

Comment,
VIRTUAL VISITATION: ARE WEBCAMS
BEING USED AS AN EXCUSE TO
ALLOW RELOCATION?

I. Introduction

Once we have accepted the fact that most families do not follow the conventional “Ward and June Cleaver” model, and that many children have mothers and fathers who do not live together, we then begin to encounter a wide array of impediments to our traditional notions of the parent-child relationship. When a child cannot live with both Mom and Dad at the same time, we need to address questions, not the least of which concern how much time the child should spend with each parent; how often a child should see each parent and for how long; and what the impact will be on parenting time if one parent decides to relocate.

The internet is celebrated for connecting people across the world, and has recently been incorporated into custody arrangements as a means to keep children and parents in more regular contact with each other, including supplementing visitation when a parent and child live in two different locations. While there is much to be said for frequent contact between children and parents, no matter where they each live, are courts using the web as a supplement to visitation *after* making the decision to approve relocation on other grounds, or are they approving relocation for custodial¹ parents based on the availability of internet communication?

¹ Throughout this Comment, the author refers to parents as either “custodial” or “noncustodial.” While different states use varying terms for parents depending upon how much parenting time they have with their children (e.g., “residential/non-residential” or “primary/secondary”), once a parent relocates with a child, he or she in essence becomes the custodial parent inasmuch as that parent provides for the child on a daily basis, while the non-relocating parent may be able to exercise visitation rights with the child periodically. As an illustration, the Supreme Court of California, in *In re Marriage of Burgess*, 913 P.2d 473 (Cal. 1996), determined that the term “joint physical custody” should be applied in only a limited set of circumstances. “Prior to Burgess, ‘joint physical custody’ meant that each parent spent substantial time with the children. The Burgess court narrowed the definition of ‘joint physical custody’ to establish the standard of judicial review in move-away cases. The court defined the term to

Virtual visitation, also called “internet visitation,” refers to the use of email, instant messaging, webcams, and other internet tools to provide regular contact between a noncustodial parent and his or her child. Courts have ordered virtual visitation in relocation cases, where the opportunities for physical contact are even more sporadic due to the increased physical distance between the child and non-moving parent. The internet can be an instrument for a “face-to-face” encounter between parent and child, but video conferencing with one’s child, just like a telephone call, should be used as a supplement to, not a replacement for, in-person visits and communication. Children crave warm hugs from both of their parents before going to bed, enjoy feeling their hair being ruffled by a loving hand while they do their homework, and relish in receiving a “high-five” after a well-played sports match. Although seeing her parent’s image on the computer monitor and hearing her parent’s voice read her a bedtime story from a computer speaker can be more fulfilling for a child than not seeing or hearing that parent at all, the availability of such technology should not be used as a substitute for the physical presence of a parent whenever possible.

This Comment will address how courts and legislatures are incorporating internet technology into visitation plans, and where the trend seems to be headed in the future. Part II gives an overview of the history of virtual visitation in the courts; Part III discusses recent and pending legislative action; and Part IV contemplates the effects of virtual visitation on the parent-child relationship.

mean sharing joint physical custody as mandated by court order and maintaining a roughly equal time share arrangement with the children.” Jennifer Gould, *California’s Move-Away Law: Are Children Being Hurt By Judicial Presumptions That Sweep Too Broadly?*, 28 Golden Gate U.L. Rev. 527, 535 (Spring 1998) (citation omitted). Other courts refer to both parents who share custody of their child as custodial parents, notwithstanding the actual amount of time each spends with the child. For example, Missouri defines “joint physical custody” as “an order awarding each of the parents significant, but not necessarily equal, periods of time during which a child resides with or is under the care and supervision of each of the parents.” Mo. Rev. Stat. § 452.375.1(3) (2007). For purposes of relocation, however, reported cases use the custodial/noncustodial nomenclature for the reasons explained above.

II. The History of Virtual Visitation in the Courts

A. Relocation Standards

One parent's desire to relocate with his or her child to a different city, state, or country than the other parent presents the issue of balancing dueling rights: the right of a custodial parent to move freely—whether it be to gain employment, get married, move closer to extended family, or another legitimate reason—against the right of the noncustodial parent to maintain a close relationship with the child while remaining in the same place. Many states recognize the custodial parent's right to move with his or her child, and will grant such a request as long as the relocating parent carries the burden of showing that there is a reasonable motive for the request and that the move is in the best interests of the child.²

Motive is an important factor to reflect on, considering the possibility of a parent moving for the sole purpose of frustrating the other parent's visitation time with the child. However, increasingly states are presuming that relocation is in a child's best interests when the parent has a good faith basis for moving.³ This presumption comes from the premise that the happiness and success of a child depends in large part on the satisfaction of her custodial parent. A new, lucrative career or living closer to the parent's extended family, for example, can affect a child positively directly through the family's extra financial stability or indirectly via living with a parent who has access to a support network that can help that parent cope with the stress of single parenthood.

If a court permits the custodial parent to move with the child, most states require the court to ensure that a meaningful relationship will continue between the child and the non-moving parent by making provisions for reasonable physical visitation and other means of communication.⁴ Enter virtual visitation.

² See, e.g., Mo. Rev. Stat. § 452.377.9 (2007); Ind. Code Ann. § 31-17-2.2-5(c)-(d) (2007).

³ *Ireland v. Ireland*, 246 Conn. 413, 421 (1998).

