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SCHEDULED SKYPING WITH MOM OR DAD: COMMUNICATIVE TECHNOLOGY'S IMPACT ON CALIFORNIA FAMILY LAW

The prominence of real-time, interactive video technology provides individuals the opportunity to communicate in the face of physical separation. The iPhone 4's FaceTime application, Gmail's g-chat phone and video application, and Skype software exemplify the realm of tools that facilitate people's ability to maintain relationships despite the geographical distance between them. Accordingly, family law has adapted to apply such technology when rendering child custody decisions. More specifically, family law courts throughout the country have issued orders requiring "virtual visitation," which utilizes technology such as web cameras and other Internet tools to provide regular and visual contact between a noncustodial parent and his or her child. This Comment analyzes the national trend toward virtual visitation and then specifically examines virtual visitation's potential to impact custody rulings in California family courts. Although appellate courts throughout the country have ordered virtual visitation in relocation decisions and state legislatures have passed statutes codifying the principle, California has yet to formally recognize virtual visitation in its appellate court decisions or legislation. This Comment will illustrate that virtual visitation is a practicable solution that should be formally recognized and readily utilized in California.

I. INTRODUCTION TO VIRTUAL VISITATION

A father sees his baby crawl for the first time; a parent watches his daughter playing at the park; grandparents see their grandchild in her cap and gown; and a soldier views his wife's first sonogram from abroad. Although these events may sound like typical, daily-life occurrences, their uniqueness stems from the fact that the people described are witnessing these momentous occasions through the lens of real-time, virtual technology. These scenes are all featured in the commercial advertisement for the Apple iPhone 4's newest video-calling application, "FaceTime."¹ Apple's

1. One-tap Video Calling with FaceTime on iPhone 4, APPLE,

advertisement for FaceTime states, “[w]ith the tap of a button, you can wave hello to your kids, share a smile from across the globe, or watch your best friend laugh at your stories”² Apple’s advertisement encompasses the idea that technology can be a medium that facilitates and allows communication, although electronic, on a deep, intimate, and interpersonal level.

Apple is not alone in recognizing the prominence and importance of electronic, virtual communication.³ Given society’s reliance on communicative technologies, it is not surprising that the legal system has also adapted to include and apply such technology in its court decisions.⁴ Family law, in particular, has seen the growth of a trend called “virtual visitation,” which “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.”⁵ Virtual visitation is most frequently applied in the context of relocation cases, often termed “move-aways,” in which the custodial parent wishes to relocate with the couple’s child against the wishes of the noncustodial parent.⁶ Relocation is likely to be challenged when the noncustodial parent’s visitation or custodial time with the child would be compromised as a result of the move.⁷ Virtual visitation can be used as part of a compromise solution, allowing the child to relocate with the custodial parent, while still maintaining and fostering a relationship with the noncustodial parent.⁸ Consequently, virtual visitation may make it more difficult for a noncustodial parent to prevent the custodial parent from re-locating.

Recently, courts throughout the country have recognized the value of virtual communication in maintaining and fostering relationships.⁹ Accordingly, there has been a wave of court decisions in which judges have or-

<http://www.apple.com/iphone/features/facetime.html> (last visited Feb. 20, 2011).

2. *Id.*

3. See David Welsh, Note, *Virtual Parents: How Virtual Visitation Legislation Is Shaping the Future of Custody Law*, 11 J.L. & FAM. STUD. 215, 215-16 (2009).

4. *Id.*

5. *Id.* at 215.

6. Sarah L. Gottfried, Note, *Virtual Visitation: The New Wave of Communication Between Children and Non-Custodial Parents in Relocation Cases*, 9 CARDOZO WOMEN’S L.J. 567, 570 (2003).

7. See *California Move Away Cases*, CUSTODYMATCH.COM, <http://www.custodymatch.com/family-law/move-away.cfm> (last visited Feb. 20, 2011).

