SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

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

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.

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

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

Kelly timely filed her Respondent's Designation of Controverted Issues to be Addressed in Statement of Decision Re Child Custody (Code of Civ. Proc. §632; Fam. Code § 3022.3 and §3082; and Cal. Rules of Court, Rule 3.1590(D)). Kelly's Designation consisted of 114 purported separate issues related to the Court's custody decision: four of the designated issues contain a total of 42 separate subissues, bringing the total number of interrogatories to the Court to156 separate areas of inquiry.

[1] 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.

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

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

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

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

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

CONTENTS OF STATEMENT OF DECISION

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

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

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

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

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

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

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

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

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

STATEMENT OF DECISION

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

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

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

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

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

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

I. THE RELOCATION/PARENTING PLAN

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

A. Legal Bases for Decision

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

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

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

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

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

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

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

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

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

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

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

B. Factual Bases for Decision

1. Expert Testimony

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

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

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

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

2. One-Year Relocation Plan Rejected

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

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

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

3. Physical and Legal Custody

a. Specific Parenting Plan

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

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

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

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

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

[2] The Court also recognizes that as much as Kelly might want to fully control her work, she may not be able to do so to the extent she has done so during the past several years. However, even if Kelly is not able to arrange her work schedule to enjoy equal parenting time under the 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.

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

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

[3] The Court notes that it appears that the charts proffered by the two parties do not match by 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.

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

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

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

b. Kelly's Employment

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

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

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

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

New York Plan. This uncertainty, it bears repetition, was the only point minor counsel cited as the reason for changing his earlier recommendation supporting and advocating for the France Plan.

Additionally, the Court finds the testimony of Dr. Aloia on the issue of Kelly's uncertainty as to her future employment to be very important and supportive of the Court's conclusion that such uncertainty should not result in the adoption of the Current New York Plan. As reflected in the transcript for the trial on July 19, 2012, the Court asked Dr. Aloia if, when Kelly informed him about the end date of her time on *Gossip Girl*, Kelly had spoken about what her plan was for employment thereafter. He indicated that they had a brief conversation about it and that her plan was to "obtain appropriate employment in New York, to maintain the children's home and her lifestyle in that city."

The Court asked if Kelly described a backup plan if she did not find employment in New York, and Dr. Aloia said she did not describe one. The Court then asked Dr. Aloia how that factored into his analysis. He then said that "[i]t certainly speaks to the issue or the question of whether she can maintain the continuity and stability that she's established for the children in New York...." He went on to state that "[s]he may have to take a different kind of position or it may involve travel or it may involve a considerable time in another locality, whether it be Canada or Los Angeles or anywhere else." He then stated that "the question of what that would do if she was the residential parent, it could make it quite problematic."

The Court asked Dr. Aloia about the "impact on [Kelly's] ability to facilitate contact with the Father if she's the primary parent if she has a job that requires more time and/or travel or relocation?" Dr. Aloia stated that

> Well, she can communicate anywhere in the world with Dad but I think - to me, the issue would be if she was, for example, only for an example had a two-month job in Los Angeles during the school year. If she is the residential parent and the children are in school in New York, that if she can't be there and Dad can't come into New York, it means somebody else is going to have to care for the children. It doesn't seem practical for her to say I'm going to be in Los Angeles, I'll transfer the children to Los Angeles in two months and move back. I guess that could happen but it's not a very desirable alternative.

It could be problematic in terms of losing the access to the primary custodial parent and not having access during the school year except for certain periods of time with Dad.

The Court asked Dr. Aloia for his view on how this concern "fits into the *LaMusga* factors" and he responded:

> Well, again, if we are talking about continuity and stability, the other factors that weigh in her favor that I've previously testified to under examination by Ms. Meyer if indeed she's not able to do it, it would, I think, trump those other factors because the continuity and stability offered by New York and the community and the peers would no longer be available and/or Mom would not be available.
>
> So that would mean that neither parent would be taking care of their children possibly from time to time or for an extended time and I'm speaking in - we don't know. It's an unknown.. . .
>
> Well, I think that it may speak to -- in terms of *LaMusga*, it certainly deals with the consistency and stability of the custodial arrangement. It certainly would talk about the relationship between the children and their mother and put them more at risk if she would not be available for feelings of loss and separation because they would be lost and separated from both parents at that point.

(Aloia testimony, July 19, 2012, Transcript at pp. 51-55)

c. Additional Factual Bases for the Decision

The statements in minor's counsel's closing argument do not conflict with the assessment of the Court regarding the facts in this case. But for the issue addressed above, minor's counsel advocated for, and stated that he believed, the children being in France under the France Plan was in their best interest, particularly given Daniel's consistent record of cooperation and of facilitating the children's relationship with their mother, in contrast to Kelly's conduct. Accordingly, the Court will now turn to some of the principal driving forces behind the decision to grant the relocation request to France, in addition to the significant opportunity that it presents to continue the nearly equal parenting time that these children have experienced.

i. Health, safety and welfare

It is necessary to consider the "health, safety, and welfare of the children" when determining their best interest. *LaMusga*, *supra*, 32 Cal.4th at 1088. As discussed by Dr. Aloia in his description of the living situation in France, the France Plan will more than adequately provide for the health, safety and welfare of Hermes and Helena. Kelly has not

argued to the contrary or presented any evidence that the health, safety or welfare of the children will be jeopardized under the France Plan. The evidence shows that the children will be well provided for while living in a lovely home with their father and his mother and her partner. The evidence also shows that these same amenities will be made available to Kelly when she is with the children if she elects to avail herself of the residence and car that has been proffered under Daniel's plan. The children have both been admitted to the same school in Mougins, France - a school that teaches in English, the children's native tongue. And the children will continue their learning of the French language, which the parents started long ago. The children would not be in the same school under the Current New York plan. Finally, the Court finds that there is no history of abuse or use of controlled substances or abuse of alcohol present in the evidence.

ii. Financial concerns

The Court finds that it is bound by the parties' July 2010 stipulated judgment concerning financial concerns and all discovery related thereto, agreeing that they both are able to support the children, and that both parents have more than adequately financially supported the children when in their respective care.

Moreover, the evidence reveals a track record for both parents of more than sufficiently providing for the children without assistance from the other parent. The Court has no basis for concluding it will be otherwise going forward. At no point subsequent to entering into the Judgment has either party attempted to modify, set aside or vacate any such financial orders. Additionally, the France Plan provides financial support for Kelly should she avail herself of it in the form of airline tickets, a residence and a car.

The Court will comment here on an assertion that Kelly has made regarding Daniel's transparency or forthrightness with regard to his financial or employment status. Although Daniel's testimony in this area was at times halting, overly technical and reluctant, the Court does not find this to be key to the analysis of the children's best interest because Daniel's financial and employment status are not at issue in this case. The parties entered into a Judgment in July 2010 resolving all financial issues and waiving all discovery and settling their

financial issues (spousal support, child support, property division). And, to some degree, the Court understands the reluctance of Daniel to make legal statements regarding residence and other matters that he may fear could be used against him by Kelly in some manner as a result of the experience with Kelly's counsel, Mr. Rich, which the Court will discuss further below. The Court finds that Daniel has previously offered to have minor's counsel and the Court review such information *in camera*, in the event such information were to be found relevant.

iii. Primary caregivers

There has been some evidence to suggest that Kelly's parenting style is a better fit for Helena and that Daniel's parenting style is a better fit for Hermes, but the Court ultimately finds that both parents are primary caregivers to the children and the children are securely and primarily attached to both parents.[4]

Both parents were actively involved in the care of Hermes during the marriage, and, indeed, there is testimony evidencing that both parents considered themselves to be primary caregivers of Hermes during the marriage. From 2009 forward, Kelly and Daniel have shared equal custodial time with Hermes. The December 2010 Order modified the schedule to account for Hermes' difficulty with transitions, but it did not reduce Hermes' time with either parent. This Court finds that both parents are primary caregivers to Hermes, and that Hermes is securely and primarily attached to both Daniel and Kelly.

Although Kelly has at times enjoyed more physical custody of Helena, such as when she was an infant, the Court finds that Helena is securely and primarily attached to both Kelly and Daniel and that both of them qualify as her primary caregiver.