⁴ See, e.g., Mo. Rev. Stat. § 452.377.10(1). (“The court shall order contact with the nonrelocating party including custody or visitation and telephone access sufficient to assure that the child has frequent, continuing and meaningful

B. *Decisions Encouraging Virtual Visitation*

The New Jersey case of *McCoy v. McCoy*⁵ is often cited as groundbreaking in the realm of virtual visitation.⁶ The *McCoy* court allowed the mother to relocate with her daughter, Katherine, and commended her suggestions for incorporating internet communication into the visitation plan.⁷ In addition to carving out 66 days of the year for physical visitation between Katherine and her father, the mother “proposed building a web site, which would include the use of camera-computer technology to give [the father], his family and friends, the ability to communicate directly with Katherine on a daily basis and review her school work and records.”⁸ By means of this website, the father and daughter would be able to see each other regularly, even though they lived miles apart.⁹ The mother’s dedication to fostering the relationship between her child and her child’s father through whatever means available impressed the court, and likely aided its decision in favor of the relocation.

McCoy was not the first decision to incorporate internet technology into visitation plans, however. In the late 1990s, several courts recognized the role email can play in continuing the relationship between parents and children who have been distanced by relocation. The 1997 New York case of *Lazarevic v. Fogelquist*¹⁰ involved a custodial mother’s request to relocate with her son Adrian to Saudi Arabia, where they would live with

contact with the nonrelocating party unless the child’s best interest warrants otherwise.” *Id.*); Ariz. Rev. Stat. § 25-408 G (LexisNexis 2007). (“To the extent practicable the court shall also make appropriate arrangements to ensure the continuation of a meaningful relationship between the child and both parents.” *Id.*)

⁵ 764 A.2d 449 (N.J. Super. 2001).

⁶ See, e.g., Sarah L. Gottfried, *Virtual Visitation: The New Wave of Communication Between Children and Non-Custodial Parents in Relocation Cases*, 9 Cardozo Women’s L.J. 567, 570-71 (2003); Sarah Gottfried, *Virtual Visitation: The Wave of the Future in Communication Between Children and Non-Custodial Parents in Relocation Cases*, 36 Fam. L.Q. 475, 477 (2002); Anne LeVasseur, *Virtual Visitation: How Will Courts Respond to a New and Emerging Issue?*, 17 Quinn. Probate L.J. 362, 373 (2004).

⁷ *McCoy*, *supra* note 5, at 454 .

⁸ *Id.* at 452-53.

⁹ *Id.* at 453.

¹⁰ 668 N.Y.S.2d 320 (1997).

the child's stepfather and half-siblings. When one parent wants to relocate to a different state, the interests of the two parents are clearly at odds and visitation is inhibited to some degree; but when one plans to move to another country, it is all the more impractical to arrange physical visitation with the child. Whomever the child ultimately does not live with, either the relocating parent or the parent left behind, will have enormous economic and logistic hurdles to jump in order to see the child in person. Therefore, whether or not to allow an international relocation is an even weightier decision for a court than is a domestic move.

In *Lazarevic*, the court determined that the relocation would be in the child's best interests, and therefore allowed the mother to take her son with her to Dhahran, Saudi Arabia.¹¹ Either choice the court made would result in an interference with the child's relationship with one of his parents; but in Saudi Arabia, Adrian would have many advantages, including the benefit of a loving, stay-at-home mother, as well as his siblings and a stepfather who treated the child as his own.¹² Expressing the sentiments of many courts burdened by the task of deciding relocation cases, the *Lazarevic* court stated that, "although the court finds that maintaining the status quo would undoubtedly be in Adrian's best interest and is something that Adrian himself would desire, to compel such an outcome is regrettably outside this court's power."¹³ In such a situation, a court must establish a plan to help the noncustodial parent maintain a relationship with the child, despite the miles that distance them. To that end, this court ordered what has since become known as "virtual visitation," together with approximately ten weeks of in-person visitation between the father and son.¹⁴ The virtual visitation plan was set out by the court as follows:

Respondent shall hire, at her expense, a computer consultant in both New York and Dhahran to select, purchase and set up compatible computer systems with laser printers in both Petitioner's residence in New York and in Adrian's new residence in Dharhan [sic] to enable Petitioner and son to communicate on the Internet and by fax. Adrian's computer system shall be placed in his bedroom which will be accessed through a dedicated phone line. In addition, Adrian's

¹¹ *Id.* at 321.

¹² *Id.* at 324.

¹³ *Id.* at 321.

¹⁴ *Id.*

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room shall have a telephone with answering machine also with a separate dedicated phone line for Petitioner and Adrian to utilize.¹⁵

Thus, the court placed the encumbrance on the mother to ensure the continuous and meaningful connection between father and son, since it was she who was disrupting the physical visitation by relocating.