8. See Gottfried, *supra* note 6.

9. See *McCoy v. McCoy*, 764 A.2d 449 (App. Div. 2001); see also *Baker v. Baker*, N.Y.L.J., Aug. 4, 2010, at *5 (Suffolk Cnty. Sup. Aug. 4, 2010); Anne LeVasseur, Note, *Virtual Visitation: How Will Courts Respond to a New and Emerging Issue?*, 17 QUINNIPIAC PROB. L.J. 362, 363 (2004); Gottfried, *supra* note 6, at 584.

dered virtual visitation as a condition to allow a custodial parent's relocation.¹⁰ Courts frequently base such decisions on the rationalization that it is in the child's best interest to relocate with the custodial parent, while maintaining frequent virtual contact with the noncustodial parent.¹¹ Courts in New York, Tennessee, New Jersey, and Iowa are among the many states to include virtual visitation in relocation decisions and custody orders.¹² In fact, Philadelphia Family Court Judge Robert Matthews applies virtual visitation beyond relocation cases and is one of the first judges in the country to mandate virtual visitation in *all* custody hearings that come before him.¹³ In ordering virtual visitation in move-away cases, judges can stipulate that the custodial parent can relocate if the custodial parent installs web-cameras or other similar technology, such as Skype, to allow the child to virtually spend time and interact with his or her noncustodial parent.¹⁴ Virtual visitation is ordered to *supplement* traditional physical visits when the geographic distance of a move precludes frequent, in-person visitation.¹⁵

Courts can be very specific in their orders and oftentimes note the precise form of virtual visitation that is to be used (such as video conferencing or instant messaging), the equipment that is necessary to install, which parent will pay for the equipment and Internet services, and the schedule for when the virtual visits will occur.¹⁶ Moreover, in addition to case law precedent, states such as Utah, Texas, and Florida have enacted legislation formally recognizing virtual visitation and setting the standards for its usage in the relocation context.¹⁷

Despite the rise of interactive technology, the increasing number of courts around the country ordering virtual visitation in relocation cases, and states' passing virtual visitation legislation, California has yet to formally recognize virtual visitation.¹⁸ No appellate court in California has ordered

10. See e.g., LeVasseur, *supra* note 9 at 366–69.

11. See *McCoy*, 764 A.2d 449; see also *Baker*, N.Y.L.J. at *4-5; LeVasseur, *supra* note 9, at 366–68; Gottfried, *supra* note 6, at 584.

12. Sean McCumber, *Virtual Visitation: The Who, the What, the How, & the Where: Long-Distance Parenting in the Digital Age*, SULLIVAN, TAYLOR & GUMINA: ATTORNEYS AT LAW, <http://www.stglawfirm.com/virtual-visitation> (last visited Nov. 21, 2010).

13. LeVasseur, *supra* note 9, at 363.

14. See Mark Fass, *Justice Conditions Family's Relocation on Mother Providing Skype to Facilitate Communication*, N.Y.L.J., Aug. 11, 2010, at 1.

15. See LeVasseur, *supra* note 9, at 363.

16. See Maury D. Beaulier, *Virtual Visitation in the Computer Age*, HG.ORG, WORLDWIDE LEGAL DIRECTORIES (Feb. 19, 2009), <http://www.hg.org/article.asp?id=6001>.

17. Welsh, *supra* note 3, at 216 n.9.

18. Julie Brook, *Virtual Visitation*, CONTINUING EDUC. OF THE BAR BLOG (Aug. 30,

virtual visitation as a condition precedent to allow a custodial parent to relocate, nor has the state enacted any specific legislation on the matter.¹⁹ In fact, as of 2004, the California Supreme Court in *In re Marriage of LaMusga* limited the presumption favoring the custodial parent's right to relocate, and held that courts must engage in an intricate balancing test to determine whether the proposed move serves the child's best interest.²⁰ Without a presumption in favor of relocation, it becomes difficult for a custodial parent in California to move away with his or her child.²¹

This Comment proposes that virtual visitation has the potential to shift the scales and change the way move-away cases are evaluated in California. The prospect of virtual visitation can make courts more likely to find it is in the child's best interest to relocate with the custodial parent, while having scheduled virtual visitation with the noncustodial parent. If such a finding is made, the court should then allow the relocation and mandate virtual visitation as part of the order.