With respect to both children, the Court finds that the nature of the children's attachment to each parent is different, and that Kelly's and Daniel's parenting approaches are different, but that their bonding and attachment with the children are equal. The Court observes that this

[4] The Court in its tentative ruling referenced a stipulation of the parties concerning both parents being primary parents. The Court's reference was to the Court Order entered on March 19, 2012, wherein the Court found based upon the evidence before the Court that the children are primarily and securely attached to both parents. As there was no stipulation by the parties, but instead a finding by the Court set forth in an Order, the portion of the Court's tentative ruling referencing a stipulation has been omitted.

assessment does not lend itself to measurement. The experts agreed that there is no metric for measuring attachment.

The Court has also considered whether its view of the children's best interest would be different if it were determined that Kelly is Helena's primary caregiver or that Kelly's parenting style is a better fit for Helena.[5] This Court finds that its determination would not change in this circumstance. It is important to observe that no one has advocated for splitting up the children, and the Court finds that such a result would be exceedingly harmful to the children. As Dr. Dupee emphasized, there are substantial benefits that exist to the children in being able to be together.

Moreover, even if the evidence supports a finding that Kelly's parenting style is a better fit for Helena, it also supports a finding that Daniel's parenting style is a better fit for Hermes. The evidence further showed that Hermes identifies himself with Daniel and experiences considerable anxiety when he is not with his father or when he receives conflicting messages about his father. Thus, it is necessary to weigh the possible harm to Helena under the France Plan in *potentially* being away from Kelly as a primary caregiver or better fitting parent for long periods of time (*i.e.*, approximately 6 weeks if only school breaks and summer are considered); the possible harm to Helena in *certainly* being away from Daniel if he were to be considered the nonprimary, yet undoubtedly securely attached and bonded caregiver under the Current New York Plan; the harm to Hermes in *potentially* being away from Kelly as one of his two primary caregivers under the France Plan, with the better fit for Hermes being with Daniel; and the possible harm to Hermes in *certainly* being away from Daniel, who is one of his two primary caregivers but whose parenting style is a better fit for Hermes and, as the evidence showed, the parent with whom Hermes identifies himself.

[5] Under the definitions of primary caregiver proffered by the experts, and based upon the evidence in the case, Kelly could be viewed as Helena's primary caregiver until just recently based upon the amount of time that Helena was in her physical custody. Under another interpretation, however, the physical custody time is not controlling and there has been either no "primary" caregiver for the last several years, or there have been two primary caregivers for Helena - namely, Kelly and Daniel.

Weighing all these interests, the Court concludes that the France Plan is in the best interest of the children and the Current New York Plan is not. First, there are many mitigating factors that will help Helena, including (1) that Helena will be together with Hermes; (2) her temperament and the lack of anxiety as described by Dr. Aloia and echoed by the evidence and Dr. Stahl (which notably contrasts to the anxiety that Hermes has experienced when not with his father or when he is receiving conflicting messages about his father); (3) the ability to have visual contact with Kelly through Skype or other video chat media; and (4) Daniel's pattern of mentioning Kelly positively to the children. Second, it bears repetition that Kelly has the opportunity for equal parenting time under the France Plan, whereas Daniel does not under the Current New York Plan and that is also a mitigating factor that potentially will help Helena.

Based upon the evidence before the Court as well as the testimony that the Court heard, it is very clear that both parents are currently primary caregivers and the children are not only securely attached to both parents, they are extraordinarily attached to both parents.

It is for this reason that the Court has done everything in its power to preserve those bonds from January 2012 to this day. The Court is convinced that the France Plan is the only plan that will be able to keep *both* children's ties strong with *both* parents.

iv. Loss of Daniel's Visa and his right to enter the United States

The evidence before the Court revealed the following and the Court makes these findings:

- Daniel is a German citizen formerly residing in the United States pursuant to a valid Visa. He had obtained an original 0-1 Visa valid through April 2012. In November of 2011, his request to extend that Visa for one year through April 2013 was approved. His Visa has since been revoked, and the most reasonable explanation is that this is the result of actions taken by Kelly's attorney, Matthew Rich. The Court finds that the following events transpired:

- On December 12, 2011, in the courthouse, Kelly's counsel, Matthew Rich, in her presence, advised Daniel and his counsel that he was on the telephone with the State Department, and stated that he had called the State Department.

- On December 12, 2011, in the presence of Kelly and in the hallway of the courthouse, Mr. Rich stated to Daniel's counsel and Daniel that he was contacting the State Department to have Daniel arrested and/or deported, and that he would be providing the State Department with the transcript of the December 12th hearing.

- When Mr. Rich approached Daniel and his counsel in the courthouse hallway on December 12, 2011, and told them he had the State Department on the line and urged that Daniel be arrested, Kelly was sitting on a bench close to where Daniel and counsel were standing. She did not stop Mr. Rich from making the call asking that Daniel be arrested.

- In the presence of Daniel's counsel, Mr. Rich claimed to be on the telephone with the State Department. He stated into the phone, "He's lied and said he has a valid Visa, he's about to kidnap the kids." "Why aren't you here arresting him?" "Daniel Giersch is here now for you to arrest him right now. Come and arrest him right now." Kelly was sitting across from Daniel's counsel and Mr. Rich in the hallway when this happened.

- Mr. Rich then handed Daniel's counsel a Stipulation and Order Re: Child Visitation, with Kelly sitting next to him, requesting that Daniel and his counsel agree via that stipulation that Daniel "shall not have any visitation with the minor children HERMES GIERSCH and HELENA GIERSCH until further order of the court." Mr. Rich told Daniel's counsel that if Daniel signed the Stipulation, the "problem" would go away. Kelly was sitting next to where Mr. Rich was standing when he said this; she did not stop Mr. Rich from providing the Stipulation to counsel. Kelly acknowledged in her July 19, 2012 testimony that the stipulation "was put in front of [her]" by Mr. Rich that day. She also admitted to Dr. Aloia (as noted in his July 6, 2012 report at page 32) that she was aware of the stipulation, "but it was not forever." The Court notes that in Kelly's earlier testimony in January 27, 2012, her counsel, Crystal Boultinghouse, asked her if she had "seen that stipulation at all prior to seeing it in [the] paperwork presented by petitioner" in connection with that January 27, 2012 hearing; she said "No." The Court finds Kelly's July 19, 2012 testimony, rather than her January 27, 2012 testimony, to be truthful.

- On December 12, 2011, Mr. Rich represented in court on the record that he had had email communications with more than one member of the State Department and he had spoken with at least two members of the State Department. He stated on the record that he had spoken with the State Department on the telephone during the lunch hour that day.

- During these events, and with Kelly's other counsel, Ms. Boultinghouse, also present in the back of the courtroom, Kelly confirmed that she was choosing to have Mr. Rich continue to represent her that day, instead of Ms. Boultinghouse (who had handled the majority of the hearings on Kelly's behalf during the prior approximately 18-month period).

The Court further notes that in Minor's Counsel's Brief Re Proposed Custody Plans (dated 7/30/12), minor's counsel urged that the circumstances leading to the loss of Daniel's Visa cannot be overlooked:

> It is difficult to call it a coincidence that Mr. Giersch experienced visa issues shortly after Respondent's [Kelly's] former counsel notified the authorities that Petitioner was a criminal and was about to abduct the children. . . it is not unreasonable to conclude that any irregularity would have been overlooked without incident but for the dogged pursuit of Respondent's [Kelly] former counsel to bring Petitioner [Daniel] to the attention of the authorities.

(Page 2:10-21).

Kelly presented no evidence to dispute the testimony provided by Daniel and his counsel or the representations made by minor's counsel regarding Mr. Rich's actions.

At this juncture, there probably is no one in this case who would not turn back the clock to the day before Kelly's attorney, Mr. Rich, entered the courtroom in this case. When Mr. Rich contacted the immigration authorities and then used the threat of immigration trouble as leverage to try to convince Daniel to sign a stipulation agreeing not to see his children, he did damage not only to Daniel, but also to Kelly, if not more so to her. Earlier in this case, when the Court was pondering what seemed to be Kelly's efforts to "fine-tune" the then-existing, well-functioning parenting plan, this Court cautioned her that trials can lead to the unexpected. However, this Court never imagined that anything like what Mr. Rich did would occur in this or any other case. In short, the Court finds that Mr. Rich - who at the relevant times was Kelly's designated agent for purposes of these proceedings - purposefully tried to

take away Daniel's ability to be with his children, and, based upon the timing of his actions, very well may have been the cause of the revocation of Daniel's Visa.

