and the non-custodial parent during non-working, non-sleeping, non-school time . . . .*

19 GCA § 8404(h) (emphasis added). However, in *Lanser*, this court recently found that even if joint custody is ordered, a joint custody plan does not *require* an equal division of time between the parents. *Lanser*, 2003 Guam 14 at ¶ 13 (stating that joint custody "does not require that each parent have equal time with the children").[3] Accordingly, we reject Howerton's argument that the trial

[3] This holding in *Lanser v. Lanser*, 2003 Guam 14, is not inconsistent with the law in other jurisdictions. Other courts have similarly found that joint physical custody does not require an equal division of time between the parents. *See Taylor v. Taylor*, 508 A.2d 964, 967 (Md. App. 1986) (describing joint physical custody as "'shared' or 'divided' custody" and recognizing that "[s]hared physical custody may, but need not, be on a 50/50 basis, and in fact most commonly will involve custody by one parent during the school year and by the other during summer vacation months, or division between weekdays and weekends, or between days and nights"). Courts have so held even in light of statutes which favor equal division custody arrangements. *See Stephenson v. Stephenson*, 847 So. 2d 175, 179 (La. Ct. App. 2003) ("[Louisiana law] provides that to the extent feasible and in the best interests of the child, physical custody of the children *should be* shared equally. Yet, when the trial court finds that a decree of joint custody is in the best interests of the child, the statute does not *necessarily require* an equal sharing of physical custody.... Substantial time rather than strict equality of time is mandated by the legislative scheme providing for joint custody of children.") (citations omitted) (emphasis added); *In re Marriage of Smyka*, 739 P.2d 489, 490 (Mont. 1989) (interpreting an amended statute which provides that the "allotment of time between parties shall be as equal as possible" to mean that equal time is now subordinate to the best interests of the child, and that "depending upon the circumstances of the case, equal physical custody will not be awarded if such is not in the best interests of the children") (citation omitted); *In re Marriage of Blonigen*, 621 N.W.2d 276, 281 (Minn. Ct. App. 2001) (finding that by statutory definition, joint physical custody is an arrangement whereby "the routine daily care and control

court was required to grant equal time under a joint custody plan as it is inconsistent with this court's prior determination that an equal division of time is not required under a joint physical custody plan where joint physical custody has been ordered.

[17] Howerton argues on appeal that the custody schedule ordered by the trial court "only gives him what amounts to fairly limited visitation." Appellant's Brief, p. 7 (July 23, 2003). Howerton contends that the time allotment ordered in this case is inconsistent with the policy under local law favoring joint custody. Howerton further argues that the trial court's decision to depart from an equal time arrangement was contrary to the best interests of the child. He contends that "[i]n the absence of any factor showing the child's best interests require otherwise, equal time should be ordered by the [c]ourt." Appellant's Brief, p. 7 (June 23, 2003).

[18] First, we reject Howerton's argument that the custody arrangement ordered in this case did not approximate a joint physical custody plan. As stated earlier, joint physical custody does not require equality of time. Rather, joint physical custody requires that each parent get continuous physical custody for significant periods of time. *See Brown*, 621 N.W.2d at 77 (defining a joint physical custody order as an arrangement whereby there is an "exertion of continuous physical custody by both parents over a child for significant periods of time") (citations and internal brackets omitted); *see also Stephenson v. Stephenson*, 847 So. 2d 175, 179 (La. Ct. App. 2003) (stating that the statutory scheme allowing for joint custody "does not necessarily require an equal sharing of

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and the residence of the child is structured between the parties" and further finding that "joint physical custody does not require an absolute equal division of time; rather it is only necessary that physical custody be the shared responsibility of the parents") (citations omitted); *Tilley v. Tilley*, 968 S.W.2d 208, 213 (Mo. Ct. App. 1998) ("By statutory definition, joint physical custody means 'an order awarding each of the parents significant periods of time during which a child resides with or is under the care and supervision of each of the parties.' Yet, joint physical custody does not require a trial court to allocate each parent an equal amount of time with the child.") (citations omitted); *In re Marriage of Condon*, 73 Cal. Rptr. 2d 33, 46 n.13 (Ct. App. 1998) (finding that by statute, a parent with joint physical custody shall have "significant periods of physical custody . . . assur[ing] a child of frequent and continuing contact with both parents," but that "a joint physical custody order does not require a child to spend an equal amount of time with each parent").