In order to understand and explain the rise of virtual visitation in today's society, the Comment begins by describing the current technological trends and discussing both national and specifically California's statistics on divorce and relocation. Next, the Comment encapsulates California's historical as well as current legal standards that determine a custodial parent's right to relocate with his or her child. Prior California court decisions that have denied a custodial parent's relocation request will also be analyzed in order to illustrate that the court may have been more inclined to allow the move if virtual visitation was ordered and utilized. Finally, the Comment will analyze out-of-state court decisions and legislation that have employed virtual visitation. The legal standards used in such decisions and statutes will be compared to current California family law jurisprudence. This analysis will demonstrate that the principles guiding virtual visitation as well as other states' case law and statutes are analogous and complementary to California's current legal standards. The Comment will thereby conclude that virtual visitation is a plausible solution that should be formally recognized and readily utilized by California's courts and legislature as a means to ensure the child's best interest, while allowing a custodial parent to relocate.

2010), <http://blog.ceb.com/2010/08/30/virtual%C2%A0visitation>.

19. *Id.*; see also CAL. FAM. CODE §§ 3040–48 (West 2010); CAL. FAM. CODE § 7501 (West 2010).

20. *In re Marriage of LaMusga*, 88 P.3d 81 (Cal. 2004).

21. See Lynne Ellinwood, *Custody—Change of Child's Residence: Showing That Custodial Parent's Proposed Move Will Cause Detriment to Child Requires Reevaluation of Custody Arrangement*, 2004 CAL. FAM. L. MONTHLY 1 (2004).

II. BACKGROUND INFORMATION

A. *The Rise in Communicative Technology*

The increasing use of new interactive technology greatly facilitates communication in the face of physical distance and separation. The high percentage of individuals who can access and participate in communicative technology (such as the iPhone 4's "FaceTime" application)²² illustrates the usefulness and impact virtual visitation can have on today's family law court decisions. Nationally, as of 2009, 70.86% of households had Internet access at home.²³ This statistic illustrates that a majority of people have access to personal computers as well as to the Internet and therefore are theoretically capable of partaking in virtual visitation. The likelihood of participating in virtual visitation is especially strong given the statistics indicating the number of people who use the Internet for communication purposes. More specifically, in 2009, 62.5% of households in the United States used e-mail,²⁴ and 25% of households used instant messaging programs.²⁵ As will be discussed, e-mail and instant messaging are examples of technologies used to implement virtual visitation.²⁶

California's high rates of Internet usage suggest that virtual visitation would be readily adaptable particularly to Californian's current patterns of technology usage and consumption. More specifically, 71.67% of households in California have Internet access at home.²⁷ Additionally, 63.41% of households in California report using e-mail,²⁸ and 25.44% of households in the state use instant messenger programs.²⁹ These statistics indicate that

22. One-tap Video Calling with FaceTime on iPhone 4, *supra* note 1.

23. ProQuest Statistical Datasets, LEXISNEXIS STATISTICAL INSIGHT [DATA FILE], <http://web.lexis-nexis.com/statuniv> (select Browse by Subject, EASI Market Planner, Media Use, Internet and select Internet Access: At Home) [hereinafter ProQuest Statistical Datasets At Home].

24. ProQuest Statistical Datasets, LEXISNEXIS STATISTICAL INSIGHT [DATA FILE], <http://web.lexis-nexis.com/statuniv> (select Browse by Subject, EASI Market Planner, Media Use, Internet and select Internet Activities: Used E-mail) [hereinafter ProQuest Statistical Datasets Used E-mail].

25. ProQuest Statistical Datasets, LEXISNEXIS STATISTICAL INSIGHT [DATA FILE], <http://web.lexis-nexis.com/statuniv> (select Browse by Subject, EASI Market Planner, Media Use, Internet and select Internet Activities: Used Instant Messenger) [hereinafter ProQuest Statistical Datasets Used Instant Messenger].

26. Welsh, *supra* note 3, at 219.

27. ProQuest Statistical Datasets At Home, *supra* note 23.

28. ProQuest Statistical Datasets Used E-mail, *supra* note 24.

29. ProQuest Statistical Datasets Used Instant Messenger, *supra* note 25.

a significant number of Californians with Internet access at home use the Internet to communicate, thereby demonstrating that a majority of Californians, if ordered by family courts to use virtual visitation, would already be capable of complying.

