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**FILED**  
Superior Court of California  
County of Los Angeles  
**OCT 24 2013**  
Sherri R. Carter, Executive Officer/Clerk  
By *Sally Fletcher* Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES

<p>In re Marriage of</p> <p>Petitioner: DANIEL GIERSCH</p> <p>and</p> <p>Respondent: KELLY GIERSCH</p>	<p>CASE NO. SD 026 864</p> <p><b>STATEMENT OF DECISION</b></p> <p>(Cal. Rule of Court, Rule 3.1590)</p> <p>Trial/Hearing re: Jurisdiction and Custody:</p> <p><i>[Hon. Teresa A. Beaudet, Dept. 59]</i></p>
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**INTRODUCTION**

The Parties were married on August 18, 2006. They have two minor children, Hermes (born in California on October 17, 2006) and Helena (born in California on June 8, 2009). The parties' marital status was terminated on July 6, 2010. On July 6, 2010, the Court entered the parties' Stipulated Judgment which set forth a final and complete settlement of the financial rights and obligations arising out of the Parties' marriage, including their respective property rights and support rights. The issues of custody and visitation were reserved, and the matter was set for trial.

1 This matter came on regularly for trial and hearings regarding jurisdiction and child  
2 custody and visitation on November 19, 2010; December 2, 2010; January 6, 2011; February  
3 18 and 24, 2011; March 10 and 23, 2011; July 15 and 21, 2011; August 25, 2011; September 1,  
4 13, 15, 16, 22, and 23, 2011; October 31, 2011; December 12, 2011; January 9, 19, 25, 27 and  
5 31, 2012; February 1, 14, 16, 17, and 29, 2012; April 10, 2012; May 9, 10, and 21, 2012; June  
6 13, 21 and 28, 2012; July 11, 13, 17, 18, 19, 20, 23, 30 and 31, 2012; and August 9, 10, 15, 27,  
7 and 28, 2012, in Department 2B of the above-entitled court, the Honorable Teresa A. Beaudet,  
8 presiding. Petitioner Daniel Giersch (hereinafter referred to as "Daniel" in accordance with the  
9 usual Family Law convention) was represented by Fahi Takesh Hallin and Dena J. Kravitz, of  
10 Harris-Ginsberg LLP. Respondent Kelly Giersch aka Kelly Rutherford (hereinafter referred to  
11 as "Kelly" also in accordance with the usual Family Law convention) was represented by  
12 Lisa Helfend Meyer, Felicia Meyers, and Roxana Taghavi of Meyer, Olson, Lowy & Meyers,  
13 LLP.<sup>1</sup> Minor's counsel, Amir Pichvai, Esq. was present. Oral and documentary evidence were  
14 presented by the parties and by minor's counsel, including the testimony of the parties and that  
15 of third party witnesses; arguments were made by all counsel; and the trial concluded on  
16 August 28, 2012.

17 The Court orally announced its Tentative Decision in open court on August 28, 2012, in  
18 the presence of counsel and both parties (who appeared via video conference and CourtCall),  
19 and issued a written Tentative Decision on that date, ordering Daniel to prepare a proposed  
20 Statement of Decision.

21 Kelly timely filed her Respondent's Designation of Controverted Issues to be Addressed  
22 in Statement of Decision Re Child Custody (Code of Civ. Proc. §632; Fam. Code § 3022.3 and  
23 §3082; and Cal. Rules of Court, Rule 3.1590(D)). Kelly's Designation consisted of 114  
24 purported separate issues related to the Court's custody decision: four of the designated issues  
25 contain a total of 42 separate subissues, bringing the total number of interrogatories to the  
26 Court to 156 separate areas of inquiry.

27  
28 <sup>1</sup> At an earlier point in the proceedings, Kelly was represented by Michael Kretzmer and Ani  
Garikian of Kolodny & Anteau, and prior to that was represented by J. Michael Kelly, Crystal  
Boultinghouse and Matthew Rich of the Law Office of Michael Kelly.