physical custody" but rather, mandates "*[s]ubstantial time* rather than strict equality of time") (citations omitted and emphasis added). In the present case, the custody order allows Howerton several overnight visits a month, almost all day during most weekends, and several afternoon visits per week. This custody arrangement allows each parent substantial time with the child and continuous physical custody for significant periods of time. *See Tracy v. Tracy*, 961 S.W.2d 855, 858-59 (Mo. Ct. App. 1998) (rejecting the mother's argument that the trial court erred in granting primary physical custody to the father, and finding that the plan, which allowed the mother alternating weekend visitation, an extended period of custody during the first half of the summer, and alternating holidays and birthdays, was a joint physical custody plan, and not a primary physical custody plan with visitation); *In re Marriage of Blonigen*, 621 N.W.2d 276, 281 (Minn. Ct. App. 2001) (stating that "[j]oint physical custody does not require an absolute equal division of time," and finding that a custody order which gave the mother "physical custody of the children from Sunday evening through Friday evening during the school year and during the months of June and July," and gave the father "physical custody of the children every weekend from Friday evening through Sunday evening and during the month of August" was a joint physical custody arrangement); *Nichols v. Ralston*, 929 S.W.2d 302, 304-05 (Mo. Ct. App. 1996) (characterizing a custody arrangement where the father had custody 20% of the time, and the mother had custody 80% of the time, as a "joint physical custody" arrangement in light of the statutory definition of joint physical custody as "an order awarding each of the parents significant periods of time during which a child resides with or is under the care and supervision of each of the parents").

[19] Further, while substantial time, and not equal time, is all that is *required* under a joint physical custody plan, we agree with Howerton that under Guam law, equal time is *preferred* and should be granted to the greatest extent possible. *See* 19 GCA § 8404(h). The holding of *Lanser*

that equal time is not *required* under a joint custody plan does not affect the clear legislative policy that equal time is preferred. Thus, because equal time is preferred under Guam law, we must decide under what circumstances the lower court may deviate from an equal time arrangement upon awarding joint physical custody to both parents.

[20] We hold that a trial court may deviate from an equal time arrangement if it is within the child's best interests. Title 19 GCA § 8404(a) provides that the award of custody in a non-joint custody circumstance should be made in accordance with the best interests of the child, and section 8404(h) provides that a trial court should to the greatest extent possible award equal time so long as the arrangement "is not found by the court, on the evidence presented, to be injurious to the welfare of the child." 19 GCA 8404(h)(1). This court has explicitly held that the preference for joint custody "is always secondary to the best interests of the child." *Flores*, 1998 Guam 30 at ¶ 12. We similarly find that, when joint physical custody is awarded, the preference for equal time is also secondary to the best interests of the child.

[21] Other courts have likewise found that a deviation from the preference for equal time is permitted if it is within the child's best interests. In *In re Marriage of Smyka*, 739 P.2d 489 (Mont. 1987), the parents of a minor child divorced and the trial court found it to be in the best interests of the child that the parents have joint custody with the child's primary residence with the mother subject to visitation by the father. *In re Marriage of Smyka*, 739 P.2d 489, 490 (Mont. 1987). That schedule was further amended upon motion of the mother, where the trial court again found that joint custody was proper but the father's visitation was reduced by eight days per year. *Id*. Under the final visitation schedule, the father was given 140 days with the child, and the mother was given 225 days. *Id*. Specifically, the father was awarded physical custody from "Wednesday through Sunday twice a month, all of February and July, half of October, and alternate holidays." *Id*. at 941.

The father appealed, contending that the "trial court erred by granting him custody of less than a full half of the child's time while finding that joint custody was appropriate." *Id*. at 490. The father argued that by statute, the policy in Montana was to award "an equal allotment of custodial time," and that the trial court's decision to grant him less than full time was a misapplication of the "best interest of the child standard" set forth under statute. *Id*. The appellate court rejected the father's challenge. First, the court cited the statutory language, which provided that

> physical custody and residency of the child shall be allotted between each parent in such a way as to assure the child frequent and continuing contact with both parents. The allotment of time between parties shall be as equal as possible; however, each case shall be determined according to the best interests of the child as the primary consideration.