Even if it could be shown that there might have been other reasons that contributed to the revocation of Daniel's Visa, or that Mr. Rich's conduct was not the only cause of Daniel's Visa being revoked, it would not negate the significance of the conduct of Kelly and her attorney. As the Court previously found and held in its February 17, 2012 Order, the relevance of such conduct is what such conduct signifies regarding the custodial issues and whether Kelly would be likely to facilitate the children's relationship with Daniel; the Court finds that this conduct supports the conclusion that she would not be likely to do so.

v. Facilitating the relationship

After careful review of all the evidence and testimony in this case, the Court finds that there is clear and convincing evidence that Daniel has facilitated the children's relationship with Kelly, particularly in the most recent years, and that Kelly has not facilitated the children's relationship with Daniel. The Court finds that the France Plan is in the best interest of the children for this additional reason.

The Court makes the following findings regarding Daniel's facilitation of the relationship with the children and Kelly's failure to do so:

(a). Kelly's three-year pattern of not facilitating Daniel's relationship with the children

- Kelly failed to identify Daniel as Helena's father on her birth certificate for the three years following her birth. This issue came up early in the case. Kelly falsely represented to Dr. Strachan, the first of the three custody evaluators mentioned above, that she had placed Daniel's name on the birth certificate. Then, despite initially agreeing to make the change to the birth certificate, Kelly refused to agree on December 2, 2010, when the issue was addressed in Court. Despite the Court's Orders on December 2, 2010, Kelly failed to provide any evidence to support her reason for refusing to amend the birth certificate, and in fact, Kelly testified in July 2012 that her reason for not including Daniel as the father on the birth certificate was that she was hurt, rather than out of any concern for Helena.

Despite claiming to Daniel on July 11, 2012 (the day before the resumption of trial) that she wanted to add Daniel's name to the birth certificate, Kelly still had not done so by the conclusion of trial.

The government's website, of which the Court took judicial notice on August 15, 2012, provides that adding a father's name to a child's birth certificate is a simple, mail-in procedure. Daniel has requested that his name be included on the birth certificate since prior to Helena's birth. Kelly's failure to put Daniel on Helena's birth certificate is reflective of her general reluctance to facilitate the children's relationship with their father.

- Before Helena was born, Kelly filed an ex parte Order to Show Cause opposing equal custody and claiming that Hermes was in danger due to Daniel's pool. Kelly had Daniel followed by a private investigator. The judge then presiding over the case appointed Mr. Pichvai as minor's counsel, and he inspected Daniel's home and did not substantiate Kelly's allegation. The Court issued an order continuing the parties' equal custody of Hermes.

- Kelly withheld news of Helena's birth from Daniel and denied Daniel the right to be present at the hospital during Helena's birth. The evidence reflects that Daniel did not request to be in the birthing room, but instead asked to be present in the hospital during that time. Kelly admitted to the custody evaluator, Dr. Strachan, that she did not tell Daniel about Helena's birth and she did not agree to his presence at the hospital at the time of Helena's birth. Despite admitting otherwise to Dr. Strachan, when Kelly testified on July 20, 2012 (three years later), Kelly stated that she notified Daniel personally of Helena's birth the following morning. This testimony by Kelly on July 20, 2012 was proven untrue in her subsequent testimony on July 23, 2012.

- During the months after Helena's birth, in 2009, Kelly withheld both Helena and Hermes from Daniel for a total of approximately 35 days.

- Shortly after Helena's birth, Kelly advised the media that she intended to raise the children alone. In her July 2012 testimony, Kelly admitted to participating in and posing for the media article in which she was quoted as saying this was her intention.

- Kelly acknowledges posing with the children in the media and/or publishing pictures of the children, which is a violation of the parties' Stipulated Judgment dated July 2010 ordering that the parties are not to expose the children to the media.

- In 2009, Kelly unilaterally enrolled Hermes at the Lycée Français in New York. In spring of 2012, Kelly unilaterally enrolled Helena in French classes in New York and thereafter, unilaterally signed her up for the waiting list of a preschool in NY, Le Jardin a L'ouest.

- Dr. Aloia concluded that, in contrast to Daniel's facilitation of Kelly's relationship with the children (described in greater detail below), he "find[s] Ms. Rutherford has engaged in conduct intended to interfere with Mr. Giersch's relationship with the children or either child." (Aloia report, pp. 81-82)

- Kelly does not provide positive messages regarding Daniel, including the following:

-- Kelly's accusations of Daniel dealing arms and drugs with no evidence to support same.

-- Kelly's nanny alleging that Daniel may be homicidal, without any evidence to support this.

-- Dr. Anzieu (Hermes' therapist) reporting to Dr. Aloia that after Daniel's Visa was revoked, Hermes questioned whether his father was a criminal or had done anything wrong. These comments were made during a period of time where Hermes was in Kelly's custody due to Daniel's Visa revocation and had not been with Daniel.

-- In 2010, Kelly admitted placing her telephone number in Hermes' shoe and instructing him that if he ever was in an airport with his father he should scream and call the police.

- Kelly does not encourage transitions.

- Both Dr. Strachan and Dr. Aloia found signs of maternal gate keeping on the part of Kelly. As early as 2009, in Dr. Strachan's evaluation, he found that all safety concerns raised by Kelly were red herrings.

- During Skype sessions with the children while the children have been in Daniel's custody, Kelly has cried and caused the children to be upset.

- Kelly has failed to have photographs of the children's father in her home.

- Kelly attempted to block minor's counsel's communication and access to information from Hermes' two teachers, his therapist and his tutor.

- Kelly, through her attorneys, has been attempting to arouse the suspicion and concern of the immigration authorities.

- As of the end of trial in this matter, Kelly, despite her promise to do so, had failed to sign any affidavit confirming that she did not wish to have Daniel's Visa denied or revoked, nor had she signed anything rescinding any action taken on her behalf by her attorney.

(b). Daniel's facilitative communication and conduct

- Daniel has demonstrated a pattern of being facilitative. Dr. Aloia testified that he did not find a single incident of conduct by Daniel intended to interfere with Kelly's relationship with the children. Dr. Aloia further stated in his evaluation report which was admitted into evidence at the time of trial:

> [B]ased on all data available to me in this evaluation, including a review of the voluminous pleadings, transcripts, declarations, court orders, emails between the parties, and interview data, I find that Mr. Giersch's intention in this matter has been to collaboratively parent the children with Ms. Rutherford, establish and maintain an equally shared schedule of physical custody with both parents living in close proximity to each other, and provide timely and respectful communication to inform Ms. Rutherford of important events and circumstances regarding the children's experiences with him, and collaboratively manage situational changes in their parenting plan.

(Aloia report, pp. 81-82)

- The emails and other evidence of communication between the parties reflects Daniel's intention of continually trying to be a collaborative parent with Kelly and to establish and maintain an equally shared schedule of physical custody with both parents.

- The emails and other evidence of communication between the parties reflects that Daniel provides timely and respectful communication to Kelly to inform her of important

events and circumstances regarding the children's experiences with him, and his efforts to collaboratively manage situational changes in their parenting plan.

- Since the children have been with Daniel in France since May 2012, Daniel has facilitated Skype communication for Kelly with the children, and has continued to proactively communicate with Kelly, including sending photos and videos of the children's activities and providing timely information to Kelly concerning Hermes' dental treatment.

- Daniel's emails to Kelly are proactive. Daniel's emails reflect that he is consistent in trying to obtain information from Kelly, and trying to be flexible and accommodate situational changes and Kelly's schedule.

- Daniel has taken action to involve Kelly in the children's activities. For example, for Helena's birthday party, he bought a present from Kelly for Helena, which was described as the biggest gift she had, with the word "Mama" written on it in big letters because Helena recognized those letters as meaning "Mama."

- Daniel accommodated Kelly's trip to France on July 23, 2012 by providing her with the full ten days of custodial time she requested despite there being no court order therefor.

(c). Custodial positions advocated by the parties

- Although three custody evaluators recommended that the parties share joint legal custody, Kelly has consistently advocated for and requested sole legal custody or versions thereof.

- In contrast, Daniel has consistently advocated for a collaborative co-parenting relationship wherein both parties would exercise joint legal and physical custody.

- Kelly filed a Petition for Dissolution of Marriage in December 2008 requesting that Daniel have "monitored" visitation of Hermes.

- Kelly has filed twelve OSCs/Motions to try to reduce Daniel's time and role in the children's lives, while, until his relocation request in January 2012 (which was filed the month following Mr. Kelly's actions and the revocation of Daniel's Visa), Daniel had filed just one OSC/Motion, on September 24, 2009, directly in response to Kelly's September 24, 2009 ex parte application.