Having computer access gives individuals the opportunity to use many forms of virtual communication that are integral to the implementation of virtual visitation. Moreover, a majority of the technology used for virtual visitation is widely accessible³⁰ at relatively low costs.³¹ In 2004, the cost of building a virtual visitation system, (including computer equipment, web cameras, and audio components), totaled approximately \$700.³² The majority of households that already have computers and Internet access only need equipment such as web cameras, microphones, and software, lowering the cost considerably.³³ Additionally, many forms of electronic communication, such as Skype,³⁴ instant messenger,³⁵ and g-chat phone,³⁶ are free and only require a computer and Internet connection.

There are a variety of options regarding the types of technology that can be used when conducting virtual visits. Thus, virtual visitation orders can be tailored to the personalized needs and preferences of each family. E-mail, a mode of electronic communication used by a significant percentage of households both across the country and in California,³⁷ is the oldest form of computerized communication.³⁸ Although a means for parents and children to remain in contact, e-mail lacks real-time as well as visual interaction.³⁹ Instant messaging programs compensate for e-mail's deficiencies

30. Although considered low in cost and thereby accessible, there are percentages of the population who cannot afford the technology. This reality may be especially true for single custodial parents who cannot afford the technology but face the need to relocate (for job opportunities or child care support). *See, e.g.*, Tricia Rosetty, *CNET Disbanding by End of Year*, TAYLOR DAILY PRESS (Nov. 8, 2011), http://www.taylordailypress.net/news/article_a47d0a8a-f2c0-11df-a12d-001cc4c03286.html (stating how programs helping to give Internet access to low income persons are dissolving). *But see, e.g.*, COMPUTERS4KIDS, <http://www.computers4kids.net/> (last visited Nov. 8, 2011) (exemplifying programs helping low-income children access the Internet).

31. Welsh, *supra* note 3, at 218.

32. *Id.*

33. *Id.*

34. Cheap Calls—Skype Prices, SKYPE, <http://www.skype.com/intl/en-us/prices/> (last visited Feb. 20, 2011).

35. *See, e.g.*, Windows Live Messenger —Free Software Downloads and Software Reviews, CNET DOWNLOAD.COM, http://download.cnet.com/Windows-Live-Messenger/3000-2150_4-10450926.html (last visited Feb. 20, 2011).

36. *See* Call Phones from Gmail, GOOGLE, <http://www.google.com/chat/voice> (last visited Feb. 20, 2011).

37. ProQuest Statistical Datasets Used E-mail, *supra* note 24.

38. Beaulier, *supra* note 16.

39. *Id.*

by providing a forum for real-time communication.⁴⁰ In addition to being a useful medium for scheduled virtual visitations, specifics of which can be ordered by the judge,⁴¹ instant messaging also allows for spontaneous interaction between parent and child, as the instant messaging program lists when other users are online and available to “chat.”⁴² However, implementing instant messaging as a means of virtual visitation would be futile if the children are too young to type and unable to read or to express themselves through the written word.⁴³

Thus, other types of personal video conferencing are preferable forms of virtual visitation, allowing the parent and child to communicate visually in real time. Video conferencing technology such as Skype allows parents to physically see and communicate with their children.⁴⁴ Reciprocally, children are able to interact with their parents through the computer.⁴⁵ Due to the fact that a greater age range of children can utilize the video technology without having to type or read, video-based virtual visitation is a feasible solution to a broad demographic of parents and children.⁴⁶

Moreover, the advent of new technologies with face-to-face capabilities continues to grow, further illustrating the relevance and applicability of virtual visitation as a means for parents and children to communicate. In August 2010, Google announced its new free phone service, which includes free domestic calling along with video capabilities to all users who have free Google e-mail accounts.⁴⁷ Additionally, following the advent of the iPhone 4’s FaceTime application,⁴⁸ smaller companies began working to provide free video calling between mobile phones.⁴⁹ For example, a company called Tango developed an application of the same name, which attempts to diversify and broaden the range of users who can take advantage of the technology beyond Apple-product users.⁵⁰ Given the prevalence of new technology designed for virtual, real-time, face-to-face com-

40. *Id.*

41. *See id.*

42. *Id.*

43. *Id.*

44. Beaulier, *supra* note 16.

45. *Id.*

46. *Id.*

47. Call Phones from Gmail, *supra* note 36.

48. One-tap Video Calling with FaceTime on iPhone 4, *supra* note 1.

49. Walter S. Mossberg, *Tango Brings a New Face to Mobile Video Calls*, ALL THINGS DIGITAL (Sept. 29, 2010), <http://ptech.allthingsd.com/20100929/tango-mobile-video-calls>.