Id. (quoting MCA § 40-4-224(2)). Citing prior cases, the court found that the statutory preference of equal time was subordinate to the best interests of the child. *Id*. at 490-91 ("[D]epending upon the circumstances of the case, equal physical custody during the school year will not be awarded if such is not in the best interests of the child. . . . [T]he statute requires that the equal time recommendation be balanced by the practicalities of providing for the best interests of the child.") (citations omitted). Ultimately, after reviewing the record, the *Smyka* court affirmed the trial court's specific custody and visitation award. *Id*. at 491; *see also Stephenson*, 847 So.2d 175, 178, 181 (finding that the visitation scheme, allowing the father visitation "every other weekend and each Wednesday afternoon . . . during the school year and alternate weekly summer visitation," achieved the paramount goal of preserving the child's best interest under the unique circumstances of the case).

[22] We agree that a best interest analysis should be a factor in structuring custodial time arrangements when joint physical custody is ordered. Where equality of time is not required, but

preferred, under a joint physical custody plan, the lower court's decision to depart from an equal time arrangement should be made in accordance with the child's best interests.

[23] This court has not previously discussed the various factors a lower court is to consider in determining allotment of custody as the decision relates to the child's best interests; thus, it is helpful to look to local statutes relating to custody as well as cases from other jurisdictions.

a) Factors for Determining Custody.

[24] Though governing the situation where a trial court awards physical custody to one parent, and not joint custody, the factors in 19 GCA § 8404(h) do provide some guidance on the matter. Section 8404(h) states that a trial court should to the greatest extent possible give equal time subject to the following considerations:

> (1) The proposed visitation is not found by the court, on evidence presented, to be injurious to the welfare of the child;
> (2) The non-custodial parent is willing to accept such visitation;
> (3) The non-custodial parent is not found by the Court to be an unfit person to have such visitation;
> (4) The visitation is not found by the Court to interfere with the child's schooling;
> (5) Unless the Court finds that it is not in the best interests of the child, non-custodial parents or the children's grandparents shall be given consideration in providing child-care for their minor children or grandchildren, when visitation orders are prepared;
> (6) In determining visitation rights under this subsection (h), the court shall take into account the employment of each parent and the time the child spends in school or in extracurricular activities;
> (7) Based on proof presented, the court may take into account other factors respecting visitation which would affect the welfare of the minor child or children;
> . . .

Title 19 GCA § 8404(h).

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[25] As referenced above, under section 8404(h), in considering a deviation from an equal time division when sole physical custody is ordered, the lower court is to consider the following factors, which are part and parcel of a finding regarding the child's best interests: the child's welfare, the parents' willingness to accept visitation, the parents' fitness, the child's schooling, the parents' jobs and the child's extra-curricular activities. Courts in other jurisdictions have found similar factors to be relevant in determining the child's best interests in determining custody. For instance, in *Bah v. Bah*, 668 S.W.2d 663, 666 (Tenn. Ct. App. 1984), the court found that in determining where the best interests of a child lies when awarding custody, the lower court should consider many factors including, but not limited to:

> (1)the age, habits, mental and emotional make-up of the child and those parties competing for custody; (2) the education and experience of those seeking to raise the child; (3) their character and propensities as evidenced by their past conduct; (4) the financial and physical circumstances available in the home of each party seeking custody and the special requirements of the child; (5) the availability and extent of third-party support; (6) the associations and influences to which the child is most likely to be exposed in the alternatives afforded, both positive and negative; (7) 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.

Id. (internal numbering added); *see also Taylor*, 508 A.2d at 971-75 (discussing factors to consider in awarding custody);[4] *Woodall v. Woodall*, 471 S.E.2d 154, 157 (S.C. 1996) (discussing factors

[4] In *Taylor*, 508 A.2d 964, the court found the following non-exclusive factors to be relevant in determining whether to grant joint physical custody: (1) capacity of the parents to communicate and to reach shared decisions affecting the child's welfare; (2) willingness of parents to share custody; (3) the relationship established between the child and each parent; (4) the preference of the child; (5) the potential disruption of the child's social and school life; (6) the geographic proximity of the parental homes; (7) the demands of parental employment; (8) the age and number of children; (9) the sincerity of the parents' request; (10) the financial status of the parents; (11) the impact on state and federal assistance; and (12) the benefit to the parents." *Id*. at 971-74 (internal numbering added).

to consider in awarding custody).[5]

[26] In the case at bar, during the January 31, 2003 custody hearing, the lower court stated that in determining custody it looks at the following factors:

> [F]itness; mental health; the ability of the Parties to provide love and affection and emotional ties; the ability of Parties to provide some sense of permanence; the capability to financially provide a roof over the child's head, clothing, food; the ability of 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.