- In 2009, Dr. Strachan performed a custody evaluation in which he recommended an equal 2/2/3 schedule for the parties with Hermes. On July 16, 2010, Kelly brought an ex parte application to reduce Daniel's custodial time with Hermes to daytime custody only (no overnights). The application was denied by the Court.

- At trial on December 2, 2010, Kelly continued to advocate Daniel having less than equal custody of Hermes. In so doing, Kelly rejected many proposals made by Daniel which would have given both parties quality time with Hermes. The Court ordered that Hermes be with Daniel during all weekends (except the 2nd and alternating 5th weekends) as well as all Wednesdays and overnight to Thursday mornings. In February 2011, Kelly attempted to change that order, stating that Daniel had the majority of Hermes' quality time under the December 2, 2010 order.

- On January 6, 2011, Kelly brought an ex parte request to reduce Daniel's time with Helena. The request was denied.

- On October 31, 2011, Kelly brought an ex parte request again to try to reduce Daniel's custody of both children. The Court denied the ex parte request and set it for hearing for December 12, 2011.

- On December 12, 2011, Mr. Rich, Kelly's counsel, admitted on the record with Kelly present next to him at counsel table that he had contacted the U.S. State Department repeatedly regarding Daniel's Visa.

- On December 12, 2011, Kelly presented Daniel with a stipulation in which he would waive all "visitation" indefinitely, in order to make the alleged problems with the State Department "go away." Daniel refused to sign such a stipulation, and on January 13, 2012, his Visa extension, and thereafter his underlying Visa, were both revoked.

- On January 19, 2012, when Daniel brought his French relocation request, necessitated by the Visa revocation, the Court stated that the children absolutely would see their father abroad. Six days later, on January 25, 2012, Kelly brought an ex parte request to terminate the California Court's jurisdiction, which request and subsequent motion were denied after a full hearing. In addition, after being made aware that Daniel could no longer enter the United

States, in January 2012, Kelly filed a response to Daniel's move away request asking that the children only have "virtual visitation" with Daniel. The Court notes that it was not until shortly before the July 2012 resumption of trial (six months after Daniel made his move away request) that for the first time Kelly made a proposal for the children to spend any time with Daniel in France.

- On May 9, 2012, Kelly brought an ex parte request to stop the children from traveling to France on May 19, 2012 to see their father as had previously been ordered by the Court on April 10, 2012. In her May 9, 2012 ex parte, Kelly sought an order providing that the children be precluded from seeing their father anywhere outside of the United States.

- In May 2012, Kelly provided a detailed history questionnaire to Dr. Aloia wherein her only plan for Daniel to see the children was in New York, despite the fact that Daniel had advised her that he had lost his U.S. Visa and thus was unable to come to New York. It was not until the end of June 2012, upon probing by Dr. Aloia, that Kelly finally agreed Daniel may ever see the children abroad.

- In Kelly's May 4, 2012 custody proposal, Kelly requested that Daniel only be allowed to see the children in New York (on Wednesday nights and every other weekend) even though Daniel had advised her that his U.S. Visa had been revoked.

- The parties each submitted three custody proposals to the Court during July and August 2012. In Kelly's second custody proposal, dated August 9, 2012, Kelly omitted her prior agreement that if Daniel's Visa were reinstated, the parties would share custody of the children on an equal 2/2/5 schedule. Only after the Court noted this omission did she add this back into her proposal dated August 15, 2012.

- On August 9 and 15, 2012, after viewing Daniel's custodial plan providing her with 50% or more custody in France, and viewing minor's counsel's response stating that Daniel's proposal is the better plan, Kelly claimed, after having testified to being an actress for 23 years, that she was planning on taking a 20-hour per week, flexible job from a friend in New York for a branding-type firm, J-line. She stated that her annual pay would be $100,000 per year "or more." Such a salary for a year's worth of work is minimal in comparison to various

opportunities that in June 2012, she claimed she gave up to spend a few days with the children in France, including a "Latisse" campaign (which she valued at $250,000, during summer 2012 for approximately 6 days of work), campaigns and personal appearances (which she valued at $30,000, during summer 2012 for 4 days of work), and the Lifetime Movie (which she valued at $250,000 during the summer 2012, for approximately four weeks of work).

- As of the conclusion of trial, Kelly still had not signed an affidavit which Daniel presented to her on January 19, 2012 to be submitted to the U.S. authorities and which was designed to provide support for the reinstatement of Daniel's Visa; nor had she signed any edited or alternative version thereof. She claimed the reason she changed her mind and decided not to sign an affidavit was that she did not want to admit to any wrongdoing; however, this explanation for not signing any affidavit was belied by the fact that in August 2012, she specifically asked Daniel to delete the following key portion of paragraph 6 of his proposed affidavit: "and [I] do not request that his [Daniel's] Visa or extension petition be revoked or denied."

The Court does believe that the Kelly of today might be somewhat more likely to facilitate the relationship between the children and Daniel than in the past, because her fears about the risk of Daniel traveling with the children and potentially abducting them have not materialized and protections have been and will be in place to prevent that. But there sadly is almost no evidence to demonstrate that there has been a reliable change in Kelly's attitude toward facilitation overall. Even while under the scrutiny of an extended trial, Kelly has declined to demonstrate the level of commitment to facilitating the other parent's relationship with the children that would be required of a residential parent in a relocation situation. The simplest of tasks, namely adding the name of Helena's father on Helena's birth certificate, was not done by Kelly even though it was discussed at the start of this trial and Kelly admitted on the witness stand that it was a mistake by her not to do it. The Court has asked about it repeatedly and yet Kelly had still not added Daniel to Helena's birth certificate by the conclusion of trial.

Pursuant to Kelly's stipulation at the end of the trial, the Court ordered that Helena's birth certificate is to be changed to reflect that Daniel is her father and that, if necessary, Daniel may take the Court's order and use it to make the change himself. (8/28/12 Order.)

In sum, the Court agrees with Dr. Aloia and finds that in this relocation case, the facilitation of the other parent's relationship is one of the most compelling factors and is a very large risk factor as to Kelly, while it is a very significantly protective factor as to Daniel. "Clearly, the court must consider the past conduct of the parents in fashioning a custody order that serves the best interests of the children." *LaMusga, supra,* 32 Cal.4th at 1094. Thus, the Court finds that Daniel's consistent facilitation of the children's relationship with Kelly, and Kelly's consistent failure to facilitate the children's relationship with Daniel, is one of many reasons why the France Plan is in the children's best interest.

vi. The *LaMusga* factors

The decision in *LaMusga* lists a number of factors for the Court to consider when considering a relocation request. (*LaMusga* (2004) 32 Cal.4th 1072). The foregoing analysis already touches on many of those factors, but the Court now specifically addresses each of them.

(a). Stability and continuity of the custodial arrangement

Under *LaMusga*, a court must take into account "established patterns of care and emotional bonds with the primary caretaker." 32 Cal. 4th at 1093. The Court finds that the custodial arrangement at the time of the Visa revocation was one of nearly 50/50 parenting.[6] Moreover, the Court finds that both parents are primary caregivers to the children and that the children are securely and primarily attached to both parents. The Court also finds that Hermes is particularly susceptible to anxiety and gets upset when he spends less time with his father. In light of these findings, it is in the best interest of the children to select a custody plan that maximizes the opportunities for equal parenting time. As described in detail above, the France

[6] The Court uses the time of the Visa revocation because the parties stipulated that the temporary custodial arrangements that the Court put into place while Daniel's request to relocate was pending would be "without prejudice." As the Court understands that, those temporary arrangements would not be the measure for purposes of *LaMusga.*

Plan offers the potential for equal parenting time while the Current New York Plan does not. The France Plan is also the only plan that gives both parents an opportunity to spend time with the children in a familiar environment and to be a part of their normal, daily lives – including, for example, attending first day of school, school functions and extracurricular activities with the children. Under the Current New York Plan, in contrast, Daniel could only spend time with the children in third-country destinations (Respondent's proposals have included Bermuda and/or Mexico), far removed from the children's regular routines. Accordingly, the factor of stability and continuity cuts sharply in favor of the France Plan.

The Court acknowledges that the children have doctors and friends in New York that they will not see as often as they have in the past. However, the evidence shows that the children already have made some new friends in France, and it is expected that they will immediately make new friends when they start school. For Helena, she would be making new friends at school in either New York or France. And at this early age, the friends of the children are not so longstanding that they will be irreplaceable. Moreover, it is far more important to preserve the children's contact with both parents by creating opportunities for equal parenting time, which is the custodial arrangement the children were accustomed to previously.

