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8 **SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO**
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11 In re the Marriage of:) Case No.: D987654
12 FRANK FATHER,)
13 Petitioner,) **MEMORANDUM OF POINTS AND**
14 and) **AUTHORITIES IN OPPOSITION TO**
15 SUSAN R. SMITH,) **MOTION FOR MODIFICATION OF**
16 Respondent,) **CHILD CUSTODY, VISITATION, AND**
17) **PASSPORT FOR MINOR CHILD AND**
18) **TRAVEL OUTSIDE THE UNITED**
) **STATES WITH MINOR**

19 Respondent Susan R. Smith (Susan) respectfully submits the following Memorandum
20 of Points and Authorities in Opposition to Petitioner’s motion to Modify Child Custody,
21 Visitation, Passport for Minor and Travel Outside the United States with Petitioner.

22 **STATEMENT OF FACTS**

23 In his moving papers Petitioner Frank Father (Frank) moves for the issuance of a
24 passport for the parties’ son Joe Father (DOB 11/11/2006) for travel to Frank’s native Nigeria
25 to participate in a family wedding. Frank is an American citizen and a reservist in the United
26 States Marine Corps. The minor child was born in the United States, and is a natural-born
27 citizen.
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1 As is more fully set forth in Respondent Susan R. Smith (Susan), Frank wishes to send
2 the minor child to Nigeria to be raised by his sister. Susan has also determined that, contrary
3 to the representations made by Frank, there is no family wedding pending in Nigeria. Frank
4 has stated that he wants his son to be immersed in Nigerian culture. As stated in Frank's
5 declaration, he is an American citizen, and has a business in San Diego County, California.
6 Frank's declaration says nothing about traveling with his son to Nigeria. If Frank is so
7 enamored with Nigerian culture and the Nigerian nation, why is he an American citizen, a
8 California domiciliary, and a reserve member of the United States Marine Corps?

9 Frank's declaration states that Nigeria is a signatory to various treaties that would
10 assure the child's return to the United States. That simply is not so. Nigeria is NOT a
11 signatory to any international treaty or convention that would assure a child's return to his
12 native country. Moreover, the State Department of the United States has declared that travel
13 to and in Nigeria is not safe. The nation is undergoing significant civil unrest and violence,
14 such that both Nigerians and foreigners are not safe.

15 Susan asserts that once the minor child is taken to Nigeria, their legal system is such
16 that there is no effective legal method for obtaining his return. Depending upon where in
17 Nigeria the child would be located, would determine the law applied. Susan further asserts
18 that a "trip" to Nigeria would be tantamount to a move-away order.

19 **LEGAL ARGUMENT**

20 **A. The Request for a Passport for the Minor Child is Tantamount to a Request for an** 21 **International Move-Away Order.**

22 Because of the unusual facts of this case, Frank's request for a passport for his 3-year
23 old son to travel to Nigeria is tantamount to a request for an international move-away order.

24 Any analysis of a change in custody, visitation, or move away begins and ends with
25 what is in the best interest of the child.

26 **Best Interests of the Child**

27 When determining the best interest of the child, relevant factors include the health,
28 safety and welfare of the child, any history of abuse by one parent against the child or the

1 other parent, and the nature and amount of contact with the parents. Family Code §3011,
2 Montenegro v. Diaz, 26 Cal.4th 249, 255 (2001).

3 There is no statutory definition of "best interests of the child." It has been described as
4 "an elusive guideline that belies rigid definition. Its purpose is to maximize a child's
5 opportunity to develop into a stable, well-adjusted adult." Adoption of Mathew B., 232
6 Cal.App.3d 1239, 1263 (1991).

7 To determine the best interest of the child, relevant factors include the health, safety
8 and welfare of the child, any history of abuse by a parent against the child or other parent, a
9 parent's habitual and continual use of controlled substances or alcohol, and the nature and
10 amount of contact with the parents. (Family Code §3011.)

11 The changed circumstances rule requires that there be a prior judicial custody decision
12 that determined the best interest of the child under the circumstances then existing. The
13 changed circumstances rule is not a different test from the initial best interest test. Rather, it is
14 an adjunct to the best interest test providing in essence that once a court has established the
15 child's best interest, it need not re-examine the issue without some significant change of
16 circumstances suggesting a different arrangement would be in the child's best interest.
17 Montenegro v. Diaz, *supra*, 26 Cal.4th 249, 256 (2001).

18 When the court orders a change in custody, "there must generally be a persuasive
19 showing of changed circumstances affecting the child. And that change must be substantial: a
20 child will not be removed from the prior custody of one parent and given to the other unless
21 the material facts and circumstances occurring subsequently are of a kind to render it essential
22 or expedient for the welfare of the child that there be a change." In re Marriage of Carney, 24
23 Cal.3d 725, 730 (1979), quoting Washburn v. Washburn, 49 Cal.App.2d 581, 588 (1942).
24 The burden of showing a sufficient change in circumstances is on the party seeking the
25 change of custody. (Carney, *supra*, at p. 731.) Here, there is no change in circumstances other
26 than Frank's desire to get the parties' child out of the reach of Susan.