Transcripts, vol. III of III, p. 102 (Bench Trial, Jan. 31, 2003). These factors are consistent with the factors listed in 19 GCA § 8404(h) as well as those relied upon by courts in other jurisdictions.

b) The Trial Court's Consideration of the Factors.

[27] Upon review of the record, it is also apparent that the court took the relevant factors into consideration when determining custody. Specifically, after enumerating the relevant factors, the court pronounced: "I find it equal on both sides." Transcripts, vol. III of III, p. 102 (Bench Trial, Jan. 31, 2003). The court then stated that it did "find more favorable to Ms. Howerton . . . a more stable environment." Transcripts, vol. III of III, p. 102 (Bench Trial, Jan. 31, 2003). Notably, the court recognized that because Howerton moved to Japan due to his job, he was at a disadvantage. The court thereafter decided that the parties would have joint legal and physical custody, with the custody arrangement in place prior to trial to remain the same. Transcripts, vol. III of III, p. 102-03 (Bench Trial, Jan. 31, 2003). The court specifically found that the arrangement proposed by Howerton, with one week on and one week off, to be inappropriate for a young child. Transcripts,

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[5] In *Woodall v. Woodall*, 471 S.E.2d 154 (S.C. 1996), the court indicated that in determining custody, the "family court must consider the character, fitness, attitude, and inclinations on the part of each parent as they impact the child. . . . [as well as the] psychological, physical, environmental, spiritual, educational, medical, family, emotional, and recreational aspects of the child's life . . . ." *Id*. at 157 (citation omitted).

vol. III of III, p. 103 (Bench Trial, Jan. 31, 2003) ("I do not agree that a week on, week off for a child of tender years is in the child's best interests.").

[28] There is evidence in the record which supports the trial court's decision. For instance, Carter testified that Howerton (who is in the military) moved to Japan for his job when the child was around eight moths old, in January of 2000, and moved back in April of 2002. *See* Transcripts, vol. III of III, pp. 17, 28, 66 (Bench Trial, Jan. 31, 2003). During his time away, Howerton had little physical or telephonic interaction with the child, as he would come to Guam every month or two for generally two or three days. Thus, it is apparent that the child spent the bulk of her young life solely in the care of Carter in Carter's home. The testimony also revealed that Howerton had work duty at least one weekend per month, had a rigorous physical training program and often left the home at 4:00 a.m. to exercise, and returned from work after 8:00 p.m. in the evenings. Howerton testified that should he be required to work early in the morning or on the weekends, he planned to bring the child to the Harvest Baptist Church daycare center. Transcripts, vol. III of III, p. 74 (Bench Trial, Jan. 31, 2003). Howerton testified that on the days he had drill or other non-regular work duty, the child would be in the care of "strangers," basically, non-relatives. Transcripts, vol. III of III, p. 80-81 (Bench Trial, Jan. 31, 2003). By contrast, Carter testified that when in her custody, the child was either cared for by herself, or, if she had to work, by Carter's eldest daughter, who, according to the transcripts, has experience with childcare and has a close relationship with the child. Howerton also testified that being in the military, if he was reassigned, he would have no choice but to move away from Guam. Transcripts, vol. III of III, p. 84 (Bench Trial, Jan. 31, 2003).

[29] The evidence identified above supports the trial court's determination that the child would find a more stable, and familiar, environment with Carter, and that the stability of the child's environment was in the child's best interests. *See Stephenson*, 847 So. 2d at 181 (finding that the

child's "best interest [wa]s served by the stability he receive[d] in [the mother's] . . . home during the school week.").[6] Furthermore, it has been recognized that "extended visitation at infrequent intervals may not be 'reasonable' with regard to infants or toddlers: 'from a developmental perspective, very young children should not be separated from their primary caretakers for long blocks of time." *Condon*, 73 Cal. Rptr. 2d at 46 n.13 (citation omitted).

[30] Accordingly, we find that the trial court did not err in deciding that Howerton's proposed week on, week off plan was not within the child's best interests. Overall, because there is some competent evidence in the record supporting the trial court's decision, it cannot be concluded that the trial court abused its discretion in deviating from an equal time arrangement and in deciding to structure the joint custody plan such that the child would spend most nights with Carter with a few afternoon and overnight stays with Howerton.