1           The Court then ordered the parties to meet and confer regarding a reasonable timeline  
2 for the Statement of Decision process, and to discuss the "appropriate issues to be included in  
3 the statement of decision consistent with the case law governing the requisite content of  
4 statements of decision, the stipulations of the parties made during the course of the trial, the  
5 actual issues disputed by the parties at trial, and the evidence presented at trial by the parties."  
6 If the parties could not agree on the timeline or the contents of the statement of decision, the  
7 Court would set a hearing to determine these matters.

8           During the meet and confer process, the parties were unable to agree on the specific  
9 subjects to be addressed in the Statement of Decision. The parties, through their counsel did  
10 stipulate to dates for filing of Daniel's proposed Statement of Decision (November 5, 2012)  
11 and Kelly's response thereto (December 10, 2012). The Court ordered Daniel's Reply, if he  
12 chose to file one, to be filed by December 26, 2012; the Court also ordered the parties to  
13 thereafter meet and confer by January 16, 2013 to pick a mutually agreeable date available on  
14 the Court's calendar for a hearing on the Statement of Decision.

15           At the subsequent hearing on March 12, 2013, counsel for Kelly requested a revised  
16 schedule that would permit an interim hearing on her request for attorney fees before any  
17 further filings could be made. Further briefing by Kelly regarding the Proposed Statement of  
18 Decision was set for July 25, 2013, and by Daniel on September 17, 2013, with a further  
19 hearing on September 26, 2013. On June 7, 2013, the Court was informed that Kelly had filed  
20 bankruptcy and that the bankruptcy could affect the pending attorney fees requests. The  
21 hearing on the Statement of Decision was advanced and continued to September 27, 2013. On  
22 August 16, 2013, the Court heard and granted the motions to be relieved brought by Kelly's  
23 counsel. Thereafter, Kelly represented herself at the hearings on the Statement of Decision.

24           Prior to the hearing on the Statement of Decision on September 27, 2013, the Court's  
25 proposed changes to the Statement of Decision and the Further Judgment were distributed to  
26 the parties in a redlined version. At the September 27, 2013 hearing, the Court indicated that it  
27 would make further changes to the documents based upon the discussion that occurred at the  
28 hearing. The hearing on the final version of the documents was set on October 24, 2013 with a

1 final opportunity for the submission of changes by October 17, 2013. A redlined further  
2 revised version of the documents was distributed by the Court prior to the October 24, 2013  
3 hearing.

#### 4 CONTENTS OF STATEMENT OF DECISION

5 At the request of any party, the Court must issue a Statement of Decision setting forth  
6 the factual and legal basis for its decision on each of the principal controverted issues. (Code  
7 Civ. Proc., section 632, Cal. Rules of Court, rule 3.1590.) In a determination of custody of  
8 children, the Court is required, upon the request of either party, to issue a Statement of  
9 Decision explaining the factual and legal basis for its decision. (Fam. Code section 3022.3)

10 The Statement of Decision must be more than merely conclusory, but it need only set  
11 forth the "ultimate facts" related to the principal controverted issues. A detailed analysis of  
12 evidentiary facts, or minor issues, is not required. Yet it is not uncommon for even  
13 experienced counsel to submit needlessly complex and detailed interrogatories to the Court,  
14 calling forth objections, counter proposals and arguments about the evidence.

15 Kelly has submitted a "Designation of Controverted Issues to be Addressed in Statement  
16 of Decision re: Child Custody" containing 156 separate areas of inquiry regarding multiple  
17 issues including minor issues, and requesting specific findings on evidentiary facts. Response  
18 to such a document in a coherent manner is not only virtually impossible, but antithetical to the  
19 purpose and requirements of the Statement of Decision,

20 It is improper to request a trial court to set forth in a Statement of Decision the  
21 evidentiary detail underlying the ultimate facts that lead to the judgment. (See, generally, 7  
22 Witkin, California Procedure (5<sup>th</sup> ed. 2008) Sufficiency of Statement, § 401, pp. 470-472, Cal.  
23 Judges Bench Book: Civil Proceedings: Trial (CJER 2010) Statement of Decision – Content,  
24 Issues To Be Covered, Basis for Decision on Each Issue, sections 2.33-4, 236, pp. 50-52.) The  
25 leading case on this issue is *People v. Casa Blanca Convalescent Homes, Inc.* (1984) 159  
26 Cal.App.3d 509 (*Casa Blanca*), in which the court of appeal held that in rendering a statement  
27 of decision, the trial court is required to state "ultimate rather than evidentiary facts," on the  
28 principal controverted issues. (*Id.* at pp. 524-526.) It affirmed the trial court's refusal to make

1 detailed evidentiary findings concerning individual items of evidence that supported its  
2 ultimate findings.

