

# Virtual Visitation: Technology Hits Home

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## **RALEIGH, N.C.—** What Is 'Virtual Visitation'?

“Virtual visitation,” also called Internet visitation or computer visitation, is a way for parents to have “face time” with their children via electronic means. The various methods that parents can use for virtual visitation are personal video conference, Web cam, and video phone. Think Jane Jetson talking to Elroy. The intent is to enhance and supplement other communication time (face-to-face and telephone) between parents and children.

Other methods of electronic communication that some consider virtual visitation include e-mail, chatting in a private chat room, instant messaging, and interactive game playing by a parent and child from remote computers, but these methods do not provide the critical “face-to-face” communication that advocates of virtual visitation champion.

Most reported cases concerning virtual visitation have addressed how non-custodial, divorced parents can communicate with their children. This is, of course, not the only application of virtual visitation. Any parent who is away from a child while traveling on business or vacation, in the military, or in a correctional facility can and should take advantage of this new technology.

Grandparents and other relatives can also use virtual visitation to share time with their loved ones.

Virtual visitation is not and should not be regarded as a replacement or substitute for personal contact between a parent and child, however. Its availability should never be justification for the relocation of the custodial parent. It is merely a factor the court can consider when determining how the parent-child relationship will be affected by custodial parent relocation.

## **Legislation**

Utah was the first state to codify the concept of virtual visitation. It defines “virtual parent-time” as “parent time facilitated by tools such as telephone, e-mail, instant messaging, video

conferencing, and other wired or wireless technologies over the Internet or other communication media to supplement in-person visits between a non-custodial parent and a child or between a child and the custodial parent when the child is staying with the non-custodial parent.

Virtual parent-time is designed to supplement, not replace, in-person parent-time. In addition, “Each parent shall permit and encourage, during reasonable hours, reasonable and uncensored communications with the child, in the form of mail privileges and virtual parent-time if the equipment is reasonably available, provided that if the parties cannot agree on whether the equipment is reasonably available, the court shall decide whether the equipment for virtual parent-time is reasonably available.”

Wisconsin followed with legislation in 2006.

Wisconsin defines “electronic communication” as “time during which a parent and his or her child communicate by using communication tools such as the telephone, electronic mail, instant messaging, video conferencing or other wired or wireless technologies via the Internet, or another medium of communication.”

The statute goes on to consider the availability of electronic communication as a factor in determining custody and parenting time. On the other hand, the relocation statute specifically states that the court may not use the availability of electronic communication to support the modification of a physical placement order or the refusal to prohibit a move.

Missouri passed a virtual visitation bill, but the 2006 session ended before Gov. Matt Blunt signed it. It will have to be affirmed in the 2007 General Session.

According to the National Conference of State Legislatures, virtual visitation legislation has been introduced in Ohio, Illinois, Virginia, and Florida. Bills have also been drafted in California, Georgia, Maine, Maryland, Minnesota, New York, North Carolina, Tennessee, Texas, and West Virginia, but they are awaiting sponsors.

Although some advocates are pushing for legislation to enable judges to grant virtual visitation, many family law experts believe such legislation is not necessary; a judge has the inherent authority to provide for such visitation, as demonstrated in the case law.

## Cases

The case that threw virtual visitation into the spotlight was *McCoy v. McCoy* in 2001. In that

case, the mother petitioned the court to allow her to relocate. She worked as a freelance Web site designer, and she wanted to move to California to accept a permanent job with health benefits. She proposed a visitation schedule that would give the father the same number of total days with the child, but would group those days around the child's school vacation schedule. She also proposed setting up a Web site with streaming video that would allow the father and the child to see each other in real time over the Internet. The father opposed the move, arguing that it was not in the child's best interests and that it would damage his relationship with his child.

The appellate court disagreed and allowed the mother to relocate. The court first noted that whenever a custodial parent moves to a distant location, the ability of the non-custodial parent to exercise visitation is adversely affected. That fact alone, however, may not be contrary to the best interests of the child if an alternate visitation schedule continues and preserves the relationship between the child and the non-custodial parent.

The court wrote, "We believe that the mother's suggested use of the Internet to enhance visitation was both creative and innovative. In dismissing that suggested use, the trial court never focused on the actual alternative visitation schedule proposed by the mother and whether it was comparable to the father's current schedule or inimical to the best interest of the child."

A key factor in the McCoy case was that the non-custodial father would have the same or a greater number of total days with the child. The Internet, in this case, would actually supplement that visitation. A few decisions before McCoy had hinted at the same principle, for example *In re Marriage of Thielges* in Iowa, *In re S.M.* in Missouri, *Lazarevic v. Fojelquist* in New York.