[31] Finally, the fact that Howerton was found to be equally as fit as Carter "did not relieve the trial judge of the burden of determining which parent could best meet the present needs of the child[]." *See Anderson v. Anderson*, 590 P.2d 944, 946 (Ariz. Ct. App. 1979) (rejecting the contention that the trial court erred in placing physical custody with the appellee where the court also found the appellant to be "fit"). Thus, although both parents were found to be fit, the trial court

[6] There was testimony which could arguably support a finding that Howerton should be granted more time. For instance, after the "Nine-Eleven Incident," Carter was required to take overnight flights. During ten nights out of the month she would leave the child overnight with a caretaker, Mrs. Reyes. Transcripts, vol. III of III, pp. 9-10 (Bench Trial, Jan. 31, 2003). Carter also testified that the child did not appear to be uncomfortable after visitation with Howerton. Transcripts, vol. III of III, pp. 53-54 (Bench Trial, Jan. 31, 2003). The court also specifically asked whether Carter was willing to develop a good relationship with Howerton in the future, to which Carter replies yes. Transcripts, vol. III of III, p. 56 (Bench Trial, Jan. 31, 2003). Howerton also testified that he lives in a home in Dededo in a secure complex, where the child has her own room (full of toys, etc.). Transcripts, vol. III of III, p. 71-72 (Bench Trial, Jan 31, 2003). He testified that the child has friends in the neighborhood. Transcripts, vol. III of III, p. 71-72 (Bench Trial, Jan 31, 2003). Howerton also testified that he has changed his lifestyle and no longer jogged as often and did not jog at 4:00 a.m. and was at home a lot more than before. Transcripts, vol. III of III, p. 74 (Bench Trial, Jan 31, 2003). Notwithstanding this testimony favoring an equal time arrangement, this court must affirm the trial court's award so long as there is competent evidence in the record to support the court's award. *See Lanser*, 2003 Guam 14 at ¶¶ 15, 18.

was still required to determine what type of joint custody arrangement was within the child's best interests, and was permitted to deviate from the preference for equal time if such an arrangement was found to be within the child's best interests. Here, the evidence supports the court's decision on the custody arrangement.

2. Tender Years Doctrine.

[32] Howerton also argues that the lower court erroneously applied the tender years doctrine, which, according to Howerton, is inapplicable under Guam law.

[33] "The 'tender years doctrine' holds that young children, generally those under the age of seven years, should be in their mother's care." Cynthia C. Siebel, *Defining Fatherhood: Emerging Case Law Reflection of Changing Societal Realities*, WHITTIER J. OF CHILD & FAM. ADVOC., 125, 126 n.5 (2003); *Lee v. Lee*, 798 So. 2d 1284, 1289 (Miss. 2001) ("[T]he tender years doctrine . . . essentially states that if the mother of a child of tender years (i.e., early in development) is fit, then she should have custody.") At common law, there was no presumption in favor of the mother. Rather, "the father, as a matter of right, was entitled to the custody of his children." *Bazemore v. Davis*, 394 A.2d 1377, 1380 (App. D.C. 1978); *Ex Parte Devine*, 398 So. 2d 686, 688 (Ala. 1981) ("At common law, it was the father rather than the mother who held a virtual absolute right to the custody of their minor children."). "Towards the end of the nineteenth century, however, the traditional rule that the father was always entitled to custody began to give way to a standard under which the best interest of the child controlled." *Bazemore*, 394 A.2d at 1380. This standard favoring the child's best interests "evolved into a preference for the mother." *Id*. Specifically, courts began to link the child's welfare with custody remaining with the mother, and a presumption arose that giving custody to the mother was in the best interests of the child. *Id*. The doctrine, which was once a conclusive rule, eventually formed into a presumption favoring the mother. *See Devine*, 398 So.

2d at 691 (stating that the tender years presumption provides that "[a]ll things being equal, the mother is presumed to be best fitted to guide and care for children of tender years")[7]

[34] In contending that the lower court relied on the tender years doctrine, Howerton cites the trial court's pronouncement during the hearing wherein it stated:

> I am going to award joint legal and physical custody to both sides. But I am keeping visitation as is. As is. By ordering this, the Court recognizes that as the child matures, that – and is older – the child is of tender years right now and I do not agree that a week on, week off for a child of tender years is in the child's best interest. But I do agree that as the child matures, that the non . . . – the one who has less time – which would be Colonel Howerton – that that less time should increase to more time.
> …
> But I do believe that it is in the best interest of this child, because both parents have expressed that Guam will be their residence, that I grant joint legal and joint physical custody with visitation as is.

Transcripts, vol. III of III, p. 103 (Bench Trial, Jan. 31, 2003).