27 Marriage of Condon, 62 Cal.App.4th 533 (1998), regarding a move away to a foreign
28 nation, the Court held that the trial court should also consider three additional issues: (1)

1 cultural differences, (2) distance, and (3) enforceability of the order in the foreign jurisdiction.
2 (Condon, supra, 62 Cal.4th at pp. 546-548.)

3 Condon Factors As Applied to Nigeria

4 Cultural Differences

5 The difference in culture between the United States and Nigeria is vast. A review of
6 the United States Department of State materials shows that Nigeria is a developing country.
7 The State Department advises against travel by Americans to Nigeria, based on gang violence,
8 political, and religious unrest. Nigeria also has rampant and violent crime, for which the State
9 Department notes that there is little victim recourse. Additionally, medical facilities are often
10 poorly maintained and many medicines are unavailable. Roads conditions and traffic safety is
11 primitive and corrupt.

12 Nigeria has both Christian and Muslim populations who are at violent odds with each
13 other. As noted below, the Muslim population has been successful in imposing Sharia
14 (Islamic) law in areas of the country. Sharia law treats women differently and without the
15 equality as America and other Western nations. What recourse would an American woman
16 have in Nigeria? Without knowing where in Nigeria Frank intends to send the child, there is
17 no way of determining whether it is a Christian or Muslim area of Nigeria.

18 While English is the official language of Nigeria, there are some 500 additional
19 languages spoken by the Nigerian people.

20 Distance

21 It is approximately 7,700 miles between San Diego, California and Lagos, Nigeria.
22 Condon held that for a person of average income or below, an order relocating his or her child
23 to a faraway foreign country is ordinarily tantamount to an order terminating that parent's
24 custody and visitation rights. Id. at 547.

25 Condon further stated:

26 To award custody to the mother would, in effect, be to completely deny to the
27 infant the right to the love, parental care, companionship and guidance of her
28 father. Further, it would deprive her of the right to be raised and educated in
her own country--which is part of her birthright. Moreover, it would deprive
the petitioner of the natural rights he has as a father--since he would be

1 completely cut off from his daughter by a distance of many thousands of miles.
2 Id. at 845

3 Susan contends that if Frank is granted the right to obtain a passport for his minor
4 child, this distance will allow Frank to send the child to Nigeria, where Susan right of
5 visitation will be purely illusory. Frank proposes to take a three year-old child some 7,700
6 miles across eight time zones for a trip of some 24 hours. How could this possibly be in the
7 child's best interests?

8 Enforceability of Order in Nigeria

9 Plainly stated, a California custody and visitation order will have little, if any, force
10 and effect in Nigeria. Nigeria has a complex three-tiered legal system composed of English
11 common law, Islamic law, and Nigerian customary law. Under the 1999 constitution, the
12 regular court system comprises federal and state trial courts, state appeals courts, the Federal
13 Court of Appeal, the Federal Supreme Court, and Sharia (Islamic) and customary (traditional)
14 courts of appeal for each state and for the federal capital territory of Abuja. Courts of the first
15 instance include magistrate or district courts, customary or traditional courts, Sharia courts,
16 and for some specified cases, the state high courts. Because of religious differences,
17 Christians (which Frank professes to be) fear the forced introduction of Sharia law.

18 Frank's declaration states that there are international treaties that would aid Susan in
19 enforcing her custody and visitation order in Nigeria. THIS SIMPLY IS NOT TRUE.
20 Nigeria is NOT a signatory to any international or bilateral treaty regarding child custody,
21 child abduction, or any related subject. How could this be in the best interests of this child?

22 CONCLUSION

23 Susan asserts that rather than the benign reason of a family wedding, Frank wishes to
24 send their child to live with his sister in Nigeria on a permanent basis. Once the child is in
25 Nigeria, Susan is left without a remedy, and her custody and visitation is effectively
26 terminated.

27 An order allowing the obtaining of a passport will be exactly what Frank needs to put
28 the minor child effectively out of reach for Susan. For whatever reasons, Frank believes that
he is in charge, and should be able to unilaterally determine what is best for the parties' child.

1 Once the child is granted leave to obtain a passport, it is one short step to getting the child out
2 of the country and to Nigeria, where is out of reach of civil and diplomatic authorities.

3 Allams contends that there is no justification in sending a three year-old child to a
4 nation in which there is civil and religious violence. No real argument can be made that such
5 a relocation could be in this child's best interest.

6 Frank's motion should be denied.

7 Dated: March __, 2010

Respectfully submitted,

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Alice Attorney
Attorney for Respondent
Susan R. Smith

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