

## Virtual Visitation: A New Factor in New York Relocation Cases?<sup>1</sup>

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Long-distance parenting is a reality of many divorces. The National Center for State Courts reports that “an estimated 18 million children have separated or divorced parents. Twenty-five (25%) percent of those children have a parent living in a different city, and within four years after separation or divorce, seventy-five (75%) percent of single mothers will relocate at least once. Of that number, at least half will relocate a second time. As a result, nearly 10 million children do not have regular, face-to-face interaction with one of their parents.”<sup>2</sup>

One solution for parents and children of divorced and separated families who are unable to have regular, face-to-face contact is to connect using virtual visitation on a regular, even daily basis, to foster and maintain a meaningful relationship.

A study conducted in Massachusetts on the user satisfaction of virtual visitation among divorced families found, in general, that virtual visitation was positively viewed by the parent exercising such access as well as by the child. Virtual presence technology, such as Skype, as compared to telephone calls and text messaging, was found to be a “warm and communicative medium” whereas the latter were deemed “distancing and cool” mediums.<sup>3</sup> Some parent participants in the study described virtual presence technology as: “More engaging and makes you feel closer;” “The children would rather Skype with their grandparents and father than talk on the phone;” “One child told a parent after a bedtime Skype, ‘now I can go to sleep.’”<sup>4</sup> The study also found that virtual presence technology contact resulted in much greater time spent communicating than the telephone. The average phone call was 8 minutes, while the average video call/internet chat lasted 32 minutes.<sup>5</sup> Two children were quoted saying, “I don’t miss my Mom so much when I can see her and talk to her whenever I want to” and “I really like FaceTime with my Dad. He helps me with homework especially Math, ‘cause Mom is not good at it.”<sup>6</sup>

While virtual visitation appealed to its users in the study, and has been adopted into law in seven states, it is not a concept supported by all. Critics of virtual visitation fear that it will provide custodial parents with more latitude in relocation cases by allowing custodial parents to offer the promise of virtual visitation to obtain the Court’s permission to relocate with a child.

As of January 2013, the following seven states passed legislation, or in the case of Indiana, court rules, on the use of virtual visitation (sometimes referred to as “Electronic Communication”): Utah (§§ [3-3-33](#) and [3-3-35](#) (2004)), Wisconsin Chapter [767.41\(4\)\(e\)](#) (2005); Texas (Family Code § [153.015\(b\)](#) (2007)), Florida (§ [61.13002](#)), Illinois ([750 ILCS 5/607](#), 2009),

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<sup>1</sup> As published in the Westchester County Bar Association, *Domestic Law Review*, Vol. 24, No. 1 (Sept. 2014).

<sup>2</sup> *Virtual visitation: a sensible child custody option*, The Washington Times (April 15, 2012). Myra Fleischer

<sup>3</sup> Wolman, R., & Pomerance, R. (2012). *Telepresence Technology in Divorce and Separation*, Open Access Journal of Forensic Psychology, 4, 51-68.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

North Carolina (G.S. § 50 - 13.2 (2009), and Indiana Rules of Court: Parenting Time Guidelines (2009).

As of right now, there is no virtual visitation law in New York State. However, there is a pre-draft bill for New York State (as well as 19 other states) that is awaiting sponsorship and introduction into the state legislature.<sup>7</sup> The pre-draft virtual visitation bill for New York State seeks to amend Section 240 of Domestic Relations Law Article 13, Section 640. The virtual visitation movement is in direct response to the Utah divorce case of Michael Gough. Following his 2002 divorce, Mr. Gough's ex-wife sought to relocate to Wisconsin with their 4-year old daughter, thus jeopardizing his ability to maintain regular communications with his daughter from his residence in Utah.<sup>8</sup> Mr. Gough, a computer security specialist, successfully persuaded the trial court to grant him virtual visitation with his daughter by demonstrating to the court how easy it is to use video-conferencing technology.<sup>9</sup> Subsequent to Mr. Gough's award of virtual visitation, he demonstrated the use of video-conferencing technology to the family law section of the Utah State Bar Association, which inspired one of the attorneys present to draft legislation creating a presumption of allowing virtual visitation in Utah custody cases.<sup>10</sup> Utah's statute became the model for the other six states that have virtual visitation laws and the 19 pre-draft bills, as it was the first state to enact virtual visitation into law in 2004.

Under the proposed draft bill for New York, virtual visitation is defined as, "time that a parent spends with his or her child during which the child is with the other parent, but which is facilitated by the use of 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." This is the definition of virtual visitation that has been adopted for purposes of this article.