(b). Distance

This case is unlike most relocation cases, where the distance of a proposed move may prevent frequent contact between one parent and his or her children. Just as in *In re Marriage of Lasich*, in this case "relocation is not "tantamount to an order terminating [a] parent's custody and visitation rights.'[quoting *Condon supra*, 62 Cal.App.4th at 547]" (2002) 99 Cal.App.4th 702, 712 (*Lasich*). Instead, Kelly and Daniel have the financial resources and the time to exercise nearly equal parenting time even if they are living in separate countries, as Daniel must be outside the U.S. until his Visa is restored or a new one is issued.

The distance poses more of a problem under the Current New York Plan than under the France Plan because the France Plan offers the opportunity for equal parenting time while the Current New York Plan does not. To further facilitate equal parenting time under the France

Plan, Daniel has agreed and the Court has ordered him, *inter alia*, to make available up to six round-trip tickets to Kelly to mitigate any inability she may have to fund her travel. (8/28/12 Order.) At the end of this Statement, the Court elaborates further regarding this matter.

The Court also observes that the parties have a significant history of traveling with the minors, albeit mostly Hermes, back and forth across the country and occasionally to Europe. See *Lasich*, 99 Cal.App.4th at 712 (noting, in evaluating distance, that "the family are experienced international travelers"). For all of these reasons, the distance factor supports the France Plan.[7]

(c). Ages of the children

The Court finds that the children are in the age group where separation from a parent with whom they are securely and primarily bonded could have very serious and life-changing consequences, both for their self-esteem and other "so-called" internal traits, as well as for their behavioral development. As previously noted, the children are securely and primarily bonded to both parents equally. Thus, significant periods of separation from either parent pose the risk of these negative effects. All of the protections that have been in place while the children have been in France and all of the mitigating factors included in the France Plan - including, most notably, the opportunities for equal parenting time under the France Plan - will have the greatest chance of mitigating the separation impact. Additionally, although the Court certainly recognizes that Skype or other video chat vehicles can never replace physical presence, these

[7] The Court notes that the distance from New York to Mougins, France and California to New York is not material since both are thousands of miles. Kelly suggests in her written closing argument that her request to relocate from California to New York is really moot because the children have been living in New York for 5 years. That assertion contradicts Kelly's statement that she was a California resident in her Petition for Dissolution of Marriage filed in California state court in December 2008. This Court finds that Kelly has at no point over the past five years abandoned her residency in California. Additionally, this issue already has been ruled upon by this Court when Kelly filed her January 2012 challenge to the jurisdiction of this Court, and Kelly took the contrary position in her May 9, 2009 ex parte application where she requested, *inter alia*, that Daniel stipulate and the Court find that California "absolutely" has subject matter jurisdiction in this case, to which Daniel stipulated, and which the Court did find, and the parties acknowledged the bases therefore. In any event, the distance factor is aimed at ensuring that a relocation request does not prevent frequent contact between one parent and his or her children. Here, Daniel has no choice but to be out of the U.S. and the France Plan provides more opportunities for equal parenting time than the Current New York Plan.

children will be able to see their mother's face and their father's face when they communicate with them by video call. This is something that has not existed when some of the current governing cases were decided and there is no research yet on whether or not daily video calls will mitigate separation in relocation cases. The Court finds in this case that it will.

(d). Children's relationship with both parents

This factor was addressed above in the Court's finding that the children are securely and primarily attached to both parents. All custody experts (parties' experts and Dr, Aloia) testified that there is no research regarding what to do in a relocation case where the children are securely and primarily attached to both parents.

With regard to the relationship between the parents, including but not limited to their ability to communicate and cooperate effectively and their willingness to put the interests of the children above their individual interests, the Court has already commented at length on the issue of facilitation. The Court repeats its finding that Daniel has facilitated the children's relationship with Kelly, but Kelly has not facilitated the children's relationship with Daniel. With regard to communications, the Court finds that the parents now communicate reasonably well and generally try to be cooperative. The Court has ordered some safeguards to enhance these communications. (8/28/12 Order.)

(d). The wishes of the children

All agree that they are too young for this factor to apply and the Court also so finds.

(e). Reasons for the proposed moves

Under *LaMusga*, the Court should consider "whether one reason for the move is to lessen the child's contact with the noncustodial parent. . . ." 32 Cal.4th at 1100. Here, the Court finds that Daniel has no choice but to live outside the U.S. given that Daniel's Visa was revoked shortly after the efforts of Kelly's former counsel. Prior thereto, both parties were willing to live in New York, with Kelly having her career opportunities as an additional basis for requesting New York. Accordingly, the Court finds that Daniel's reasons for the proposed move to France and Kelly's reasons for the proposed move to New York are all good-faith reasons.

(f). The extent of parents currently sharing custody

The parents have been sharing joint and physical custody on nearly a 50/50 basis.

II. THE INTERNATIONAL FACTORS

A. Legal Bases for Decision

In a case proposing international relocation of a child, the court must consider additional factors:

- Difficulties in contact with each parent caused by distance;
- Cultural conditions and practices in the foreign country;
- Jurisdictional issues impacting the enforceability of the California order.

(*Condon, supra,* 62 Cal.App.4th 533, 546-547.)

B. Factual Bases for Decision

1. Distance

The Court already has discussed above the impact of distance under the *LaMusga* factors. In short, the France Plan presents more opportunity for equal parenting time than the Current New York Plan. Moreover, Daniel's facilitation of the relationship with Kelly will help mitigate the impact on the children during periods of separation from Kelly.

2. Cultural issues

There is no evidence that a relocation in France will deprive the children of "important protections and advantages." *Condon*, 62 Cal.App.4th at 546; *Lasich*, 99 Cal.App.4th at 712. As noted above, the children will not lose their native language because English is the primary language spoken in the Mougins, France school. Also, the Court ordered that Daniel is to consult with Kelly and to arrange for age and grade-level appropriate tutoring for the children regarding American history, literature and culture, and to celebrate traditional American holidays with the children when they do not occur during Kelly's time with the children. (8/28/12 Order.)

Moreover, the parents have long exposed their children to French language and culture. Despite the fact that neither of them were citizens or even residents of France, they chose very early on in Hermes' life to enroll Hermes in a French school first in Los Angeles, then in New

York. They took Hermes to France on at least one trip when they were together. And Kelly hired a French tutor for Helena and enrolled her in a French school in New York. The relocation to France, from a cultural and language standpoint, presents familiar territory to the children and the parents, and it almost seems as if it fits within some plan these parents had when they first started the education of the children.

3. Jurisdictional Issues

The Court orders that all the existing protections that went into the "mirror order" that already was filed in France will continue, plus the additional protective measure resulting from including in the 8/28/12 Order and the Further Judgment, on a mutually applicable basis, the language from the *Lasich* case regarding parental abduction. (2002) 99 Cal.App.4th 702, 712-13. The Court notes that the *Lasich* case provides a good model because it involved a relocation to Spain, another European Union country like France.

The Court finds that the protections that have been included in the adoption of the French Plan will, to the greatest extent possible, ensure that the orders and judgment of this Court will be followed when the children are in France. Among other protections, the Court has required the following:

- Daniel has been ordered to act forthwith through French counsel to obtain "mirror orders" in France and Monaco recognizing and adopting all of the findings and terms of the 8/28/12 Order; the "mirror orders" are for enforcement only (expressly providing that neither France nor Monaco will modify this Court's orders and expressly deferring to California's exclusive continuing jurisdiction). The "mirror orders" continue unless and until the 8/28/12 Order has been superseded by a subsequent California order or the Further Judgment.

- Daniel is ordered to register the Further Judgment accompanying this Statement of Decision for enforcement only in the State of New York forthwith under New York's version of the Uniform Child Custody Jurisdiction and Enforcement Act. The Court has further required both parents to waive any and all objections to recognition, enforcement, and registration of the 8/28/12 Order by the New York court (including the 20-day period he/she would otherwise have

to object to the New York registration) unless and until the 8/28/12 Order has been superseded by a subsequent California order or the Further Judgment.

- Both parties have acknowledged that 18 United States Code section 1204, pertaining to parental kidnapping, applies to him/her, that if he/she violates the 8/28/12 Order or the Further Judgment, he/she may be arrested pursuant to that provision, and that he/she will waive extradition on the arrest warrant.