In 1998, in *McGuinness v. McGuinness*,¹⁶ the Supreme Court of Nevada reiterated the longstanding sentiment pertaining to the parent-child relationship that “maintaining significant and substantial involvement in a child’s life. . . is clearly desirable.”¹⁷ Such involvement can be facilitated through phone calls, email, and letter writing, in addition to in-person visitation.¹⁸ In *McGuinness*, the parents were awarded joint custody of their son, and the mother later filed a motion seeking primary physical custody so that she could relocate to West Virginia with the child.¹⁹ The court found that the mother’s desire to move was in good faith, as she would then be closer to her siblings, live rent-free while she went back to college, and thereafter be able to pursue a “career” in teaching as opposed to her current “job”; in addition, her new career would allow for her to be home at the same times as her son, eliminating the need for child care.²⁰ The court remanded the district court’s denial of the relocation request and ordered that the district court determine if reasonable, alternative visitation options may be suitable, rather than focusing on the collapse of the joint custody arrangement.²¹

All of the advantages that the mother in *McGuinness* would derive from relocating from Nevada to West Virginia would carry over to benefit her son. If she were not permitted to relocate, her life satisfaction would suffer, as well as her relationship with her son. Therefore, the Supreme Court of Nevada concluded that denial of relocation should not be made too hastily; email and other alternative methods of communication to ensure a con-

¹⁵ *Id.* at 328.

¹⁶ 970 P.2d 1074 (Nev. 1998).

¹⁷ *Id.* at 1078.

¹⁸ *Id.*

¹⁹ *Id.* at 1075.

²⁰ *Id.*

²¹ *Id.* at 1078, 1079.

tinuing, meaningful relationship between father and son should at least be considered before dismissing relocation entirely.

A lower court's decision in North Dakota also received criticism for rejecting alternatives to physical visitation in a relocation case.²² In *Tibor v. Tibor*,²³ the trial court found that supplemental means of communication, such as the regular email and telephone contact and exchange of video tapes that the mother had suggested, in addition to trips to the father's home state, were insufficient to "preserve and foster" the relationship between the father and his children.²⁴ The Supreme Court of North Dakota, however, reversed, finding that the trial court had erred because a restructured visitation schedule, despite the unavoidable differences between the original and new arrangements, could still "preserve and foster the children's relationship with [their father]."²⁵

In *Rice v. Rice*,²⁶ the custodial mother had moved from South Carolina to Maine with her children, and the family court ordered her to return to South Carolina, or within 250 miles of the county in which the father lived.²⁷ The South Carolina Court of Appeals reversed, citing *McGuinness* in its approval of alternatives such as phone calls and email messages to decrease the negative effects of reduced physical visitation.²⁸

McGuinness and *Tibor* both involved joint custody arrangements, which are probably the most difficult cases for courts to decide, since theoretically both parents have equal custodial rights and moving the children to a different area is seen as an even greater affront to the parent left behind; what were once regular weekend or bi-weekly visits might become monthly, or even limited to a few weeks over the summer and winter school holidays. Relocation cases more typically involve a primary custodial parent and a noncustodial parent who has a right to reasonable visitation time with the children.²⁹ Noncustodial

²² 598 N.W.2d 480 (ND 1999).

²³ *Id.*

²⁴ *Id.* at 487.

²⁵ *Id.*

²⁶ 517 S.E.2d 220, 222 (S.C. App. 1999).

²⁷ *Id.*

²⁸ *Id.* at 227, 229.

²⁹ See, e.g., Kenneth Waldron, *A Review of Social Science Research on Post Divorce Relocation*, 19 J. Am. Acad. Matrim. Law. 337, 342 (2005).

parenting time varies greatly from one family to the next, ranging from a monthly trip to the zoo, or less, to an overnight visit every week, or more; therefore, the length of time and frequency with which a noncustodial parent and his or her child are accustomed to seeing each other in person varies greatly, as well.³⁰ The same distance move can cause serious disruption in one parent-child relationship and have little or no effect on another, due to the current status of their connection.

C. Cases Denying Relocation Despite Availability of Virtual Visitation

Some courts are understandably wary of allowing relocation of a parent and child away from the other parent, regardless of available resources to continue visitation with the non-moving parent in alternative ways. Permission to relocate seems to be most out-of-reach when the noncustodial parent is actively involved in his or her child's life, and the two enjoy a close and loving relationship.

The Superior Court of Connecticut, in *Nighswander v. Sudick*,³¹ denied the mother's request to relocate to California. The court stated that even if phone calls and email messages were used to supplement visitation, the father-child relationship would be "forever altered."³² But this statement is perplexing because courts often allow one parent to relocate, despite the inevitability of altered relationships. The Connecticut court seemed to base its decision heavily on the father's tremendous involvement in his children's lives and the mother's disinclination to cultivate the children's relationship with their father; however, the court may have also considered the role of gender: both children were boys, who are believed by many to require strong male role models in their lives in order to thrive. Between the approximate ages of five and ten, "[t]he work of several researchers has shown that it is developmentally important for a child. . .to have a good deal of involvement with the same gender parent. Boys,

³⁰ *See Id.*

³¹ 2000 Conn. Super. LEXIS 192 (unreported decision Jan. 26, 2000).