[35] After reviewing the record, we disagree with Howerton's contention that the lower court relied on the tender years doctrine. Under the "tender years doctrine," all things being equal, a court is required to place a young child in the custody of the mother. In this case, the trial court stated that it did not feel that the custody plan proposed by Howerton, which consisted of a one-week on, one-week off schedule, was in the best interests of the child considering the child's age. While the lower court indicated that the child is "of tender years," this reference to the child's young age was made to emphasize that a ping-pong arrangement was inappropriate in this case. This is further evident in the trial court's question to Howerton during the hearing, which the court characterized as an

[7] Whether the doctrine is useful for application in modern times is a separate issue. In fact, the legal trend has been to abandon the tender years doctrine. The doctrine "has been abolished, or is disregarded, by most jurisdictions currently . . . ." Cynthia C. Siebel, *Defining Fatherhood: Emerging Case Law Reflection of Changing Societal Realities*, WHITTIER J. OF CHILD & FAM. ADVOC., 125, 126 n.5 (2003); *In re Marriage of Fynaardt*, 545 N.W.2d 890, 893 (Iowa Ct. App. 1996) ("[W]e no longer infer the best interests of children of tender years are better served by awarding custody to their mother.") (citation omitted).

"important question," *to wit*: "How do you feel that it's in the best interest of a child of tender years to go back and forth seven days on and seven days off? How is it in the best interest of a three-year-old child to have that?" Transcripts, vol. III of III, p. 93 (Bench Trial, Jan. 31, 2003). The trial court's focus on the child's young age was related to its determination that the child would find a more stable environment under the custody plan as ordered, as opposed to the week-on, week-off plan proposed by Howerton.

[36] Thus, because the court did not use the child's age for the purpose of holding that the child should be in the mother's care *because of the age*, but rather, considered the child's age to determine whether Howerton's proposed arrangement was within the child's best interests, the trial court did not apply the tender years doctrine as Howerton asserts. Consequently, because the lower court did not apply the tender years doctrine, we reject Howerton's argument that the lower court's decision should be reversed on that ground.[8]

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[8] We do note that Title 19 GCA § 9108 appears to be a codification of the tender years doctrine in this jurisdiction. *See* Title 19 GCA § 9108 (1994) ("In awarding the custody of a minor, or in appointing a general guardian, the court or officer is to be guided by the following considerations . . . (b) As between parents adversely claiming the custody or guardianship, neither parent is entitled to it as of right; *but other things being equal, if the child is of tender years, it should be given to the mother*; if it is of an age to require education and preparation for labor and business, then to the father.') (emphasis added). Howerton identifies several statutes which arguably indicate that legislative policy disfavors the doctrine. *See* Title 19 GCA § 4106 (1994) ("The father and mother of a legitimate unmarried minor child are equally entitled to its custody, services and earnings. If either the father or mother be dead or unable or refuse to take the custody or has abandoned his or her family, the other is entitled to its custody, services and earnings."); Title 19 GCA § 4107 (1994) ("The husband and father, as such, has no rights superior to those of the wife and mother, in regard to the care, custody, education, and control of the children of the marriage, while such husband and wife live separate and apart from each other."); Title 19 GCA § 8404(a) (1994) ("Custody should be awarded *to either parent* according to the best interest of the child.") (emphasis added). Further, during oral arguments, Howerton alluded to a contention that the doctrine may be constitutionally infirm in its bias favoring women. However, because we find that the lower court did not apply the doctrine, we find it unnecessary at this time to determine the validity of the doctrine in this jurisdiction. We further find it unnecessary to address Howerton's argument that even assuming the doctrine applies in this jurisdiction, it should not be applied where the mother and father are both employed full time outside the home.

IV.

[37] Overall, we find that equal time is preferred but not required under a joint physical custody arrangement. Furthermore, while equal time is preferred under Guam law, the lower court may deviate from an equal time arrangement if doing so is within the child's best interests. The evidence in the record supports the trial court's determination that equal time was not in the child's best interests, and that the child should primarily reside with Carter. Thus, because the lower court's decision was supported by substantial evidence, we find that the lower court did not abuse its discretion in its custody decision. Further, we find that the lower court did not apply the tender years doctrine in this case. Accordingly, we reject Howerton's contention that the lower court's decision should be reversed on the ground that the court erroneously relied on the doctrine. In light of the foregoing, we **AFFIRM** the lower court's decision regarding the custody of the parties' minor child.