3 In *Casa Blanca*, the defendant made 16 separate demands each with several subparts,  
4 which would have required the trial court to answer over 75 questions and to make a list of  
5 findings on evidentiary facts. The court of appeal rejected this approach, stating that "[s]uch a  
6 requirement cannot be made of the court. [Citation omitted.] Casa Blanca seeks an inquisition,  
7 a rehearing of the evidence. The trial court was not required to provide specific answers so  
8 long as the findings in the statement of decision fairly disclose the court's determination of all  
9 material issues." (*Casa Blanca, supra*, 159 Cal.App.3d at 525; accord *In re Marriage of*  
10 *Garrity & Bishton* (1986) 181 Cal.App.3d 675, *Wolf v. Lipsey* (1985) 163 Cal.App.3d 633.)

11 A court need not address each issue or question listed by the parties. In *Golden Eagle*  
12 *Ins. Co. v. Foremost Ins. Co.* (1993) 20 Cal.App.4th 1372, 1379-80, the court held a statement  
13 of decision adequately covered the principal issues even though it failed to respond to a party's  
14 outline of 36 issues claimed to be in controversy. A judge is not required to make detailed  
15 findings as to the truth or falsity of each individual piece of evidence. (*People v. Dollar-Rent-*  
16 *a-Car Systems, Inc.* (1989) 211 Cal.App.3d 119, 128.)

17 More recently, in *In re Marriage of Balcof* (2006) 141 Cal.App.4th 1509, the reviewing  
18 court reiterated that in rendering a statement of decision under Code of Civil Procedure section  
19 632, a trial court is required only to state ultimate rather than evidentiary facts; it rejected the  
20 appellant's contention that the trial court was constrained to provide a statement of decision  
21 addressing every single one of her 37 questions, "some of which included subparts." The court  
22 explained that the trial court had "filed a seven-page statement of decision in which it made  
23 seven findings and nine holdings. Most importantly, it stated the court's findings concerning  
24 undue influence and duress and the evidence and reasoning underlying those findings. . . ."  
25 The statement of decision was adequate for the purposes of the appellate court's review. (*Id.* at  
26 p. 1530.) "The trial court need not discuss each question listed in a party's request; all that is  
27 required is an explanation of the factual and legal basis of the court's decision regarding the  
28 principal controverted issues at trial as are listed in the request." (*Id.* at 1531.)

1 Based on the foregoing, this Court declines to conduct a further review of the evidence  
2 in the guise of preparing a Statement of Decision, which is ultimately what Kelly seeks in her  
3 Designation of Controverted Issues to be Addressed in Statement of Decision re: Child  
4 Custody. In an effort to avoid waste of judicial and litigant time and economy in this matter,  
5 the Court denies such a request and hereby adopts the following Statement of Decision:

6 **STATEMENT OF DECISION**

7 The Court makes this Statement of Decision, setting forth the legal and factual bases for  
8 its decisions on the principal controverted issues at trial, namely the custody and parenting plan  
9 for minors Hermes and Helena. All of the time frames and temporal references herein are as of  
10 the August 28, 2012 enunciation of the original oral Tentative Decision and Order of the Court  
11 (the "8/28/12 Order"), unless otherwise indicated.