³² *Id.* at 32.

for example, do better if they have a good deal of involvement with fathers.”³³

As remarked upon above, a relocation request by a parent in a joint custody arrangement presents an extremely difficult decision for a judge, since both parents have the right to actual custody of the child, not merely visitation privileges. The complexity of this dilemma is matched by a relocation request that is made before there is any custody order in place; the Pennsylvania Superior Court faced the latter issue in *Marshall v. Marshall*.³⁴ In *Marshall*, the separated mother and father each filed custody actions; the father first filed for joint legal and physical custody and, subsequently, the mother filed for primary physical custody, stating her plan to relocate to South Carolina where her family lived.³⁵ The trial court allowed the relocation, but the appellate court reversed and remanded.³⁶

Since no custody order was in place at the time the mother made her request to relocate, the trial court in *Marshall* should not have made its decision based on primary custodial status in the mother;³⁷ instead, regarding the best interests of the children, the court was obliged to “scrutinize both custodial environments without favoring one over the other.”³⁸ The Pennsylvania Superior Court determined that the relocation would not considerably enhance the mother’s life, and therefore neither would the move be a significant boon to the children’s lives.³⁹ Moreover, the damage to the relationship between the father and children due to the move would be substantial.⁴⁰

The trial court looked favorably upon the mother’s support of visitation between the father and children, specifying her readiness to install webcams through which the father and children would be able to communicate with each other when they were not physically together.⁴¹ However, the appellate court agreed

³³ Waldron, *supra* note 29, at 353 (citing the work of Warshak and Santrock, as well as Michael Lamb).

³⁴ 814 A.2d 1226 (Pa. Super. Ct. 2002).

³⁵ *Id.* at 1228.

³⁶ *Id.* at 1227-28.

³⁷ *Id.* at 1230.

³⁸ *Id.* (citing *Beers v. Beers*, 710 A.2d 1206, 1209 (Pa. Super. 1998)).

³⁹ *Id.* at 1233.

⁴⁰ *Id.*

⁴¹ *Id.* (citing Trial Court Opinion, 3/1/02, at 7-8).

with the decision in *Graham v. Graham*⁴² in discouraging the use of the internet as a substitute for physical contact when it stated, “[w]hile the Internet undoubtedly has fostered a myriad of ways for people to maintain communication and while computer video cameras allow people to ‘feel’ closer even when separated by hundreds of miles, such technology cannot realistically be equated with day-to-day contact between parents and young children.”⁴³ In this case, the continuous nature and quality of the relationship between the father and children could not be replaced adequately by infrequent in-person contact supplemented by virtual visitation;⁴⁴ therefore, the court found that the move would not be in the children’s best interests.⁴⁵

III. Legislative Action

Laws pertaining to virtual visitation are already in effect in Utah, Wisconsin, Texas, and Florida, and many other states have drafted or are in the process of drafting bills.⁴⁶ That so many states are considering the internet in custody cases indicates a growing trend toward using virtual visitation as a tool to foster ongoing and meaningful connections between parents and children, particularly when great distances separate them.

Michael Gough, a divorced father from Utah whose ex-wife relocated to Wisconsin with their minor daughter several years ago,⁴⁷ is a leading advocate of virtual visitation. After implementing the alternative visitation method into his own parenting plan, Gough encouraged the Utah Bar Association to adopt similar measures to help noncustodial parents remain connected to

⁴² 794 A.2d 912, 915 (Pa. Super. 2002).

⁴³ *Marshall*, *supra* note 34, at 1233.

⁴⁴ *Id.*

⁴⁵ *Id.* at 1234.

⁴⁶ See InternetVisitation.org, Legislation, http://www.internetvisitation.org/web_pages/legislation.html (last visited September 24, 2007).

⁴⁷ See Nora Lockwood Tooher, *Divorced Dad Leads Nationwide Drive for ‘Virtual Visitation,’* Daily Record (Kansas City, MO), December 10, 2005.

their children.⁴⁸ Today, Gough continues his quest to extend virtual visitation legislation nationwide.⁴⁹

A. Utah

The amendments to Utah's law were enacted in 2004, making the state "the first. . .state to legislate the authority of judges to include virtual visitation in divorce decrees."⁵⁰ The law's general description states: "This bill provides that, if available, reasonable virtual access be permitted and encouraged between children and a noncustodial parent."⁵¹

The bill does not authorize courts to use virtual visitation as a substitute for physical contact, but specifically asserts that "virtual parent-time," consisting of telephone and various internet communications be used "to supplement, not replace, in-person parent-time."⁵² Thus, it appears that Utah recognizes that courts may have a tendency to use the availability of internet communications as a crutch in deciding difficult relocation cases, favoring the move if alternatives to physical contact, such as webcams, are offered. By expressly denying the virtual world as a viable substitute for face-to-face interaction, the bill acknowledges that nothing can compare to actual in-person contact in preserving the parent-child bond.

Another major amendment to Utah's law pertains to communications between the noncustodial parent and child.⁵³ The law commands that each parent must "permit and encourage" communications between the other parent and child, including internet communications, if the technology is reasonably available.⁵⁴ Although the two parents have decided to part ways from each other, they both must do that which is necessary to cultivate the child's relationship with the other parent. When there is a disagreement about whether or not virtual visitation is "reasona-

⁴⁸ *See Id.*

⁴⁹ *See* InternetVisitation.org, <http://www.internetvisitation.org> (last visited September 24, 2007) (Michael Gough is the President of www.InternetVisitation.org).

⁵⁰ Elizabeth Millard, *Live-Action Interaction: Virtual Visitation Diminishes Distances Between Divorced Parents and Their Kids*, 91-Nov A.B.A.J 24.

⁵¹ 2004 Utah Laws 321.

⁵² *Id.* at 30-3-32(3)(d).

⁵³ *Id.* at 30-3-32(12).

⁵⁴ *Id.*

bly available,” the court will decide the matter after considering “(a) the best interests of the child; (b) each parent’s ability to handle any additional expenses for virtual parent-time; and (c) any other factors the court considers material.”⁵⁵ Certainly, a material factor for the court to bear in mind would be the age of the child at issue, for example, whether the child is old enough to operate a computer by herself, especially if it is important for parent-child communications to remain private, or whether a teenager with a full social calendar will be able to commit to sitting down at the computer for a certain length of time each week.