The decision in McCoy was relied upon in two Connecticut trial court cases granting relocation. In *Arriaga v. Gambardella* (2002), the court ordered: "The parties shall immediately explore the use of the Internet for virtual visitation or online conferencing. Each party will be responsible for its own expenses in purchasing a computer and related hardware and software and obtaining and maintaining Internet access.

This court will retain jurisdiction over any motions or proceedings addressed to implementing this paragraph." The court also relied on McCoy in *Armstrong v. Armstrong* (2002). In *Hernandez-Mora v. Jex*, (2001), a case in federal court in Colorado, the parents settled the case by having the child and father live in Spain, while the mother remained in the U.S. The agreement spelled out that the father:

- would provide an appropriate computer and service plan for the mother before the child and father remove themselves to Spain
- would pay for necessary service upgrades
- would pay for a DSL line or greater quality bandwidth service for the mother for two years
- create and maintain a Web site for the child with the child's schedules, activities, pictures and information
- ensure that the mother's privacy is protected.

A 2002 case in Massachusetts, *Cleri v. Cleri*, also shone the spotlight on virtual visitation and generated much publicity. The trial judge awarded the ex-wife custody of her three small children and gave her permission to move the children to Long Island, N.Y. The trial judge granted two weekend visits a month to the ex-husband. The ex-husband would also have virtual visitation on Tuesdays and Thursdays from 6 to 7 p.m. The judge ruled that the computer conferences are relatively cheap and would allow the ex-husband to read to his children and help them with their homework. This case became a rallying point for those opposed to virtual visitation. They argued that the judge was substituting virtual time for real time, to the detriment of the father.

## **Drafting an Agreement**

Internet visitation agreements can be general or very detailed, depending on the issues addressed. At the least, the agreement should state that the custodial parent will ensure that any information transmitted between the non-custodial parent and the child remains private between the non-custodial parent and child.

Parties should also agree that they will not use the child to communicate any issues related to the divorce, and the agreement should punish non-compliance, with the remedies or sanctions clearly spelled out. For example: If the agreed-upon electronic communications are not in place for a certain period of time, then the caretaker parent of the child will send the child for an extra weekend at his or her expense to visit with the parent remaining behind.

The agreement should specify who pays for the necessary technology, including computer, computer access to the Internet, web camera, e-mail, and necessary software. In addition, the agreement should specify the required level of quality of the Internet access. A DSL line or greater quality bandwidth should be required. The language used in *Hernandez-Mora v. Jex* (2001) specifies that “[e]ach party may make reasonable telephone, e-mail, or videoconferencing contact with the child while the child is at the home of the other party, during reasonable hours,” so long as it is not disruptive to the child's schedule. The father was also to provide an appropriate computer and service plan to be delivered to the mother's

residence, and he was to be completely responsible for computer costs, including monthly DSL and Internet service for two years.

The 2001 Supplement to Jeff Atkinson, *Modern Child Custody Practice* (2d ed. 2000), § 5.34A provides the following form for Internet visitation: Each parent shall allow the other parent reasonable contact with the child by use of the Internet. Reasonable contact shall include sending and receiving e-mails, sending and receiving "instant messages," and sending and receiving photographs.

The following may also be used: (A) By not later than December 1, 2000, former wife shall purchase or lease a separate, state of the art computer system together with appropriate computer furniture for Child's sole and exclusive use in her bedroom, which will feature video-conferencing equipment and software, including a video camera with audio capabilities, for Child to privately contact her father via internet and e-mail systems.

(B) By not later than December 1, 2000, former husband shall purchase or lease a separate, state of the art computer system together with appropriate computer furniture for Child's sole and exclusive use in her bedroom in Florida, which will feature videoconferencing equipment and software, including a video camera with audio capabilities, for Child to privately contact her mother via internet and email systems. Father shall also obtain and pay for internet access service for the child which can be utilized by the child at either residence.

## **Pros and Cons**

Of course, not everyone favors virtual visitation. Many express concern that instead of supplementing in person contact, it will be used to limit in person contact. "You can't hug a child through a computer" is a common refrain. Others worry that virtual visitation may be used as support for a custodial parent's relocation.

Supporters of virtual visitation point out that the Utah and Wisconsin legislation specifically provide that virtual visitation is in addition to, not instead of, personal contact. Legislation is needed, they say, to make judges aware of their options. Judges tend not to be aware of technological advances that can aid parties.

Regardless of whether one supports or opposes virtual visitation, the fact is that virtual visitation is a fact, and attorneys, psychologists, and others involved in family law should be aware of its uses and abuses.

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