The Court notes that the *Condon* case urges the trial court to "use its ingenuity to ensure the moving parent adheres to its orders and does not seek to invalidate or modify them in a foreign court." (62 Cal.App.4th at 547-8.) The Court believes it has done so in this case. And to date, there has been no evidence presented that Daniel has sought to contravene or overturn this Court's orders, even though he has been in France and/or Monaco with the children for more than a year.[8]

Moreover, the Court reviewed the declarations of the jurisdictional French law experts, including the expert proffered by Kelly in connection with the initial relocation request, Mr. Jeremy Morley. The Court found his suggestions helpful and most were incorporated into the Court's mirrored May 16, 2012 order. The Court has ordered that those same provisions will continue. The declaration of Kelly's witness, Edith Curry, was not admitted into evidence, and Kelly chose at trial to withdraw Ms. Curry as one of her witnesses.

The Court did not find the analysis of Ms. Setton, Kelly's French law expert, to be as credible or as well informed as the testimony of Ms. Chauveau, Daniel's French law expert. The Court finds that if Daniel were to violate this Court's Further Judgment or seek to modify it, the French Courts will not likely assume jurisdiction over the children if the Further Judgment in the case is not final, meaning no longer subject to appeal. And even after the appeal period has concluded, a French court may still find that the Further Judgment is not final because the Court has adopted a two-tiered plan - namely, the France Plan subject to replacement by the Return to New York Plan. Thus, the Court finds that a French court might

[8] This statement is made as of the date of the signing of this Statement of Decision.

very well decline to exercise jurisdiction over the children because the France Plan is subject to a condition.

The Court further finds that even if the French Court were to assume jurisdiction over the children if Daniel violated the Further Judgment or sought to change the Further Judgment, there is no evidence that the French Court would not enforce the Further Judgment since there is nothing in the Court's decision that would violate the stated public policy of French law. Based on the expert testimony provided, this Court finds that French law promotes the best interest of the children and focuses on the "paramount concern" that "both parents have access to the child and that the relationship between the child and each parent is respected." Finally, as in California, the French court would require a "modification" or change of circumstances before it would consider modifying a final custody order, whether it be one originating in France or in another foreign court such as a U.S. court. (Declaration of Ms. Chauveau at p. 2).

Finally, based upon the expert testimony, the Court finds the French courts, although part of the European Union, will not have any special interest in this case because neither party nor the children are citizens of France.

For these reasons, the Court finds that the Court's decision and Further Judgment comply with the requirements of *Condon* and its progeny.

4. Notice

The Court finds that the parties had sufficient notice with regard to their respective relocation requests (Fam. Code §3024), and they participated in meaningful mediation and conciliation regarding the relocation requests. The Court gave priority to the issue of custody. Nothing in the 8/28/12 Order, this Statement of Decision or the Further Judgment concerning relocation impairs the right of either parent to travel or relocate their residence. (8/28/12 Order.) This Statement of Decision and the Further Judgment impact only the issue of where the minor children reside. The Court incorporates herein its previous findings with regard to the jurisdiction of this Court, which are set forth herein.

As to the most recent unusual issue that has arisen in this case, namely whether a party seeking to move away to another state, rather than another country, bears the burden of proving

whether that state's laws are consistent with or conflict with the laws and presumptions of California regarding legal and physical custody and the best interest of the children, under the ruling of this Court, since the Court is not granting the Current New York plan and only the Return to New York Plan that both parties have agreed to, the Court does not feel that this issue is controlling. However, the record is clear, if that burden rests with Kelly, she obviously has not met it because she has not provided any evidence or legal authority regarding New York law, and the law presented by Daniel suggests that NY law may not be consistent with California law on these issues, and that would be a risk factor for these children.

III. GENERAL CONDITIONS AND ORDERS

Finally the Court adds the following with regard to the France Plan and other matters:

Airline tickets: Within 30 days of August 28, 2012, Daniel was ordered to deposit into an account to which both he and Kelly will have access, the funds sufficient for 3 round-trip economy class tickets on a major U.S. carrier purchased 30 days in advance. Within 30 days of the start of the second semester of school in Mougins, Daniel was to deposit into the same account the funds sufficient for 3 additional round-trip economy class tickets. Kelly may withdraw the funds from the account to purchase 3 round trip tickets to France for herself during each semester. She must provide Daniel with a copy of the receipt for the tickets purchased before she draws down the next ticket. Kelly is not restricted to economy class flight, but Daniel is not obligated to deposit funds in the account for anything other than economy class with 30 days' notice. Kelly may use the funds for shorter noticed tickets, but any deficiency resulting from purchases upon less than 30 days' notice will be made up by Kelly. Alternatively, Daniel may transfer to Kelly sufficient frequent flier-type miles with Lufthansa or another major airline to cover the six flights. (8/28/12 Order.)

Car and residence: Within 30 days of August 28, 2012, Daniel was ordered to notify Kelly in writing of the residence address and the description of the car that is part of the France plan. Kelly had 30 days from receipt of the notice to notify Daniel in writing that she would use the residence and/or the car.[9] If she declined to use the residence or the car, Daniel was not

[9] For everyday matters involving the children, printouts of confirming emails and text messages

obligated to provide either thereafter until 30 days prior to the start of the 2013-2014 school year. If Kelly notifies Daniel that she will use the residence and/or the car, but she fails to do so for 3 months in a row, Daniel may assume that the residence and/or the car, as applicable, is not needed, and he will no longer be obligated to provide them that year. If Kelly declines the residence and/or the car two years in a row, the obligation of Daniel to provide the residence or the car, as applicable, ends. (8/28/12 Order.)

Transitions: The transitions have been an ongoing problem for these two parents. It is where their different parenting styles run head on into each other. One could describe Daniel's approach as passive/aggressive to a degree, but one could also describe Kelly's approach as somewhat overly controlling or what Kelly herself designated as "over nurturing." The Court believes that over time, they have improved, but there is still plenty of room for further improvement that will be in the clear best interest of the children. Consequently, the Court orders Kelly and Daniel to follow the guidelines set forth by Dr. Aloia in his testimony regarding ways to improve the transitions. So, for example, Daniel is to personally greet the person(s) who transition from Kelly's side using English and they are to return the greeting. Kelly is to say her "good-byes" before she leaves the residence where she is staying and both children are to be walking on their own and not in the arms of either parent. Each child may bring one toy or other special object with him or her from Kelly's residence but, if for some reason, a child comes to the transition with more than one such object, then Daniel will simply let the child bring the object. It should be rare that more than one object should be brought to the transition without prior clearance with the other parent in a separate conversation prior to the exchange. (8/28/12 Order.)

Information for the other parent: Unless one parent requests more frequent updates from the other parent, each parent will send the other parent no more than one communication from the children per day showing what they have been doing. (8/28/12 Order.)

Co-criticizing vs. co-parenting: Communications between the parents are to be devoid of criticism and accusation. If something happens to a child during the day, the parent with the

are acceptable evidence of written consent wherever such consent is required herein.

child is not to link that event up in his or her communication about the child to other past events that may have occurred in an attempt to justify what happened. (8/28/12 Order.)

Timeliness and interruptions: Transitions are to occur within 30 minutes of the time set for the transition. Failure to arrive on time for two consecutive transitions will result in the cancellation of the next visit for the parent who has been late twice. This does not apply to lateness due to flight cancellations. The parties must work together in good faith to deal fairly with flight cancellations and other circumstances beyond their control. Daily Skype or other video chat sessions or telephone communications are to occur within 5 minutes of the designated start time and they are to occur in a quiet room secluded from other people and other noise. Failure to be timely or to follow these guidelines on two consecutive occasions will result in the next video chat or telephone session being cancelled.

Summer break time and the start of school: Under the France plan and the Return to New York Plan, neither parent is to have the entire summer with the minors without contact with the other parent. The Court recognizes that both parties tried to offer the maximum time with the minors to the other parent during the breaks. However, the Court finds that this would not be a good idea under any plan. Therefore, the parties are to meet and confer and agree upon a plan for France and New York that would include at least a one-week period during the summer break for the minors to spend time with the other parent.

Similarly, although Daniel offered to let the children start their first day of school with only Kelly, the Court finds that it is in the best interest of the children that both parents be present and it has so ordered them to do so if they are both in France. (8/28/12 Order.) The Court hopes that, at minimum, Kelly will adjust her return flight from France (for her trip to France which she has represented she will be taking starting on or about August 30, 2012) so that she may leave later on September 3, 2012, thereby permitting her to participate in the children's first day of school in Mougins, France, on September 3, 2012.