In addition to defining virtual visitation, the proposed bill draft prescribes when and how virtual visitation should be used by the Courts. The following instructions are expressly set forth in the pre-draft bill:

- (1) Virtual visitation may not be used as a replacement or substitute for parental rights and responsibilities.
- (2) Virtual visitation with the child may be used only to supplement a parent's periods of parenting time or visitation with the child.
- (3) Virtual visitation with the child may be used only to supplement a party's contact, parenting time, or visitation with the child.
- (4) Granting a parent virtual visitation with the child shall be based on whether it is in the child's best interest and whether equipment for providing virtual visitation is reasonably available to both parents.

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<sup>7</sup> <http://www.internetvisitation.org/storage/bills/NY%20-%20Pre-draft%20Virtual%20Visitation%20Bill%20ver%201.0.pdf>

<sup>8</sup> David Welsh, *Virtual parents: How Virtual Visitation Legislation Is Shaping the Future of Custody Law*, Journal of Law & Family Studies, Vol. 11, No. 1 (2008).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

- (5) The court may not use the availability of virtual visitation as a factor in support of a modification of the parental rights and responsibilities or visitation order.
- (6) The court may not use the availability of virtual visitation as a factor in support of a modification of contact or visitation rights.
- (7) The court may not use the availability of virtual visitation as a factor in support of a removal of a child by the residential parent out of the immediate area or state.
- (8) Virtual visitation may not be used as a factor in deciding support for a child.”<sup>11</sup>

Under current New York law, if a parent with primary residential custody wishes to relocate with their child to a different state, or within the state, they will need to petition a court of competent jurisdiction for permission to do so (assuming the non-custodial parent opposes the relocation). The custodial parent seeking permission to relocate will have the burden of proving by a preponderance of the evidence that the proposed relocation is in the best interest of the child.<sup>12</sup>

When the Court is evaluating whether a proposed relocation is in the child’s best interest, the Court will conduct a fact specific analysis that takes into consideration “each parent’s reasons for seeking or opposing the move; the quality of the relationships between the child and the custodial and non-custodial parents; the impact of the move on the quantity and quality of the child’s future contact with the non-custodial parent; the degree to which the custodial parent’s and child’s life may be enhanced economically, emotionally, and educationally by the move; and the feasibility of preserving the relationship between the non-custodial parent and child through suitable visitation arrangements.”<sup>13</sup>

While New York has yet to adopt a virtual visitation statute, currently, under the best interest standard, judges can consider the availability of virtual visitation as a factor in child custody relocation cases. It was anticipated by the author that this factor, along with the emergence of virtual visitation laws in other states and the widespread popularity and use of electronic communications between adults and children, would have resulted in more New York decisions permitting relocation after factoring in the positive effects of virtual visitation on long distance parent-child relationships.

A review of recent custody relocation decisions issued by the Appellate Divisions of the First, Second, and Third Judicial Departments between January 1, 2012, and October 24, 2013,<sup>14</sup> indicates that New York courts are not using the availability of virtual visitation and access to

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<sup>11</sup> Draft New York Virtual visitation Amendments – Ver. 1.0 (May 2, 2013), available at <http://www.virtualvisitation.org/legislation/>

<sup>12</sup> *Hirtz v. Hirtz*, 108 A.D. 3d 712, 713 (2<sup>nd</sup> Dept. 2013)

<sup>13</sup> *Tropea v. Tropea*, 87 N.Y.2d 727, 741 (1996)

<sup>14</sup> With the exception of one case from the First department, *Alaire K.G. v. Anthony P.G.*, 925 N.Y.S.2d 417 (2011), that was decided on May 31, 2011.

enhanced communications technology as a basis to justify a custodial parent's proposed relocation with a child.

Generally, in the First Department, the Court was open to considering the availability of virtual visitation in custody relocation cases.<sup>15</sup> In *Sonbuchner v. Sonbuchner*,<sup>16</sup> the First Department affirmed the Family Court's grant of permission for the custodial mother to relocate to North Carolina with the child. In this case, the defendant-mother was pursuing a degree in post-graduate medical clinical training. With no control over her placement, she was placed in a residency program in North Carolina. In granting the defendant-mother's relocation request, the Court noted that while a visitation schedule following the relocation had not yet been ruled upon, "any diminution of regular in-person contact can be addressed in a visitation order that provides for phone or Skype access following the move."

