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

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

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

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

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

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

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

27
28 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.

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

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

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

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

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

4 CONTENTS OF STATEMENT OF DECISION

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

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

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

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

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

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

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

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

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

6 **STATEMENT OF DECISION**

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

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

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

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

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

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

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

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

17 **A. Legal Bases for Decision**

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

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

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

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

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

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

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

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

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

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