12 At the outset, the Court commends the parties for the exceptional parenting they both  
13 have demonstrated during the years that this case has been pending before this judicial officer.  
14 Each in their own way has helped to shape and enrich the two wonderful children they share  
15 together. They are the luckiest of parents because they both have had more financial security  
16 and more time available to spend with their children than most people will ever have. And  
17 with that time and wealth, they have afforded their children exceptional educational and  
18 cultural experiences. There is no question that each one of them has their own unique yet valid  
19 approach to child rearing and their own unique but valid communication style. That is not to  
20 say that there is no room for improvement for both, and both have openly agreed to work on  
21 such improvement, but it is important to acknowledge that these children have two excellent  
22 parents.

23 Because these children have two excellent parents, the relocation decision this Court has  
24 made, is without a doubt one of the hardest decisions this Court has made during its more than  
25 three years in family law. As stated so well in Kelly's Closing Trial Brief at page 5, "everyone  
26 agrees that the best interest of the minor children would be best served by Daniel being in the  
27 United States, just as he was in the United States on his O-1 Visa for nearly three years, since  
28 the minor children are now faced with experiencing momentous change. Everyone

1 acknowledges that the children are closely bonded to both parents and will suffer detriment  
2 from Daniel having to live outside the United States."

3           However, due to circumstances that appear to have been beyond Daniel's control, Daniel  
4 does not presently have the ability to live in the United States; both his U.S. Visa and his Visa  
5 extension were revoked within approximately one month after the unfortunate contact by  
6 Kelly's prior counsel, Matthew Rich, with the State Department, as discussed further below. It  
7 appears that there currently is no other option than for Daniel to live outside of the U.S.

8           In light of that fact, this Court has shaped the custody determination in a fashion  
9 intended to maximize the ability of both parents to share equally in parenting and to preserve  
10 the stability and continuity of the children's relationships with Kelly and Daniel, to whom both  
11 are securely and primarily attached.

## 12 **I. THE RELOCATION/PARENTING PLAN**

13           The parties will continue to share joint legal and physical custody of Helena and  
14 Hermes. However, the parenting plan will change. As described in detail below, it is in the  
15 best interest of the children to grant Daniel's relocation request. Daniel is permitted to relocate  
16 the children to France and Monaco.

### 17 **A. Legal Bases for Decision**

18           The following are the legal bases for this Court's Decision:

19           - It is the public policy of California to ensure minor children frequent and  
20 continuing contact with both parents after their separation or dissolution, except when this  
21 contact would not be in the children's best interest as set forth in Family Code section 3011.

22           - The order of preference of custody is first to both parents jointly. In making an  
23 order granting custody to either parent, the "court shall consider, among other factors, which  
24 parent is more likely to allow the child frequent and continuing contact with the noncustodial  
25 parent." (Fam. Code §3040, subd. (a)(1).)

26           - Custodial parents have the freedom to relocate with the children, under certain  
27 circumstances. (Fam. Code §7501; *In re Marriage of LaMusga* (2004) 32 Cal.4th 1072  
28 (*LaMusga*); *In re Marriage of Burgess* (1996) 13 Cal.4th 25) (*Burgess*.)

1 - Custody must be awarded in accordance with the best interest of the children.  
2 (Fam. Code §3040.) The proper standard to effect a change in parenting time is solely the  
3 children's best interest. (*In re Marriage of Lucio* (2008) 161 Cal.App.4th 1068, 1080.) A  
4 change in a coparenting residential arrangement under a joint custody order is subject only to a  
5 child's best interest standard. (*In re Marriage of Birnbaum* (1989) 211 Cal.App.3d 1508, 1515-  
6 16.) The court "must look to *all the circumstances* bearing on the best interest of the minor  
7 child." (Emphasis in original.) (*Burgess*, 13 Cal.4th at pp. 31-32.)

8 - Where the parents share physical custody under an existing order, and a parent  
9 seeks to relocate with the child, the trial court must determine what primary custody  
10 arrangement is in the child's best interest. (*Burgess, supra*, 13 Cal.4th at p. 40 fn.12; see *In re*  
11 *Marriage of Seagondollar* (2006) 139 Cal.App.4th 1116, 1127.)

12 - Permitting a parent with joint physical custody to relocate with the child may be a  
13 modified coparenting arrangement, not a change of custody. (*Niko v. Foreman* (2006) 144  
14 Cal.App.4th 344, 365.)