Visa issue: The Court accepts as truthful the testimony of Daniel that he intends to do everything he can to restore his right to reside legally in the United States. The Court also accepts as truthful, the testimony of Kelly that she will sign an affidavit that can be submitted

to the appropriate U.S. authorities in order to assist Daniel in the restoration of his right to reside legally in the U.S. (hereinafter referred to as the "Residence Right"). To date, that affidavit has not been forthcoming. The Court has considered the testimony by the experts on the immigration issues in this case, and the only clear conclusion this Court draws is that it is not possible to predict when, if ever, Daniel's Residence Right will be restored and that the U.S. authorities may never issue a definitive statement regarding Daniel's request. Much of the remaining testimony of the experts constituted speculation and was not of much assistance to the Court.

The Court finds that it is important to create a mechanism for ensuring that Kelly and Daniel do what they say they intend to do with regard to the immigration situation (hereinafter referred to as the "Immigration Review") because it is in the best interest of the children to have both parents residing in the same location where the children are close at hand and they are able to share equally in their lives.

To that end, the Court finds first, that Kelly should have through December 31, 2013 to submit her affidavit to the U.S. authorities in support of Daniel's efforts to obtain his Residence Right and to provide a copy thereof to Daniel; and second, Daniel should have through December 31, 2013, approximately two years from the revocation of his Visa, to pursue in good faith his Residence Right.

Unless the parties stipulate in writing to waive the Immigration Review, as set forth below, the Court will appoint an Evidence Code Section 730 evaluator to help determine if the parties have proceeded in good faith and to identify any further actions that either or both parties should take to increase the possibility that Daniel's Residence Right will be restored. Further to that end, starting in September 2013 and ending no later than December 31, 2013, Daniel and Kelly are ordered to meet and confer in an effort to jointly select an independent immigration expert (the "Immigration Expert") who will then be designated by the Court to act as an Evidence Code Section 730 evaluator on the issue of the good faith efforts of Daniel to obtain his Residence Right, and the issue of the good faith effort of Kelly to support his efforts

through her submission of an affidavit to the U.S. authorities. (8/28/12 Order, modified with regard to the date for Kelly's compliance.)

If the parties are unable to agree upon an Immigration Expert by December 31, 2013, then by no later than January 10, 2014, either of them may request a noticed hearing regarding the appointment of the Immigration Expert. If no request is made by either party by January 10, 2014 (or other date agreed upon pursuant to written stipulation of the parties and order of the Court), the Court will assume that the parties have agreed to waive the Immigration Review. Otherwise, by January 10, 2014 (or other date agreed upon pursuant to written stipulation of the parties and order of the Court), and, in accordance with Civil Procedure Code section 1005, the parties must file and serve the necessary papers, including a memorandum of points and authorities and declarations, in support of their request to appoint their proposed Immigration Expert.

Once appointed by the Court, the Immigration Expert will then meet with the parties and obtain copies of the documents submitted by Daniel and Kelly to the U.S. authorities and will discuss with each of them the efforts that each has made to obtain Daniel's Residence Right. The Immigration Expert will then prepare a written report regarding the status of Daniel's and Kelly's efforts to obtain Daniel's Residence Right, and will make recommendations, if any, regarding additional efforts that one or both of the parties should make to facilitate the restoration of Daniel's Residence Right. Immigration Expert will serve the parties with copies of the report and, if applicable, give them adequate time to comply with the recommendations. Upon the expiration of the additional time, and after meeting with the parties regarding their completion of any additionally recommended efforts, the Immigration Expert will file and serve a final report with the Court setting forth his/her analysis and conclusions regarding whether the parties have acted in good faith.

This Immigration review will be repeated by the same Immigration Expert (or, if necessary, a new Immigration Expert appointed by the Court pursuant to the same process described above) every two years until the children have reached the age of majority, unless the Court orders otherwise or the parties stipulate in writing to waive the Immigration Review.

If the Immigration Expert finds that both parties have acted in good faith, (s)he will so state in the report to the Court, and nothing further will be required for that Immigration review. If the Immigration Expert finds that either or both of the parties have not acted in good faith after being given time to implement the Immigration Expert's recommendations, if any, the Immigration Expert must request that the Court set a noticed hearing regarding the report; the Court will then set a hearing to determine if (a) it agrees with the Immigration Expert, (b) it is in the best interest of the children that they be returned to the U.S., (c) a material change of circumstances has occurred, and (d) a new parenting plan must be ordered. Standing alone, the continuing failure of the U.S. authorities to grant the Residence Right will not constitute a material change of circumstances. In accordance with Civil Procedure Code section 1005, once the Immigration Expert requests a noticed hearing, the parties may file and serve responses to the Immigration Expert's report, including a memorandum of points and authorities and declarations, and they may request an evidentiary hearing.

IV. JURISDICTIONAL FINDINGS; FAMILY CODE SECTION 3048

A. California's Home State Status and Its Continuing and Exclusive Jurisdiction

In making its custody determinations herein and granting both parties' respective move away requests as set forth above (as reflected in the Court's above determinations, Kelly's move away request from California to New York is not granted until the Return Date), California hereby exercises its exclusive and continuing jurisdiction over the issues of child custody visitation pursuant to California's version of the Uniform Child Custody Jurisdiction and Enforcement Act (Cal-UCCJEA). This Court finds that as of August 28, 2012 and as of the date of this Statement of Decision, California has sole and exclusive initial and modification jurisdiction over the issue of custody and visitation of the children for the reasons set forth herein. At the time of making its August 28, 2012 Order and this Statement of Decision, the United States of America was and is the children's habitual residence for purposes of the Hague Convention on the Civil Aspects of International Parental Child Abduction.

1. California's Jurisdiction Over the Minor Children Pursuant to Family Code Section 3421

As required by Family Code Section 3048, the Court finds that at the time Daniel filed his Petition for Dissolution of Marriage in this action on December 30, 2008, and at all times thereafter, California is and was the home state of the minor children, Hermes (dob: 10/17/06) and Helena (dob: 6/8/09) under Cal-UCCJEA and under the federal Parental Kidnapping Prevention Act. The Court finds that pursuant to California Family Code Section 3421, the party who is seeking to have the Court assume jurisdiction and make an initial custody determination bears the burden of proof to establish this Court's jurisdiction. In this case, both parties filed family law Petitions seeking the jurisdiction of this Court and acknowledging the jurisdiction of this Court.

- On December 30, 2008, like Daniel, Kelly filed a separate Petition for Dissolution of Marriage in California stating under penalty of perjury that she had been a resident of the State of California for at least the six months immediately preceding the filing of her Petition, and she had resided in Los Angeles County for at least the three months immediately preceding the filing of her Petition.

- At the time of the filing of the parties' respective Petitions for Dissolution of Marriage, Hermes had lived in California with his parents for more than the preceding six-months. Both parties stated and acknowledged this under penalty of perjury in their respective Petitions and in Kelly's Response to Daniel's Petition.

- On January 9, 2009, Kelly filed a request that she be allowed to travel to New York with Hermes temporarily during the filming season of her then television show, Gossip Girl.

- At the time of the filing of the parties' respective Petitions, Helena was an unborn child. Helena was subsequently born in Los Angeles, California, on June 8, 2009.

- Kelly subsequently made a move away request to New York which was ultimately heard and decided at the conclusion of the trial in this matter.

- On or around January 13, 2012, Daniel left the United States to pick up his Visa extension and at the meeting to retrieve his extension was informed that his Visa extension was revoked, and he learned shortly thereafter that his underlying Visa was revoked. Therefore, Daniel no longer had a Visa permitting him to enter the United States, and at that point, on or about January 19, 2012, he filed a request seeking that this Court order that the children reside with him in France. His move away request also was ultimately heard and decided at the conclusion of the trial in this matter.

- The parties and children temporarily stayed in New York during most of the period of time when this Court was trying the question of whether the children might be permitted to move away to New York or to France.

2. Basis and Findings for Court's Denial of Kelly's Challenge to California's Jurisdiction

The Court finds that in the midst of trial, in January 2012, Kelly, for the first time, challenged the California Court's subject matter jurisdiction in this matter, contending that such jurisdiction should be found to be in New York. The Court held a hearing on this issue and an Order was entered on April 5, 2012, confirming that California had the subject matter jurisdiction in this matter.