The decisions rendered by the Second Department addressing this issue did not follow a general trend, but varied from case to case. For instance in *Francis-Miller v. Miller*,<sup>17</sup> the Appellate Division overturned the Family Court's decision, which initially found that it was in the four-year old child's best interest to relocate to the mother's native country, South Africa, to live with the mother's close, extended family because doing so afforded a better financial and emotional environment for the mother and child. In permitting the relocation, the Family Court granted the father four visits with the child paid by the mother (two in South Africa and two in the U.S.) plus Skype, telephone, and email communications.<sup>18</sup> This was a case where the father and mother had a rocky relationship marred with altercations, an order of protection, and threats made by the father to commit suicide in the presence of the mother and child.<sup>19</sup> In reversing the Family Court's decision, the Second Department credited the psychologist's report that the father was currently emotionally and mentally stable, the fact that the father never harmed or directed anger toward the child, and that he exercised visitation with the child twice a week with her living only a quarter mile away and would not be able to maintain a good relationship through Skype communications.<sup>20</sup>

While the Appellate Division, Second Department, denied the custodial parent's request to relocate with the child in four cases<sup>21</sup> rendered between January 1, 2012, and October 24, 2013, it did permit the custodial parent to relocate with the child in five<sup>22</sup> other cases during that

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<sup>15</sup> Kevin McK. v. Elizabeth A.G., 972 N.Y.S.2d 25 (2013) (granting relocation with the proviso that the father be allowed broad access to the child in MS and remanding to Family Court to create a "liberal" visitation schedule as a remedy to compensate for the decreased face-to-face contact); *Sonbuchner v. Sonbuchner*, 947 N.Y.S.2d 80 (2012); *Carmen G. v. Rogelio D.*, 955 N.Y.S.2d 14 (2012); *Alaire K.G. v. Anthony P.G.*, 925 N.Y.S.2d 417 (2011) (Virtual visitation was used between mother and child during pendency of relocation hearing through webcam phone calls 2-3 times/week).

<sup>16</sup> 947 N.Y.S.2d 80, 82-3 (2012)

<sup>17</sup> 975 N.Y.S.2d 74 (2013)

<sup>18</sup> *Id.* at 76-77.

<sup>19</sup> *Id.* at 76

<sup>20</sup> *Id.* at 77-78.

<sup>21</sup> *Hirtz v. Hirtz*, 969 N.Y.S.2d 553 (2013); *McBryde v. Bodden*, 91 A.D.3d 781 (2012); *Retamozzo v. Moyer*, 91 A.D.3d 957 (2012); *Raffa v. Raffa*, 96 A.D.3d 855 (2012).

<sup>22</sup> *Wofford v. Marquardt*, 961 N.Y.S.2d 222 (2013); *Sahagun v. Alix*, 107 A.D.3d 781 (2013); *Eddington v. McCabe*, 949 N.Y.S.2d 734 (2012); *Shaw v. Miller*, 938 N.Y.S.2d 107 (2012); *Sweetser v. Willis*, 91 A.D.3d 963 (2012)

same period. Of the reported decisions by the said Appellate Division granting the custodial parent's request to relocate with the child, none expressly cited the availability of virtual visitation as a motivating, or even influential, factor in its decision to permit the relocation. Four of the five decisions did expressly acknowledge the formulation and implementation of a "liberal access schedule" and its ability to foster and maintain a meaningful relationship between the child and non-custodial parent. A liberal access schedule does not necessarily mean that a relocation request will be granted. In *Hirtz v. Hirtz*, the promise by a non-custodial parent of a liberal access schedule, including a promise to make sure the children have as much access as possible to the relocating parent, enabled the non-custodial parent to not only prevent the children's relocation, but also to bring about a change in custody. Based on the foregoing cases, it appears that extended visits during summer and school vacations are a main component of liberal access schedules. However, the Second Department has not yet elaborated as to whether a "liberal access schedule" includes, or can include, virtual visitation between the child and non-custodial parent.