15 - Where "hurdles to meaningful contact" in an international move-away situation  
16 "cut both ways," the "tiebreaker" on that issue turns on which parent is more likely to provide  
17 the other frequent and continuing contact with the child. (See, *In re Marriage of Abargil* (2003)  
18 106 Cal.App.4th 1294, 1299-1300 (*Abargil*.)

19 - Evidence of a parent's past conduct demonstrating uncooperative parenting that is  
20 likely to disrupt the child's relationship with the other parent is very relevant in a custody  
21 contest, and especially in a move-away case. (*LaMusga, supra*, 32 Cal.4th at pp. 1094-1095.)

22 In this move-away case, the Court holds that, with the parties sharing joint custody, the  
23 governing standards and burdens of proof are the same as in any initial custody determination:  
24 the Court has the "widest discretion to choose a parenting plan that is in the best interest of the  
25 children." (Fam. Code §3040; *Burgess, supra*, 13 Cal.4th at 31-32.) The standard used by the  
26 Court herein is the best interest of the children. Neither party has the burden of proof as to the  
27 best interest standard. There is no changed circumstances requirement, and neither parent has  
28 the burden to show the proposed move is either beneficial or detrimental, or that the move is



1 necessary. No threshold finding is required. (*Id.*) However, where “hurdles to meaningful  
2 contact” in an international move-away situation “cut both ways” as they do here, the  
3 “tiebreaker” on that issue has to turn on which parent is more likely to provide the other  
4 frequent and continuing contact with the child. (*Abargil, supra*, 106 Cal.App.4<sup>th</sup> at 1300). As  
5 discussed below, the Court has found that Daniel is the parent more likely to provide Kelly  
6 frequent and continuing contact with Hermes and Helena.

7 **B. Factual Bases for Decision**

8 **1. Expert Testimony**

9 The Court has benefitted from the input of three esteemed custody evaluators, two of  
10 whom testified before this Court. The Court was not assigned to this case when Dr. Strachan  
11 did his evaluation, but the Court has read and benefitted from his report, particularly with  
12 regard to understanding the inception of some of the issues that have continued to affect these  
13 parties.

14 Dr. Dupee's reports and testimony have assisted the Court not only in the trial but also  
15 by agreement of the parties, during the *pendente lite* custodial proceedings that occurred  
16 between trial sessions. In particular, her insights were helpful in adjusting the ongoing  
17 parenting plan to reduce the wear and tear on the parties' minor son, Hermes, resulting from too  
18 many transitions between the parties. Dr. Dupee was also helpful with regard to the adjustment  
19 of weekday versus weekend time. Dr. Dupee's involvement as an evaluator ended before the  
20 events of January 2012 involving Mr. Rich that ultimately led to Daniel's move-away request.

21 The Court finds that Dr. Aloia worked in accordance with the order appointing him and  
22 that he conducted a thorough and balanced evaluation and gathered extensive amounts of  
23 information from the parties, their counsel and their collaterals; he made himself available both  
24 in New York, and in France and Monaco. His creative request to have the minors be "at home"  
25 in each location for a substantial period of time before he met with them was very sensible and  
26 productive. His written report also was balanced and clear, as was his testimony. The Court  
27 found Dr. Aloia to be free of any bias for or against either party. Because Dr. Aloia's work is  
28 both the timeliest and the most relevant to the issues currently before this Court, the Court

1 places the greatest reliance upon his evaluation in reaching its decision. The Court did  
2 consider the testimony of the additional custody experts, Dr. Gould (Kelly's expert witness)  
3 and Dr. Stahl (Daniel's expert witness). The Court gave their testimony some weight, but  
4 mostly as to general propositions and definitions, and whether there was data in the report and  
5 testimony of Dr. Aloia to support his conclusions.