50. *Id.*

munication, children and parents are likely to easily adapt to virtual visitation.

B. Divorce and Relocation Statistics

As of 2003, approximately “[eighteen] million children have separated or divorced parents, and an additional [seventeen] million children’s parents never married.”⁵¹ More specifically, “43.7% of custodial mothers and 56.2% of custodial fathers [are] either separated or divorced.”⁵² At least 25% of children with separated, divorced, or unmarried parents “have a parent living in a different city.”⁵³ Accordingly, approximately “ten million children do not have standard face-to-face interaction with one of their parents.”⁵⁴ Additionally, over twenty-two million people changed their state of residency between the years 1995 and 2000.⁵⁵ Approximately eleven million of these domestic migrants relocated to a state in a different region of the country.⁵⁶ In terms of single parents’ rates of relocation, 75% of custodial mothers will relocate at least once within four years of separation or divorce, and half of these women will then again relocate for a second time.⁵⁷ Thus, given the rates of parent-child separation as well as the significant rate of relocation, virtual visitation is an important solution to facilitate communication between geographically separated parents and children. Additionally, virtual visitation can help alleviate the problems resulting from parent-child separation and a lack of face-to-face interaction.

California’s statistics on divorce and relocation rates illustrate a compelling need for the state to formally address and recognize virtual visitation. California’s divorce rate is approximately 54%.⁵⁸ In terms of relocation, according to the 2000 United States Census, California had the highest migration rates (movement in and out of the state) in the country between

51. Welsh, *supra* note 3, at 216.

52. *U.S. Divorce Statistics*, DIVORCE MAGAZINE, <http://www.divorcemag.com/statistics/statsUS.shtml> (last visited Feb. 20, 2011).

53. Carol R. Flango, *Science and Technology for Judges Trends in 2003: Virtual Visitation—Is This a New Option for Divorcing Parents?*, NATIONAL CENTER FOR STATE COURTS, http://www.ncsconline.org/WC/Publications/KIS_SciJud_Trends03.pdf (last visited Feb. 20, 2011).

54. Welsh, *supra* note 3, at 216.

55. Rachel S. Franklin, *Domestic Migration Across Regions, Divisions, and States: 1995 to 2000*, CENSUS 2000 SPECIAL REPORTS (Aug. 2003), <http://www.census.gov/prod/2003pubs/censr-7.pdf>.

56. *Id.*

57. Gottfried, *supra* note 6, at 568.

58. *Marriages and Divorces—Number and Rate by State: 1990 to 2007*, CENSUS 2010, <http://www.census.gov/compendia/statab/2010/tables/10s0126.pdf> (last visited Mar. 21, 2011) (citing California’s previously reporting on the number of marriages and divorces in 1990).

the years 1995 and 2000, exceeding a total of 3.6 million people.⁵⁹ California's high divorce rate, coupled with its high relocation rate, makes California an ideal candidate to implement virtual visitation. With the large number of divorced families coupled with the mass migration in-and-out of the state, courts must have tools to ensure that communication continues between parents and children, even in the face of physical distance and separation following dissolution and parental relocation.

III. CALIFORNIA'S CURRENT LEGAL STANDARD REGARDING RELOCATION: THE CONCERN FOR CONTINUED PARENTAL RELATIONSHIPS AND THE CHILD'S BEST INTEREST

California courts have struggled with the question of when to allow a custodial parent to relocate with his or her child. In 1979, in *In re Marriage of Carney*, the California Supreme Court ruled that a child custody order could be modified only if the parent proved that there are substantially changed circumstances that render a change in custody "essential" or "expedient" to the welfare of the child.⁶⁰ In terms of relocation, subsequent court cases used the *Carney* holding to prevent custodial parents from moving away with their children in order to uphold the status quo custody arrangement.⁶¹ Accordingly, in applying *Carney*, courts ruled that new job prospects or moving to be with a new spouse or near family were insufficient reasons to justify a custodial parent's desire to relocate with his or her child and consequently modify the current custody order.⁶²

However, seventeen years after *Carney*, the California Supreme Court in *In re Marriage of Burgess* nullified past decisions grounded in *Carney* and created a presumption favoring the custodial parent's right to relocate, effectively making it easier for the custodial parent to move with his or her child.⁶³ In *Burgess*, the custodial mother wanted to move with her two children from their hometown of Tehachapi, California to Lancaster, California, approximately forty minutes away.⁶⁴ The noncustodial father objected to the move and requested permanent physical custody of the chil-

59. Franklin, *supra* note 55.

60. *In re Marriage of Carney*, 598 P.2d 36, 38 (Cal. 1979).