B. *Wisconsin*

Wisconsin’s statute on virtual visitation is more recent. Enacted in 2006, Wisconsin’s law relates to “granting a parent electronic communication with a child.”⁵⁶ Similar to Utah’s law, Wisconsin’s statute declares that it is within the court’s discretion whether or not to incorporate virtual visitation into a parenting plan, and when such visitation is ordered, it “may be used only to supplement a parent’s periods of physical placement with the child. Electronic communication may not be used as a replacement or as a substitute for a parent’s periods of physical placement with the child.”⁵⁷ Also parallel to Utah’s law, the Wisconsin statute mandates that courts take into consideration the child’s best interests as well as the reasonable availability of the technology when determining whether virtual visitation should be integrated in the custody schedule.⁵⁸

There are two major differences between the legislation in Utah and Wisconsin. First, Wisconsin’s law stipulates that when a court orders virtual visitation where one parent has supervised visitation rights only, the electronic communication between that parent and his or her child must also be supervised.⁵⁹ Although this requirement might seem overly cautious, since virtual visitation pertains to situations where there is no physical contact, and therefore the parent would not be able to physically harm the child, it is logical to limit these virtual visits just like any other

⁵⁵ *Id.*

⁵⁶ 2005 Wis. Sess. Laws 174.

⁵⁷ Wis. Stat. § 767.41(4)(e) (2007).

⁵⁸ *Id.*

⁵⁹ *Id.*

visit. Not only has the noncustodial parent not earned the privilege of unrestricted access to his or her child, that parent may be in need of supervision because of the effect his or her behavior has on the child mentally and emotionally, in addition to the physical effects; for example, the internet does not protect a child from a parent's abusive language, which could result in psychological injury to the child in some cases. Supervision of the parent, even over internet communications, can curtail abusive behavior before it goes any further, or provide the opportunity to remove the child from a harmful interaction.

A second significant addendum included in Wisconsin's statute, which is absent from Utah's law, is the explicit admonishment of and warning against using the internet to justify granting a relocation request when the move is contested: "The court may not use the availability of electronic communication as a factor in support of a modification of a physical placement order or in support of a refusal to prohibit a move."⁶⁰ This provision may assist in allaying some of the fears many parents feel regarding possible diminished physical visitation with their children due to the potential for alternative visitation methods that the internet provides. If relocation is allowed, theoretically at least, it will not be attributable to the moving parent's ability and willingness to install webcams in each of the parent's homes. The internet is an inadequate surrogate when it comes to parenting, and modification of something as crucial as parenting time should depend upon parenting skills, availability, a child's best interests, and many other factors, not on whether or not a child will be able to see her parent on a webcam. Of course it is debatable whether or not such a factor actually enters a judge's mind, since other, otherwise-sufficient reasons may be offered to support a conclusion favoring the move, regardless of the judge's unspoken considerations.

C. Texas

In June 2007, Texas enacted its virtual visitation law.⁶¹ Agreeing with its predecessors, the Texas statute insists that electronic communication, when ordered, is a supplement to physical

⁶⁰ Wis. Stat. § 767.481(5m)(b) (2007).

⁶¹ See InternetVisitation.org, *supra* note 16.

parenting time,⁶² and “is not intended as a substitute for physical possession of or access to the child, where otherwise appropriate.”⁶³ This language is not as strong as that in the earlier statutes. But given the highly discretionary nature of custody arrangements and the difficulty in monitoring how such decisions are reached, it is unlikely that any language could be strong enough to alleviate all of the concerns over whether the internet is taking the place of face time between parents and their children. Texas follows the trend set by Utah, requiring courts to consider the child’s best interests, reasonable availability of electronic communication to the parties involved, and any other appropriate factors, when deciding if virtual visitation is appropriate in each case.⁶⁴

While Texas does not specifically refer to relocation, as Wisconsin does, the statute incorporates a variation on another Wisconsin invention in the world of virtual visitation laws: where the court has found domestic violence in a case, “the court may award periods of electronic communication under this section only if. . .(2) the terms of the award: (B) include any specific restrictions relating to family violence or supervised visitation, as applicable, required by other law to be included in a possession or access order.”⁶⁵ Therefore, although virtual visitation should not be viewed as equivalent to physical parenting time in most respects, when it comes to domestic violence, precautions must be taken whether interactions between parent and child are in-person or online.

Texas adds a new provision to the mix, rejecting the use of virtual visitation in child support calculations.⁶⁶ Therefore, for example, virtual visitation time would not count toward a non-custodial parent’s actual time with the child as a factor used in lowering the amount of child support owed to the custodial parent. The provision is consistent with the notion that virtual visitation is not equivalent to physical visitation. The noncustodial parent, when interacting with his or her child via the internet, is not providing food, clothing, or other necessities for the child,

⁶² Tex. Fam. Code Ann. § 153.015(b) (Vernon 2007).

⁶³ *Id.* at § 153.015(d).

⁶⁴ *Id.* at § 153.015(b).

⁶⁵ *Id.* at § 153.015(e).