## 6 2. One-Year Relocation Plan Rejected

7 . Leading up to this decision, the Court inquired of the parties as to their positions  
8 regarding a one-year relocation plan, with some mechanism for review at the end of that time  
9 period, along with a best interest standard, instead of the traditional combined, material change  
10 of circumstances and best interest standard which otherwise applies post-judgment. The Court  
11 proposed this one-year possibility because of the uncertainties that exist in this case due to (a)  
12 Daniel's current Visa status, and (b) the unanticipated fall-2012 termination of Kelly's *Gossip*  
13 *Girl* series (rather than the anticipated 2014 termination); for a number of years, the *Gossip*  
14 *Girl* series had been, through her California loan-out company Ollie Bagollie Productions, Inc.,  
15 Kelly's most consistent and significant source of work and revenue.

16 Daniel's counsel indicated that Daniel would be agreeable to such a one-year plan, but  
17 Kelly's counsel did not so indicate as to Kelly, except as to the best interest standard. Instead,  
18 Kelly's counsel later challenged the basis for such a plan, pointing out that the case of *In re*  
19 *Marriage of Condon* (1998) 62 Cal.App.4th 533 (*Condon*), one of the key international  
20 relocation cases and the case previously cited by the Court as a possible basis for implementing  
21 such a plan, did not specifically identify such an option. The Court acknowledged that *Condon*  
22 did not specifically mention a one-year relocation plan but, in the context of discussing "some  
23 other plan which accommodates the valuable relationship between the nonmoving parent and  
24 the child," it did mention the possibility of a relocation plan whereby the "child spends  
25 alternate years in the two countries" (*id. at 547*); therefore, the Court had felt that a one-year  
26 relocation plan, with some mechanism for review at the end of that time period, could fall  
27 within the parameters of "another accommodating plan" as suggested in *Condon*, and it would  
28 be particularly valuable if both parties had been committed to it. That did not occur.

1           After hearing all of the evidence in this case and reviewing much of it again, and giving  
2 consideration to the history of the parties and the oral and written arguments most recently  
3 presented by the parties, the Court has concluded that it is not, in fact, in the best interest of the  
4 minors to adopt a one-year plan or an alternating year plan. The Court finds that it would be a  
5 disservice to the children to force them to uproot themselves in one year or every other year  
6 just for the sake of balance, or to make the decision easier for the Court, or to avoid the  
7 uncertainties that currently exist in this case which minor's counsel has clearly noted in his  
8 closing arguments. Additionally, if there is anything that these parties and the children need  
9 from this Court, it is final resolution. Neither a one-year plan nor an alternating plan would  
10 provide such resolution or facilitate the stability and continuity of the parents' relationships  
11 with their children. Additionally, and for the same reason, the Court has declined to adopt the  
12 best interest standard it was contemplating as part of that one-year plan rather than the usual  
13 "material change of circumstances plus best interest" standard required for modification of a  
14 final judgment.

### 15           **3. Physical and Legal Custody**

#### 16           **a. Specific Parenting Plan**

17           The Court confirms that joint legal and physical custody will continue and only the  
18 parenting plan will change. The parties have always shared joint legal and physical custody of  
19 the children. Because of the unique circumstances and the wealth available to these parties,  
20 unlike nearly all relocation cases, under the approach discussed below, the parties will be able  
21 to maintain joint legal and physical custody. The Court grants both relocation requests, but in  
22 the sequence and manner set forth specifically herein.

23           The Court finds that it is in the best interest of the children to now grant the relocation  
24 request of Daniel for the children to move to France and Monaco (which for purposes of  
25 hereinafter describing the relocation request will be referred to just as "France" but will  
26 incorporate both countries), in accordance with the latest version of his parenting plan, dated  
27 August 15, 2012, (hereinafter referred to as the "France Plan"), but only until two weeks after  
28 the end of the school year following such time as (1) (a) his U.S. Visa is restored, (b) a new

1 U.S. Visa is granted to him, or (c) he is otherwise permitted to reside continuously in the  
2 United States, (hereinafter such date is referred to as the "Return Date"); or (2) the Court finds,  
3 through the mechanism for monitoring the Visa situation described below, that (i) Daniel is not  
4 seeking a U.S. Visa (or alternatively U.S. residency, if he so chooses) in good faith, (ii) such  
5 failure constitutes a material change of circumstance, (iii) it is in the best interest of the  
6 children that they be returned to the U.S., and (iv) a new parenting plan is ordered (hereinafter  
7 referred to as the "Alternative Return Date").

