

FILED
SUPERIOR COURT
OF GUAM

2019 JUN 10 AM 10:30
CLERK OF COURT

By: _____

IN THE SUPERIOR COURT OF GUAM

JAMES THOMAS NICHOLS,

Plaintiff,

vs.

ELENA GROZA NICHOLS

Defendant.

Case No.DM0250-14

DECISION AND ORDER

INTRODUCTION

Defendant has moved to modify custody of the parties' six-year-old son. This matter is before the Honorable Michael J. Bordallo. Plaintiff James Thomas Nichols ("Plaintiff") is represented by attorney Seaton M. Woodley, III of the Law Offices of Seaton M. Woodley, III. Defendant Elena Groza, formerly known as Elena Groza Nichols, ("Defendant") is represented by Vanessa L. Williams, Esq. of the Law Office of Vanessa L. Williams, P.C. Having considered the arguments and the applicable law, the Court hereby **DENIES** Defendant's motion to modify custody for the parties' son.

BACKGROUND

This matter arises out of Defendant's Ex Parte Motion for Order to Show Cause Re: Immediate Suspension of Visitation & Modify Custody ("Ex Parte Motion"), filed May 31,

1 2019. The Court granted the OSC and the parties appeared in court on June 6, 2019 on this
2 matter. The Court will treat this matter as a motion to modify custody.