However, contrary to the First Department's apparent willingness to consider virtual visitation as a factor under the best interest analysis, the Appellate Division, Third Department, denied the custodial parent's request to relocate with the child in *Rose v. Buck*<sup>23</sup>, *Scott VV v. Joy VV*<sup>24</sup>, and *Byron v. Davis* (a Supreme Court case)<sup>25</sup> despite the availability and promise by the custodial parent to allow virtual visitation (or, as in the case of *Scott VV*, the continuation of using virtual visitation). Specifically, in *Rose v. Buck*<sup>26</sup>, the custodial mother's proposal to relocate to Kentucky with phone and Skype contact for the child and father and a promise to assist the father with visits or his relocation to Kentucky did not result in the court granting the mother permission to relocate with the child. Despite the mother's willingness to continue to foster the father and child's relationship, the *Rose* Court only modified the custody judgment to allow her to relocate no more than 50 miles from her current residence. There were several factors weighing favorably for granting the mother permission to relocate with the child, such as a "comfortable lifestyle and economic improvement awaiting the mother and child in Kentucky, the stability offered by the mother's new post-divorce family unit, including the child's new half-sibling, the mother's ability to work part-time at home, the child's very close relationship with her mother who has always cared for her and the child's newly formed positive relationships with Rose and his extended family."<sup>27</sup> Despite all the supporting factors, the Court, contrary to the First Department in the case of *Kevin McK v. Elizabeth A.G.*,<sup>28</sup> found the impact of the move on the child's future relationship with the father to be "the" central concern,<sup>29</sup> where in *Kevin McK v. Elizabeth A.G.*, the Court did not consider the impact of a move on the non-custodial parent's future relationship with a child to be "the" central concern to base its decision to allow relocation.<sup>30</sup>

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<sup>23</sup> *Rose v. Buck*, 962 N.Y.S.2d 356 (2013)

<sup>24</sup> *Scott VV v. Joy VV*, 103 A.D.3d 945 (2013)

<sup>25</sup> *Byron v. Davis*, 37 Misc.3d 606 (Sup. Ct. Monroe Cty 2012)

<sup>26</sup> 962 N.Y.S.2d 356, 360-61 (2013)

<sup>27</sup> *Id.* at 361.

<sup>28</sup> 972 N.Y.S.2d 25 (2013)

<sup>29</sup> *Id.*

<sup>30</sup> 972 N.Y.S.2d 25, 30-31 (2013)

A recent case issued by the Appellate Division, Third Department, *Cole v. Reynolds*,<sup>31</sup> issued on October 24, 2013, may be the start of a new trend in the Third Department toward recognizing virtual visitation and its advantages in fostering a relationship with the non-custodial parent in cases where the custodial parent's reasons for the proposed relocation are, in all other aspects, in the best interest of the child.

In *Cole v. Reynolds*, the father was the custodial parent of the parties' 15 year-old daughter and had been since she was five. The father raised the daughter with his new wife, and three-month old son, in what the court determined to be a "close and supportive family relationship."<sup>32</sup> The Appellate Division affirmed the Family Court's decision to permit the father to relocate to Bethesda, Maryland, with the parties' daughter. When granting the father permission to relocate, heightened emphasis was placed on his new wife's testimony that in addition to ordered visits, "they would often be traveling to places near the mother's home in Tioga County when visiting their parents and extended family in nearby Broome and Tompkins Counties, and they would encourage phone calls and online video chats with the mother and half siblings."<sup>33</sup>

It appears certain that virtual visitation will play a role in future relocation cases in New York State. The pace at which advances are made in digital and technological communication tools practically ensures that virtual visitation will be an issue family law practitioners will face in the future. At the forefront right now is how much weight virtual visitation should be afforded when a relocation request is considered by the courts in New York. Should the Court be precluded from considering virtual visitation, when available, as a factor mitigating in favor of the custodial parent seeking permission to relocate as would be the case if the proposed legislation were adopted? Or should virtual visitation continue to stand as, but one factor of many for the Court to consider as part of the existing best interest analysis? There are pros and cons to each that must be carefully evaluated. Right now, the best interest analysis grants New York State judges the latitude to consider virtual visitation as a factor when deciding whether to grant a custodial parent permission to relocate with a child. The proposed virtual visitation legislation, as written, broadly defines virtual visitation so as to include future technological advances, but its express prohibition upon the ability of the courts to consider virtual visitation in relocation cases limits the authority of New York judges. A revised virtual visitation statute, if enacted, could provide instructions for New York judges as to how and when virtual visitation should be considered, thereby increasing the utility of virtual visitation without waiting for case law to establish the parameters of its use, which may, or may not, be optimal. Regardless of its form, virtual visitation is a tool that every family law practitioner should be familiar with given the positive effects that it has had, and can have, connecting separated parents and children.

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<sup>31</sup> 973 N.Y.S.2d 469 (2013)

<sup>32</sup> 973 N.Y.S.2d at 471

<sup>33</sup> 973 N.Y.S.2d at 472