Once it is has been established that California has exclusive and continuing jurisdiction, as it was established in this case, the Court finds that the burden rests on the party contesting jurisdiction to prove that California has somehow been divested of jurisdiction. See, California Family Code Section 3422; *In re Marriage of Nurie,* (2009) 176 Cal.App.4th 478, 491 (*Nurie*).

In making the determination that it had not been divested of exclusive and continuing jurisdiction under California Family Code Section 3422 (a) (2), the Court found that Kelly, as the party seeking to divest the Court of jurisdiction, had failed to meet her burden of proof that the Court no longer had jurisdiction. For the reasons set forth herein and in the Court's April 5, 2012 Order, the Court has found that Kelly was unable to prove with sufficient evidence that the California Court was divested of its exclusive and continuing jurisdiction. Pursuant to California Family Code Section 3421 and the reasons set forth herein and in its April 5, 2012

Order, the Court finds that California and this Court have continuing and exclusive jurisdiction over the parties' children and the issue of custody.

- There was no evidence presented that any other state has asserted jurisdiction or that any other forum or court was available to assert such jurisdiction. The Court finds that this has remained true throughout the pendency of this matter. The Court therefore finds that at all times during the pendency of this matter, no evidence has been proffered showing that another action regarding custody of the children has been filed in any jurisdiction, other than for enforcement, and that during the pendency of this matter, no other jurisdiction has had a basis for asserting jurisdiction over the children under the criteria of the Cal-UCCJEA.

- Kelly, Daniel, Hermes and Helena all have a significant connection with California.

- The parties' stay in New York was temporary and was always intended to be temporary as reflected in the parties' two stipulations in this matter, dated July 30, 2009 and April 7, 2010, respectively. During the pendency of this proceeding, Kelly owned and maintained a home in Los Angeles, California, and Daniel had a home available to him and the children for when/if he and the children returned to Los Angeles, and he continually maintained a functional residence in California despite his physical presence in New York, France and Monaco for certain periods.

- The parties have litigated in California, and Kelly, more so than Daniel, has availed herself of this forum.

- The Court found that prior to its making its final determination regarding the parties' respective move requests, the appropriate inference to draw from the parties' agreement to "temporarily relocate" to New York was that the stay in New York was temporary (due to Kelly's request to be in New York during the filming season of Gossip Girl), and the parties and children would then return to California upon the completion of Kelly's contractual obligation to that television show. At that time, the Court made the sensible inference that the parties and children would return to California. See, *Nurie* (2009) 176 Cal.App.4th 478. Regardless of whether Kelly has been in New York, she has never "stopped residing in California." *Ibid.*

- The Court found that it would not be appropriate and against public policy to encourage parties to make agreements and resolve issues, as the parties did here, regarding their temporary time in New York, and then penalize them for it by ignoring the temporary nature of the agreement.

- The Court found that Kelly failed to meet her burden to show that any such agreement caused the parties to change their residence from California to New York. As previously found by the Court, the absences of the parties and children from California in connection with Kelly's employment in New York were temporary absences within the meaning of California Family Code Section 3402(g).

- The Court found that having a move away evaluation, as was had in this matter with regard to Kelly's request to be able to move the children to New York, creates an inference that a party needs permission to move away from California. The Court found that the parties agreed that they would go to New York at certain times with the understanding that it was for a limited period of time. The Court found that this agreement does not constitute evidence that the parties or Kelly herself no longer resided in California.

- Kelly has at all times during the pendency of these proceedings maintained a functional residence in California. Kelly continuously maintained this residence in California despite her physical presence in New York for certain periods for work. The evidence before the Court at the time of the hearing on jurisdiction was that there was no dispute that during the pendency of the proceeding Kelly had a house in Los Angeles, which she called a home on her Income and Expense Declaration. Kelly also called her apartment in New York a home. Kelly provided no back up documentation reflecting that her home in Los Angeles was investment property. The Court found that it was reasonable to infer that, if Kelly wanted to come back to her house in California, she would have had the ability to remove her tenant, if any, in short order. The Court found that the parties had the financial wherewithal to rent places wherever they wanted to be.

- The Court further found that just because Kelly's Los Angeles home may have been rented during certain periods of time in the trial, although there was insufficient evidence

presented to confirm that this was the case, does not mean that the California residence is no longer a functional residence under the *Nurie* test. In *Nurie*, the court found there was a place the father could go when he was in California, despite the fact that he spent a lot of time in Pakistan. By preserving a functional residence in California, the *Nurie* court found, the father preserved the Court's continuing and exclusive jurisdiction in California. (2009) 176 Cal.App.4th 478. Although Kelly testified in July 2012 that her California house was "in escrow," she never provided any update to the Court or claimed that she had sold her California house.

- There was very little evidence provided by Kelly to support her position that the residence of the parties and children had changed. Kelly provided no information about her taxes other than her Income and Expense Declaration which stated she filed tax returns in both California and New York. Kelly provided no evidence regarding her vehicle registration, her driver's license, her bank accounts or where she voted.

- The Court found and expressed its concern about Kelly choosing to raise a jurisdiction issue in the middle of trial. The Court noted and could not overlook the fact that it was Kelly who availed herself of the Court's jurisdiction on December 12, 2011 and January 9, 2012, and was in the middle of those proceedings, as well as in the middle of the Court's tentative rulings with regard to Daniel's then pending Order to Show Cause to move, when Kelly for the first time raised the issue of jurisdiction and whether or not California had jurisdiction in this matter. The Court took notice that it was not until the conduct of Kelly's attorney, Mr. Rich, on December 12, 2011 occurred, and Daniel's subsequent immigration issues arose which led to his request to have the children move to France, that this jurisdiction issue was raised by Kelly for the first time. The Court took notice that given the timing of Kelly's request, it had the trappings of "judge shopping."

In deciding the forum nonconveniens issue, the Court found that the factors set forth in Family Code Section 3427 weighed in favor of this proceeding remaining in California. Testimony had already commenced in California. A significant number of witnesses were in California. There were some witnesses in New York as well, however, it was determined that

those witnesses might not have to appear given some of the expert testimony. (The Court notes that, in fact, Kelly did not call those witnesses at the trial in this matter). Kelly's mother resides in Los Angeles. Daniel's mother is out of the country. This Court and Minor's counsel had invested a great deal of time and study in this matter, and the loss of their respective knowledge and familiarity with this case would have been tremendous if the case were to be transferred (notwithstanding the fact that there was no Court to which to transfer this case as no action was filed in any other jurisdiction by either party). The parties had been accommodating with each other with regard to location by agreeing that each party could testify by CourtCall. The parties had the ability to afford transportation back and forth. In weighing the factors and judicial efficiency, the Court found that it was appropriate for this matter to remain in California.

3. Kelly's request to stipulate to California's continuing jurisdiction

On May 9, 2012, Kelly took the opposite position and filed a request that both parties stipulate (and that the Court make orders) that California is and was the home state of the children, and that California "absolutely has continuing jurisdiction" in this matter. Daniel did not oppose Kelly's request and the Court entered an order that included Kelly's requested order that California is and was the home state of the children and had exclusive continuing jurisdiction over the custody and visitation of the minor children.

B. Risk of Abduction

The Court has not become aware of facts which may indicate that there is a risk of abduction of either child by Daniel. (Fam. Code §3048 (b).) Previously in this matter, on January 27, 2012, March 19, 2012 and May 10, 2012, the Court considered and found that there was no risk of abduction of the minor children by Daniel. This finding was supported by minor's counsel. In making its finding, the Court included its findings and reasoning in its prior relevant Orders. The Court found that Daniel has never threatened to or taken, enticed away, kept, withheld, or concealed either child in violation of Kelly's right of custody. There was no history of a lack of parental cooperation by Daniel (and, in fact, the Court found the opposite to be true as set forth herein) or child abuse or domestic violence.

Based upon the evidence before the Court, including the trial testimony of witnesses, the Court further finds that there are no new facts since making its prior findings that would cause the Court to now find any such risk. Daniel has evidenced even further that he intends to comply with all Court Orders and is not an abduction risk. Daniel has complied with all Court Orders and has exercised custody of the children in Canada, Bermuda, France and Monaco, without any issue or any threat of abduction. Minor's counsel stated he did not believe that there was any abduction risk by Daniel. Further, in her trial testimony in July 2012, Kelly stated that she does not believe Daniel is a flight risk.

Dated: October 24, 2013.

Teresa A. Beaudet

Hon. Teresa A. Beaudet
Judge of the Superior Court