3 **FACTS**

- 4 1. The parties have been divorced since 2015 and have a six-year-old son, D.G.N. (DOB:
5 08/18/2012) (“Minor”).
- 6 2. The Court established a custody schedule in the Interlocutory Judgment of Divorce that
7 is still in force in which Defendant has physical custody on weekdays and Plaintiff has
8 physical custody on weekends.
- 9 3. During summer breaks between school years, Plaintiff obtains custody of Minor during
10 the month of June and again during the last half of August.
- 11 4. On several occasions since the divorce, Defendant has alleged that Plaintiff has abused
12 Minor. She has alleged that Plaintiff has digitally penetrated Minor and touched his
13 genitals. On some occasions, Minor confirmed that Plaintiff committed these acts. On
14 other occasions, Minor has voluntarily and unprompted stated that these acts have
15 occurred. However, based on the Court’s review of all submitted documents and
16 evidence, none of these allegations has ever been confirmed by professionals, in spite of
17 multiple investigations and physical examinations of Minor as explained below.
- 18 5. CPS received seven (7) referrals alleging sexual abuse, physical abuse, and emotional
19 abuse from Feb. 16, 2017 through Mar. 24, 2017. JP0116-17 Pet. For Persons in Need of
20 Services ¶¶ 19-21 (Apr. 3, 2017).
- 21 6. Based on its investigation, CPS determined that the referrals alleging sexual abuse
22 against Plaintiff were unsubstantiated. Id. at ¶ 27.
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- 1 7. At that time CPS suggested that Minor was a Person In Need of Services due to
2 excessive interviews and medical examinations from child services and medical
3 professionals. Id. at ¶ 29.
- 4 8. The Office of the Attorney General (“AG”) therefore petitioned the Court to declare
5 Minor to be a person in need of services. Id. at p. 6. This resulted in the child being
6 placed in foster care. See JP0116-17 Order (Apr. 4, 2017).
- 7 9. On June 15, 2017, CPS again received a referral alleging that Minor was a victim of
8 sexual abuse by Plaintiff. That same night, Defendant took Minor to Guam Memorial
9 Hospital, where Minor was admitted by Dr. James Nozaki. JP0116-17 Declaration of
10 Craig Alan N. Marquez.
- 11 10. Dr. Nozaki diagnosed Minor with a rash or allergy, but Dr. Nozaki informed Valerie
12 Cepeda of Healing Hearts that he did not see any lacerations or trauma to Minor’s anal
13 region. Ms. Cepeda of Healing Hearts then stated that an exam was not warranted at that
14 time. Id.
- 15 11. The parties arranged to carry out the physical exchange of Minor at Erica’s House – A
16 Family Visitation Center in Barrigada, Guam beginning on Mar. 17, 2017. These
17 exchanges began to occur regularly, using the schedule of the court visitation order in
18 the divorce decree. JP0116-17 Erica’s House Informational Report, 1 (Sep. 14, 2017).
- 19 12. Erica’s House reported that the parties exchanged four written communications on Aug.
20 20, Aug. 25, Aug. 27, and Sep. 3 of 2017 in which Defendant advised Plaintiff that
21 Minor’s buttocks and/or penis were red and asked if Plaintiff knew why. Plaintiff always
22 responded “No.” Id. at 2-3.
- 23 13. On Nov. 3, 2017, Minor did not want Plaintiff to take him home, and when Erica’s
24 House staff asked why, he told them, “[Plaintiff] hurt my butt, he puts fingers inside my
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- 1 butt then he hurt me.” JP0116-17 Erica’s House Informational Report, 2 (Nov. 27,
2 2017). When staff asked when Plaintiff did that, Minor responded, “Monday.” Id.
- 3 14. On Nov. 10, 2017, a similar exchange occurred. Minor stated that he did not want to go
4 with Plaintiff because Plaintiff hurts him. He told the Erica’s House staff that his dad
5 “hurt him in the butt.” Id. at 5.
- 6 15. On Feb. 2, 2018, another similar exchange occurred in which Minor was reluctant to go
7 with Plaintiff during the exchange of custody. Minor told staff that Plaintiff “puts his
8 finger in my butt.” JP0116-17 Erica’s House Informational Report, 2 (Feb. 22, 2018).
- 9 16. On Apr. 11, 2018, the AG recommended that custody be restored to the parents.
10 JP0116-17 Hr’g (Apr. 11, 2018). The AG stated that the child was doing well in school,
11 and that CPS had deemed the case right for closure. Id. Defendant and Plaintiff were
12 both present with counsel and both agreed to close the case. Id. The Court restored
13 custody to the parties and dismissed the case with prejudice. Id.; see JP0116-17 Order
14 for Dismissal (Apr. 11, 2018) (order dismissing the case with prejudice.)
- 15 17. The Court issued a clarification order that all visitation orders from JP0116-17 were
16 cancelled, and all orders from DM0250-14 were restored to full force and effect.
17 DM0250-14 Order for Clarification of Visitation (May 25, 2018). That order also
18 stated, “Erica’s House will play no official and/or informal role regarding the
19 exchanges of [Minor]; unless it is voluntary.” Id. at 2.
- 20 18. The parties continued to exchange custody of Minor during the 2018/2019 school year,
21 Defendant with weekday custody and Plaintiff with weekend custody.
- 22 19. On May 30, 2019, two days before Plaintiff was to assume his scheduled summer
23 custody of Minor during the month of June, Defendant filed the Ex Parte Motion.
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1 20. Also on May 30, 2019, Defendant filed a declaration in which she stated that Minor
2 will go several days without defecating after being at Plaintiff's house on the weekends.
3 Decl. of Def. in Support of Mot. to Modify Custody 3 (May 30, 2019). She stated that
4 the previous week, Minor again didn't want to defecate. Id. When he finally did, she
5 stated "he was bleeding bright red blood from his anus and he said his butt hurt." Id.
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7 21. Defendant stated that she immediately took Minor to urgent care to see Dr. Thomas
8 Rozycki. Id.
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10 22. Dr. Rozycki stated in the medical record that Minor informed him, without prompting
11 by the mother, that "his father puts his finger into his butt and sometimes his hand." Id.
12 at Ex. 1.
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14 23. Upon examination of Minor, Dr. Rozycki wrote, "Anus appears normal on visual exam;
15 no fissure seen." Id.
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17 24. Dr. Rozycki made a Child Abuse and Neglect Referral regarding Minor to CPS. Id. at
18 Ex. 2.
19
20 25. Defendant appeared in Court on May 31, 2019 and asserted her fear that Plaintiff would
21 abuse Minor if Minor were to begin physical custody in June with Plaintiff.
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23 26. The Court granted an Order to Show Cause Re: Immediate Suspension of Visitation
24 and meanwhile ordered Defendant to maintain pendente lite custody of Minor until the
25 evidentiary hearing on Jun. 6, 2019.
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27. On Jun. 6, 2019 the parties met in Court. Defendant stated that she had no evidence to
add beyond what she had already included in her May 30, 2019 declaration. She
petitioned the Court to leave Minor in her custody until at least the completion of the
CPS study into this most recent abuse referral by Dr. Rozycki.

1 28. Plaintiff denied ever having harmed Minor and accused Defendant of bringing the Ex
2 Parte Motion as a ploy to prevent him obtaining custody of Minor on the eve of his
3 summer visitation during June.

4 29. The matter is now before the Court.