⁶⁶ *Id.* at § 153.015(d).

and consequently is not incurring additional expenses during the course of the “visit” so as to justify a reduction in child support obligations. Moreover, a custodial parent who finances such visitation by installing internet services, webcams, and the like into the homes of both parents should not receive more in child support payments from the noncustodial parent because of the contributions to facilitate internet communications; after all, it was the custodial parent’s relocation itself which made necessary the internet services used to maintain continuous interaction between the child and noncustodial parent.

D. Florida

Just days after the Texas enactment, Florida became the most recent state to pass a virtual visitation statute to date.⁶⁷ Regarding the use of technology to facilitate parent-child communication, Florida’s law uses firmer language than those that came before, stating that “[e]lectronic communication may be used *only* to supplement a parent’s face-to-face contact with his or her minor child. Electronic communication *may not* be used to replace or as a substitute for face-to-face contact.”⁶⁸ Although, as stated above, it may be impossible to eliminate the possibility of substituting physical interactions with virtual time, the stronger language makes Florida’s intentions unmistakable.

Florida asks courts to consider the same basic factors as the other states, when deciding whether an order for electronic communication is appropriate: the child’s best interests, reasonable availability and affordability of the technology, and other material factors.⁶⁹ But one more factor is included in the analysis, that of “[e]ach parent’s history of substance abuse or domestic violence.”⁷⁰ The inclusion of this factor shows recognition of the inability to completely shield a child from some kinds of harm, even if the possibility of physical harm is removed.

Unlike Wisconsin’s prohibition of using electronic communication’s accessibility to sway a decision in support of or against relocation of one parent with the child,⁷¹ Florida merely pros-

⁶⁷ See InternetVisitation.org, *supra* note 46.

⁶⁸ Fla. Stat. § 61.13002(4) (2007) (emphasis added).

⁶⁹ *Id.* at § 61.13002(1)(a)1, 2, 4.

⁷⁰ *Id.* at § 61.13002(1)(a)3.

⁷¹ *Supra* note 60.

cribes employing it as “the sole determinative factor when considering relocation.”⁷² Therefore, if a webcam or email is available to both parties in a relocation case, a Florida court may take the technology into account, along with other considerations, when making its decision. However, Florida excludes child support calculations from its list of permissible topics for which electronic communication may be considered.⁷³

E. Progress in Other States

Many states have drafted bills in the past year that are anticipated to become law in the near future. Most of those states have adopted Utah’s provisions, with only minor variations. For example, Illinois’s, New Jersey’s, and South Carolina’s bills were introduced in the past few years and track Utah’s language closely, including using virtual visitation as a supplement to physical visitation and not as a replacement, as well as the factors for a court to consider when determining if the technology is reasonably available: the child’s best interests, the parents’ available financial resources to provide for virtual visitation, and other relevant factors.⁷⁴

Many other states are on the road to incorporating virtual visitation in their custody statutes.⁷⁵ Some of the states with pre-draft bills already created are Washington, California, Georgia, North Carolina, Colorado, and Missouri.⁷⁶ Among those states that are not far behind in the process are Minnesota, Kansas, Oregon, Indiana, West Virginia, Pennsylvania, Maryland, New York, and Maine.⁷⁷ It remains to be seen if the above-named states will include provisions in their bills banning the use of virtual visitation as a factor in deciding relocation cases, or whether they will tackle other issues that are sure to emerge after cases have been decided under other states’ virtual visitation statutes. It can be surmised that most states, if not all, will plainly aver

⁷² Fla. Stat. § 61.13002(6).

⁷³ *Id.* at § 61.13002(7).

⁷⁴ H. 5379, 94th Gen. Assem., (Ill. 2005); Assem. B. 3107, 212th Leg. (N.J. 2006); S. 1344, 116th Sess., Gen. Assem. (S.C. 2005).

⁷⁵ See InternetVisitation.org, *supra* note 46.

⁷⁶ See *Id.*

⁷⁷ See *Id.*

that internet interactions shall be used to supplement, not replace, in-person parenting time.

Just under half of the states do not have any legislation pending regarding the use of virtual visitation in parenting plans at present,⁷⁸ but it seems that the trend is moving in the direction of incorporating internet technology into visitation schedules. With the always-expanding use of the internet to bridge gaps in communication, there may even be a day in the foreseeable future when each of the fifty states uses some variation of Utah's law on when such visitation may be proper.

IV. The Effects of Virtual Visitation on the Parent-Child Relationship

The relationship that a child has with his or her parents has a huge impact upon who that child will eventually become. Nature versus nurture has always been a lively debate: which plays a greater role in the development of a child, genetics or lifetime experiences and environment?⁷⁹ Most researchers now agree that each has a large influence on an individual's personality.⁸⁰

The nurture aspect of human development begins from birth with the parent-child relationship. Even very early in their lives, children are affected by the myriad happenings in the world around them,⁸¹ especially by that which transpires in their own homes: how their parents interact with each other,⁸² how much time the child spends with each parent, and the types of activities

⁷⁸ See *Id.*

⁷⁹ See Ilene Knable Gotts, David A. Schwartz, Damian G. Didden, & Daniel E. Hemli, *Nature vs. Nurture and Reaching the Age of Reason: The U.S./E.U. Treatment of Transatlantic Mergers*, 61 N.Y.U. Ann. Surv. Am. L. 453, 453 (2005) (citing generally Psychology, Microsoft Encarta Online Encyclopedia, 2005, at http://encarta.msn.com/encyclopedia_761576533/Psychology.html).

