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Domestic Relations Law Virtual Visitation: The Next Generation Of Options For Parent-Child Communication

By Kimberly R. Shefts

Within the past year, virtual visitation has been touted as cutting-edge family law. Because the majority of the cases involve relocation, the debate has been framed as the right of the custodial parent to move versus the right of the non-custodial to remain in close physical proximity to his or her children. This article's purpose is two-fold. First, it discusses how the Internet may be utilized by parents, judges, and attorneys to promote stable and ongoing relationships between non-custodial parents and their children. Second, it attempts to gather the relevant information currently available for the benefit of practitioners.

How custody and visitation cases are decided. Child custody is defined as the right and duty to care for a child on a day-to-day basis and to make major decisions regarding the raising of the child. The best-interest- of-the child standard is usually determined by weighing various factors that are set out either statutorily or in case law, with some states favoring joint custody and others rejecting it as a presumption.

The Illinois Marriage and Dissolution of Marriage Act is representative of the factors considered in most jurisdictions regarding the initial custody determination. Among the factors to be weighed in determining the child's best interests are: (1) the wishes of the child's parents as to his custody; (2) the wishes of the

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child as to his custody; (3) the interaction and interrelationship of the child with his parents, siblings, and any other person who may significantly affect the child's best interest; (4) the child's adjustment to his home, school, and community; (5) the mental and physical health of all individuals involved; (6) the physical violence or threat of physical violence by the child's potential custodian, whether directed against the child or directed against another individual; (7) the occurrence of ongoing abuse; and (8) the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child.

States differ considerably when it comes to allowing the custodial parent to remove the child from the jurisdiction. Whereas, traditionally, most states allowed a parent with sole custody to move with the children without question, with the advent of joint custody and unhappy non-custodial parents, several states have placed restrictions on removing a child from the state with an emphasis on preserving the continuity in the relationship between the children and the non-custodial parent. Among the factors that courts consider in deciding whether to allow the relocation are (1) the custodial parent's reasons for the move; (2) the non-custodial parent's reasons for opposing the move; (3) the direct and indirect advantages to the child from the move, including the extent to which the move is likely to improve the quality of life for both the child and the custodial parent; and (4) the degree to which visitation can be restructured to preserve the relationship between the child and the non-custodial parent.

Balanced against the direct and indirect benefits gained from the move is the potential burden on the relationship of the non-moving parent and child. The courts will determine whether visitation can be restructured to preserve that relationship. Restructuring visitation usually means scheduling physical visitation for more time during the summer and

over school holidays, often resulting in the non-custodial parent having more days per year with the child than she would have had under the original schedule, but in less frequent intervals of time. While the opponents of Internet-based visitation fear that technology-based provisions will take the place of physical visitation, that assumption has not been borne out in the reported cases. The orders have been restructured to give parents the same amount of visitation time as before the move, and in addition to the restructuring, the courts have ordered that technology-based communications be available for the parties to utilize.

Incorporating virtual visitation into parenting agreements and orders. Parents and children can engage in any number of activities together over the Internet, in real time, or individually as time permits. All that is required is a basic Internet package, which comes preloaded in most computers purchased today.

Procedurally, who should raise the possibility of the use of technology being written into a proposed agreement, plan, or court order? The family law section of the Association of Trial Lawyers of America recommends that the party petitioning the court for permission to leave the jurisdiction in relocation cases offer evidence of the availability and cost of different modes of communication, including the use of video conferencing and e-mail. And it appears from the reported cases that it has been the party seeking leave of the court who has suggested the use of technology as a means of continuing the ongoing relationship of the non-custodial parent and the children in the majority of cases.

While some feel that an Internet-based communication provision is not advisable where the parents live close to one another, others feel that such communication can be beneficial in almost all cases. Procedurally, where a determination is based on the best interest of the child, there is no reason that anyone involved in the case could not raise the issue as a possibility for keeping the children more consistently in contact with the parents.

While the cost of technology is lower than it has ever been, there is still an added expense in providing the equipment for two homes and in the ongoing monthly service fees that are necessary to maintain the communication devices. Several Internet service providers are free of monthly costs, however, as are some video conferencing systems. Additionally, children

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often have e-mail accounts at school or through the public library, and parents have them at work, so even if the parties cannot afford systems of their own, it is often possible to utilize alternative sources to communicate more frequently. Moreover, because the Internet is accessed through a local telephone number, it may actually be much less expensive to communicate online than over the phone.

Working a new technology into an established model:

Drafting language. At a minimum, the language should cover who pays for the necessary equipment and services, as well as the required quality of the Internet access, such as a minimum of a 56K modem or a DSL connection. Additionally, the language should make clear that the parents will at all times maintain the privacy of the information shared between the non-custodial parent and the child, and that both parties agree they will not use the child to communicate messages to the other parent. Language can also be used to punish noncompliance with the order, such as providing for remedies, sanctions, or the contempt power of the court.

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- **This article** is an abridged and edited version of one that originally appeared on page 303 of *Family Law Quarterly*, Summer 2002 (36:2).

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