8 The Court finds that, unless the Court orders the implementation of the Alternative  
9 Return Date, effective at the end of the school year during which the Return Date occurs, it is  
10 in the best interest of the children to grant Kelly's relocation request to New York with the  
11 equal parenting time plan that both parties have outlined in the proposed plans for the time  
12 when both parties could live in New York (hereinafter referred to as the "Return to New York  
13 Plan," whereas Kelly's plan to relocate now to New York while Daniel's Visa has not been  
14 restored will be referred to as the "Current New York Plan").

15 Under the approach selected by the Court, the best interest of the children will be served  
16 because the relocation plan for France is the only plan that offers the possibility of nearly equal  
17 parenting time while Daniel cannot return to the U.S. This approach therefore best serves the  
18 statutory policy promoting "frequent and continuing contact with both parents" (Fam. Code  
19 § 3020). *LaMusga, supra*, 32 Cal.4<sup>th</sup> at 1088 (when considering the best interest of the minor  
20 children, court must consider "the nature and amount of contact with both parents" (quoting  
21 from *Burgess* 13 Cal.4<sup>th</sup> at 34.). To a very large extent, the France Plan permits Kelly to  
22 control the extent of her parenting time by scheduling her work to free up blocks of time to  
23 spend with the children, as she has done in the past.<sup>2</sup> And, if and when Daniel can return to  
24 the U.S., they will continue to share equal parenting time in the U.S.

25 <sup>2</sup> The Court also recognizes that as much as Kelly might want to fully control her work, she  
26 may not be able to do so to the extent she has done so during the past several years. However,  
27 even if Kelly is not able to arrange her work schedule to enjoy equal parenting time under the  
28 France Plan, she will have at least as much time with the children as Daniel would have under  
the Current New York Plan that Kelly had proposed. This point is discussed further in the next  
paragraph of this Statement.

1           The Court has weighed very heavily the concern expressed by minor's counsel in his  
2 closing argument about the uncertainty regarding Kelly's work schedule, which for him tips the  
3 scales in favor of the Current New York Plan. It bears emphasis that, prior to Kelly's new  
4 testimony concerning her work schedule (discussed further below), minor's counsel advocated  
5 in favor of the children living in France with Daniel under Daniel's proposal. Given Kelly's  
6 new testimony and minor's counsel's concerns, however, the Court has analyzed the evidence  
7 in this case and the plans proposed by each parent using what can be called the "worst-case  
8 scenario" for Kelly under the France Plan. Under that worst case scenario, the Court assumes  
9 that Kelly would not have the job flexibility that she has had until now, and that she in fact  
10 would not have the additional 7 to 15 days per month of "opportunity time" to enjoy custody of  
11 the children in France, as provided in the France Plan. But this worst-case scenario is  
12 essentially identical to the *best case scenario* for Daniel under the Current New York Plan,  
13 pursuant to which Daniel would only enjoy custody of the children during various school break  
14 times and over the summer, with a few additional abbreviated visits available on some  
15 weekends.<sup>3</sup>

16           In other words, the *minimum* amount of time Kelly will enjoy with the children under  
17 the France Plan is the same as the *maximum* amount of time that Daniel would have with the  
18 children under the Current New York Plan; and while Kelly has the option under the France  
19 Plan to substantially increase her custodial time, Daniel would have no comparable option  
20 under the Current New York Plan. For these reasons, the France Plan offers far more  
21 likelihood and potential than the Current New York Plan for "frequent and continuing contact  
22 with both parents." Fam. Code. § 3020. Moreover, the France Plan better preserves the  
23 stability and continuity of the custodial relationships because it offers Kelly an opportunity to  
24 remain involved in the normal activities of the children's daily lives: When exercising her  
25 custodial rights in France, Kelly will have the ability to be involved in the children's school

26  
27 <sup>3</sup> The Court notes that it appears that the charts proffered by the two parties do not match by  
28 approximately one day due to Daniel's measuring of the time by the nights the children are in a  
parent's custody. The Court does not find this distinction meaningful.