⁸⁰ See *Id.*

⁸¹ See, e.g., Judith S. Wallerstein and Tony J. Tanke, *To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce*, 30 Fam. L.Q. 305, 307 (Summer 1996) (citing John Bowlby, *Attachment and Loss* (2d ed. 1982)).

⁸² See Mark D. Matthews, *Curing the "Every-Other-Weekend-Syndrome": Why Visitation Should Be Considered Separate and Apart from Custody*, 5 Wm. & Mary J. Women & L. 411, 414 (Spring 1999) (citing Robert E. Emery, *Renegotiating Family Relationships: Divorce, Child Custody, and Mediation* 217 (1994)).

that time involves, to name but a few. How, then, is the parent-child relationship transformed when a child, because of her parents' divorce, does not see both of her parents each day? And what occurs within a child when she cannot see one of her parents for long periods of time due to relocating with the other parent? Can any negative effects of this distancing be alleviated through virtual visitation, or does internet communication with the noncustodial parent further cement the reality that one parent is no longer a physical presence in the child's everyday life, thus making the coping process that much more difficult and painful for the child?

Regrettably, relocation is all-too-often viewed from the parents' perspectives: one parent's right to move is pitted against the other parent's right to a continuing relationship with the child.⁸³ However, relocation disrupts a child's life in dramatic ways, often removing her from the only home she's ever known, her school and friends, and at least one of her caregivers. Due to the limited research on the effects of relocation as a whole,⁸⁴ this section discusses some of the positive and negative aspects of virtual visitation as construed by various commentators, as well as those effects perceived by children and parents who have gained insight from experience.

A. *The Scholarly Debate*

Dr. Judith Wallerstein, a renowned researcher on the lasting impact of divorce on children,⁸⁵ determined that nothing indicates "that frequency of visiting or amount of time spent with the noncustodial parent over the child's entire growing-up years is significantly related to good outcome in the child or adolescent."⁸⁶ Instead, "it is the substance and character of the parent-

⁸³ See David S. Rosettenstein Nat'l Interdisciplinary Colloquium on Child Custody Law, *Mental Health Aspects of Custody Law* 252 (Robert J. Levy ed., 2005).

⁸⁴ See Wallerstein & Tanke, *supra* note 81, at 307; Waldron, *supra* note 29, at 341.

⁸⁵ See Judith Wallerstein, <http://www.divorceinfo.com/judithwallerstein.htm> (last visited March 17, 2007).

⁸⁶ Wallerstein & Tanke, *supra* note 81, at 312 (citing Judith S. Wallerstein & Sandra Blakeslee, *Second Chances: Men, Women, and Children a Decade after Divorce*, 297, 238 (1989)).

child relationship, and not the particular form, that is critical.”⁸⁷ At the heart of Wallerstein’s arguments in favor of relocation, as voiced in her *amica curiae* brief presented in the case of *In re Marriage of LaMusga*,⁸⁸ is her conviction that the most important relationship to protect when considering a relocation request is that between the child and her primary custodial parent.⁸⁹

In contrast to Dr. Wallerstein’s support of relocation, psychologist Dr. Richard A. Warshak asserted in his brief to the *LaMusga* court that children benefit greatly from daily interaction with both parents, and in-person visits with a noncustodial parent that are relegated to school holidays only simply would not suffice.⁹⁰ Warshak asserts that when a child sees her noncustodial parent only over holidays, or even if the contact occurs every weekend, the child views that parent as a playmate while the custodial parent is the rule-enforcer, which can harm the noncustodial parent-child relationship.⁹¹

Although we do not have views from Wallerstein and Warshak specifically related to virtual visitation, it may be surmised that Wallerstein would be supportive of such interaction between a child and her noncustodial parent, providing that it would be in the best interests of the child and would not interfere with the child’s relationship with her custodial parent. Warshak, on the other hand, may be skeptical, as are many noncustodial parents, in believing that courts could use the internet access to further diminish in-person visitation.

Kenneth Waldron, a psychologist whose work pertains exclusively to divorce issues,⁹² maintains that virtual visitation may be appropriate for children between the ages of five and thirteen,

⁸⁷ *Id.* at 312.

⁸⁸ 88 P.3d 81 (Cal. 2004).

⁸⁹ See TheLizLibrary.org, *LaMusga*, Wallerstein Brief, <http://www.thelizlibrary.org/lamusga/wallerstein-brief.pdf> (last visited March 17, 2007); Leslie Eaton, *Divorced Parents Move, and Custody Gets Trickier*, N.Y. Times, Aug. 8, 2004.

⁹⁰ See TheLizLibrary.org, *LaMusga*, Warshak Amici Brief, <http://www.thelizlibrary.org/lamusga/submittedWarshakamicibrief.pdf> (last visited March 17, 2007).

⁹¹ Bruce Smyth, *Parent-Child Contact in Australia: Exploring Five Different Post-Separation Patterns of Parenting*, 19 Int’l J.L. & Pol’y & Fam. 1, 12 (April 2005).