5 **ISSUE**

6 1. Whether to modify custody of Minor in response to the Ex Parte Motion.
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8 **PRINCIPLES OF LAW**

9 The Court's decisions regarding child custody are governed by Section 8404 of Title 19
10 of the Guam Code. 19 G.C.A. § 8404. It is well settled that the Court must establish the custody
11 arrangement based on the best interests of the child. Id. at (a)(1). When determining what is
12 within the child's best interests, the Court may consider a multitude of factors, including what is
13 best for that child's moral, physical, mental, and spiritual well-being. Id. at (a)(5); see also
14 Howerton v. Howerton, 2004 Guam 8, ¶ 25 (providing additional factors to weigh in a custody
15 decision, like the child's age, habits, schooling, and extra-curricular activities, and the parents'
16 jobs and fitness). In addition to the best interests of the child, the Court must also consider the
17 legislative preference for joint custody and the legislative policy that children should spend "as
18 much time with each of their parents as possible when the parents are not living together." 19
19 G.C.A. § 8404 at (a)(8). The Supreme Court of Guam has stated, "Title 19 of the Guam Code
20 Annotated, read as a whole, reflects the legislature's underlying policy that whenever possible,
21 the sanctity of family life should be preserved by the inclusion of both parents in the lives of
22 their children." Flores v. Cruz, 1998 Guam 30, ¶ 11.

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24 With regard to changing a custody order that is already in place, the Supreme Court of
25 Guam has established that "there must generally be a persuasive showing of changed
26 circumstances affecting the child." Lanser v. Lanser 2003 Guam ¶ 9 n.2 (quoting In re Marriage

1 of Carney, 598 p. 2d 36, 38 (Cal. 1979). The change must also be substantial, enough to
2 demonstrate that it is “essential or expedient for the welfare of the child that there be a change.”
3 In re Marriage of Carney 38. Lastly, the burden of showing a substantial change in
4 circumstances lies with the party seeking the change of custody. Id.

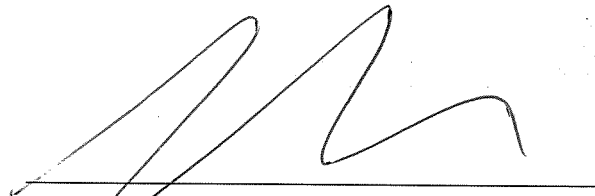
5 **ANALYSIS**

6 The burden lies with Defendant to demonstrate a substantial change in circumstances,
7 and the Court is not persuaded by the evidence presented that such a change has occurred.
8 Defendant presented little evidence, other than her declaration in which she made the claims of
9 abuse. The Court is aware of Defendant’s previous allegations of abuse against Minor by
10 Plaintiff and that none of the allegations have ever been substantiated or corroborated by a
11 doctor or other professional, even after multiple examinations, referrals, and investigations.
12 The situation here appears to be no different. Defendant took Minor to an urgent care doctor
13 who found no physical evidence of abuse on Minor. Defendant claimed that Minor produced
14 blood from his anus, but apparently the doctor concluded that everything appeared normal with
15 regard to Minor’s anus, including no fissures, and apparently, no blood. The Court
16 acknowledges that Minor himself has stated repeatedly that he is being abused by Plaintiff, but
17 this contrasts with the many investigations and examinations that seem to refute those claims.
18 The Court trusts that CPS, doctors, and other professionals in these matters are experienced in
19 recognizing abuse and would be prompt to disclose any signs of abuse of a child. With regard
20 to Minor, they have not done so, including in the instant matter. The Court is aware that CPS
21 has undertaken an investigation into the current allegations of abuse and the Court will await
22 the outcome of that study. Meanwhile, the custody arrangement of the Minor will remain
23 unchanged.
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1 **CONCLUSION AND ORDER**

2 For the above reasons, the Court **DENIES** Defendant's motion to modify custody of
3 Minor. Because the motion is denied and it caused a delay in Plaintiff obtaining his typical 30-
4 day custody in June, Plaintiff will obtain and retain custody of Minor beginning today and
5 ending 30 days from the date of this order, July 11, 2019. Defendant will resume her July
6 custody on July 11, 2019 at 8:00 a.m. From that date forward, the custody arrangement
7 established by the Court in the Interlocutory Judgment of Divorce will resume.
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9 SO ORDERED, this 10 day of June 2019.

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14 HONORABLE MICHAEL J. BORDALLO
15 Judge, Superior Court of Guam
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22 SERVICE VIA COURT BOX
23 I acknowledge that a copy of the
24 original of this order was placed in the
25 court box of:
W. Williams
V. Williams
26 Date: 6/10/19 Time: 1:42
W. Williams
Deputy Clerk, Superior Court of Guam