1 and extracurricular activities and can spend time with the children in their familiar  
2 environments. The same opportunity is not available to Daniel under the Current New York  
3 Plan because he does not have the option to enter the United States. Thus, he could not attend  
4 the children's school functions in the United States, could not meet any doctors or friends  
5 there, and could not spend time with the children in a familiar environment. To date, both  
6 parents have been actively involved in all aspects of the children's daily lives, and the France  
7 Plan is the only custodial arrangement which permits the opportunity for both parents to  
8 continue to do so.

9 Finally, even if Kelly declined to exercise her full parental rights in France, the France  
10 plan is still superior to the Current New York Plan because it is more child-focused in that it  
11 eliminates the wear and tear on the children that minor's counsel has noted previously and the  
12 poor quality of the hotel living in Bermuda about which minor's counsel also expressed  
13 concern.

14 It bears emphasis that no matter whether Kelly exercises her additional custody rights in  
15 France, the France Plan guarantees custodial time for her with the children in the United States.  
16 Specifically, during the children's five, extended school breaks (Fall Semester Break, Winter  
17 Break, Winter Semester Break, Spring Break and Summer), the children will be in Kelly's  
18 custody in the United States. And even if Kelly is unable to plan her time to be entirely free  
19 from work during these periods of custody, the children will still physically be with her. (Of  
20 course, most nonresidential parents who are employed face this situation when their children  
21 visit them during school breaks and summer.) Moreover, as noted above, the France Plan  
22 offers Kelly additional opportunities to enjoy physical custody of the children for substantial  
23 periods of time in France. For all of these reasons, the France Plan better serves the interest of  
24 the children than the Current New York Plan.

25 **b. Kelly's Employment**

26 Additionally, the Court finds credible the written and testimonial evidence proffered by  
27 Kelly that it is quite likely that her past employment will be predictive of her future  
28 employment, and that she will therefore be able to arrange her schedule to accommodate trips

1 to France to exercise her custody rights (in addition to the guaranteed periods of custody she  
2 will enjoy in the United States). The Court also finds that Kelly's recent reconstruction of her  
3 work history is very much at odds with her very emphatic earlier testimony regarding the  
4 unusually great amount of availability to her children that she always has had with her work,  
5 which has allowed her to make herself wholly available to the children for very long stretches  
6 of time and very numerous shorter intervals.

7 In response to the Court's request on September 23, 2011 that the parties provide a  
8 schedule setting forth the times that the parties are away from the children when the children  
9 are in their care, Kelly reconfirmed that Exhibit SSS reflects her work schedule. Among other  
10 things, Kelly represented that she works only 45-72 days per year, that she does not work  
11 during hiatuses, and that during filming season, she works only 1 to 3 days per week. She  
12 made these assertions when her availability was being contrasted with Daniel's and she felt it  
13 was important to demonstrate her commitment to maintaining her availability to the children  
14 even if her employer had to adjust to her demands, which, happily for her, her employers had  
15 always done.

16 In more recent declarations to the Court, Kelly provided information concerning her  
17 schedule that conflicts with and contradicts much of her prior testimony. She has offered this  
18 contradictory information to argue against the France Plan by suggesting that she will not have  
19 the availability to exercise additional custody rights in France. Her lack of candor regarding  
20 her work flexibility is of concern to the Court because it goes to the central issue of the  
21 children's best interest. Despite this concern, the Court is confident that it will not be  
22 meaningful in the end because, as Kelly's counsel stated on August 28, 2012, this Court is and  
23 has been convinced for a long time now that there is "no risk that Kelly will now stop putting  
24 these children first when it comes to spending time with them." Thus, the Court is confident  
25 that Kelly will find a way to continue in her chosen field, maintain flexibility (which even her  
26 new job with J-line provides her), and spend a significant amount of time with the children in  
27 France and the U.S. For all of these reasons, the Court does not agree with minor's counsel  
28 that the "uncertainty" of Kelly's employment situation tips the scale in favor of the Current