⁹² See Waldron *supra* note 29, at 337.

but it is certainly not a replacement for face-to-face contact.⁹³ “The sound of the voice on a telephone is a little closer to direct experience than reading a letter. Seeing a visual representation via computer, while talking, is closer still.”⁹⁴ Nevertheless, Waldron cautions that “it would be difficult to make a convincing argument that seeing each other on a computer monitor is comparable to a hug, or showing a baseball trophy on the screen is comparable to having a parent at the game.”⁹⁵

B. *Children’s and Parents’ Perspectives*

Michael Gough, as stated above, is the father of a daughter who relocated with her mother, and he continuously sings the praises of virtual visitation, with which he has first-hand familiarity.⁹⁶ Gough’s internet “visits” with his young daughter range from 20 minutes to two hours and, he says, his daughter loves it.⁹⁷ Through their video conferencing Gough can listen to his daughter read him stories and see the developmental stages of his child, such as losing her baby teeth,⁹⁸ which he would not have been able to experience in the same way over the phone or through a letter. However, despite Gough’s enthusiasm for the alternative visitation, he admits that it does not replace the need of both parent and child for physical contact, such as the warmth that a hug can bring.⁹⁹ In fact, Gough later relocated to be near his daughter, stating,

[w]hen I realized my daughter really needed me and wanted me around more, I moved so I could be closer. I traded some virtual time for real time, and now I see her every Monday and Wednesday and every other weekend. If a dad is going to be involved in his kid’s life, he’s going to be involved. If he thinks he’ll just use [virtual visitation] to keep in touch, he probably wasn’t going to stay involved anyway.¹⁰⁰

So, although Gough is a fervent devotee to virtual visitation in relocation cases, he also acknowledges its limitations and con-

⁹³ *Id.* at 352.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ See InternetVisitation.org, *supra* note 49.

⁹⁷ See Chuck Haga, *Divorced Families Get Lifeline Online*, Star Tribune, March 27, 2006, at 1A.

⁹⁸ See *Id.*

⁹⁹ See *Id.*

¹⁰⁰ *Id.*

cedes that it is not a complete answer to promoting and maintaining parental involvement in a child's life.

A custodial mother in Colorado, Vada Dreisbach, also extols the benefits that webcams have bestowed upon the relationship between father and daughter, despite the child's youth.¹⁰¹ Young children often have short attention spans but, Dreisbach says, "[w]hen they can talk and play games and see each other, it's a lot easier to keep her engaged and focused."¹⁰² While a telephone conversation may leave a toddler with little to say and no motivation to stay on the call for more than a few minutes, webcams allow for interactive communication between parent and child. Dreisbach's daughter Arielle, now 10 years old,¹⁰³ plays games with her father over the internet and can express herself in ways a telephone conversation does not allow, some of which Dreisbach describes: "On one of the last calls she played some songs for him on her little keyboard. She gets to show him things rather than just tell him things."¹⁰⁴ Arielle agrees that virtual visitation with her father is an enjoyable experience: "It's funner [sic] than talking on the phone, because I can see him."¹⁰⁵ Even Arielle's father Charles welcomes the internet communication with his daughter, especially because it encourages Arielle to speak to him at greater lengths than does telephone contact.¹⁰⁶

Appreciation for virtual visitation comes from another non-custodial father, David List, as well. List lives in an entirely different country than his five-year-old daughter,¹⁰⁷ and the two meet in person only on occasion, but are able to keep in contact via webcams every few days.¹⁰⁸ This visual connection is important especially for a younger child for whom time moves very slowly; it might be easy for her to forget what her father—who she has seen only a handful of times in her life—looks like if she

¹⁰¹ See Amanda Paulson, *Divorced Parents Get High-Tech Link to Kids*, The Christian Science Monitor, March 30, 2006, at 1.

¹⁰² *Id.*

¹⁰³ Lynette Clemetson, *Virtual Visitation*, The Kansas City Star, Sept. 12, 2006, at E1.

¹⁰⁴ Paulson, *supra* note 101.

¹⁰⁵ Clemetson, *supra* note 103.

¹⁰⁶ *See Id.*

¹⁰⁷ See Ann Sanner, "Virtual" Visits Pushed in Several States, Associated Press, Feb. 28, 2006.

¹⁰⁸ *See Id.*

does not see his image often. List feels that his overall connection to his daughter is strengthened through the internet interactions because there are no extensive gaps in communication. He says of their in-person visits, “[w]hen she gets off the plane, I know what she had for dinner last night. She’ll run right up to me and jump in my arms because I know exactly what she’s all about.”¹⁰⁹

V. Conclusion

Divorce has become a fact of life in many American families, as has the subsequent relocation of one parent. While children arguably fare better existing in a loving and supportive nuclear family in which they have physical contact with both parents each day, for many children this is not an option. Therefore, parents and the legal system must decide what will be the second-best choice concerning a child’s best interests.

Virtual visitation is gaining popularity and, as indicated by the large number of states with plans for allowing such visitation to be ordered by statute, it is not likely to disappear. The good news is that each state that has proposed a bill thus far to allow incorporation of virtual visitation into parenting plans has also included a provision stating that this alternative visitation is not to be used to replace physical visitation. The bad news is that the mandate to use virtual visitation as a supplement to, and not a substitute for, regular visitation cannot be regulated with any degree of certainty; using this language does not remove the possibilities for abuse of the alternative visitation by parents or judges.

Many debates have arisen over the benefits and detriments of virtual visitation. The one thing that everyone seems to agree on is that regardless of the internet’s convenience and efficiency, and the many wonderful tools that have been invented to bring two people closer no matter how far they are physically distanced, the internet will never be capable of fulfilling all of the many benefits of physical interaction between a parent and child.

Elisabeth Bach-Van Horn

¹⁰⁹ *Id.*