61. Glen Rabenn, *The Move-Away Dilemma*, DIVORCENET.COM, http://www.divorcenet.com/states/california/ca_art09 (last visited Feb. 20, 2011).

62. *Id.*

63. *See In re Marriage of Burgess*, 913 P.2d 473 (Cal. 1996).

64. *Id.* at 476.

dren if the mother relocated.⁶⁵

The California Supreme Court overturned the District Court of Appeal's decision and ruled that the custodial parent must only establish that the move serves the child's best interest.⁶⁶ As a result, the custodial parent no longer faced the burden of proving that changed circumstances rendered a custody change essential, so long as the move was not detrimental to the child.⁶⁷ Under *Burgess*, the parent's right to relocate was only per se restricted by a bad-faith reason for the move, such as relocating simply to restrict the noncustodial parent's access to his or her child.⁶⁸ Additionally, the Court held that absent detriment to the child, trial courts should preserve custodial parent's rights, and thereby presumptively allow the custodial parent to move with his or her child.⁶⁹ In *Burgess*, the Court held the mother had the presumptive right to relocate because she was the children's primary caretaker, was moving in good-faith for employment reasons, and the father would still be able to visit the children regularly.⁷⁰

In 2004, in *In re Marriage of LaMusga*, the California Supreme Court affirmed, but narrowly redefined *Burgess*, effectively making it more difficult for a parent to move.⁷¹ In *LaMusga*, the custodial mother wanted to relocate with her children from California to Ohio, citing that she had family in the state and her new husband had received a job offer as the reasons for the move.⁷² The trial court ordered that the noncustodial father would obtain primary physical custody of the two children if the custodial mother were to move.⁷³ The mother appealed, and the appellate court ruled in her favor based on the custodial parent's presumptive right to relocate, as established in *Burgess*.⁷⁴ However, the California Supreme Court overturned the appellate court's decision, ruling that the trial court did not place undue emphasis on the detriment that would result from separating the children from their father.⁷⁵ The California Supreme Court narrowed the *Burgess* holding, effectually shifting the presumption once again away from the cus-

65. *Id.*

66. *Id.*

67. See *LaMusga Memo*, CALIFORNIA FAMILY LAW REPORT, <http://www.cflr.com/courses/study/LaMusgaMemo.htm> (last visited Feb. 20, 2011).

68. *Id.*

69. See *In re Marriage of Burgess*, 913 P.2d at 481-82.

70. *Id.* at 479.

71. *In re Marriage of LaMusga*, 88 P.3d 81 (Cal. 2004).

72. *Id.* at 86.

73. *Id.* at 85.

74. *Id.* at 89.

75. *Id.* at 94.

todial parent's right to relocate.⁷⁶ More specifically, *LaMusga* held that "a noncustodial parent who opposes a . . . relocation . . . bears the initial burden of showing" only that the proposed "relocation would cause detriment to the child."⁷⁷ Once the possibility of detriment is shown, the court then must engage in a balancing test to determine whether the proposed relocation would be in the best interest of the child.⁷⁸ To determine the best interest of the child, the court weighs the following factors:

the children's interest in stability and continuity in the custodial arrangement; the distance of the move; the age of the children; the children's relationship with both parents; the relationship between the parents including, but not limited to, their ability to communicate and cooperate effectively and their willingness to put the interests of the children above their individual interests; the wishes of the children if they are mature enough for such an inquiry to be appropriate; the reasons for the proposed move; and the extent to which the parents currently are sharing custody.⁷⁹

The *LaMusga* Court analogized that just as a custodial parent need not establish that a move is necessary, the noncustodial parent need not establish "that a change of custody is 'essential' to prevent detriment to the children."⁸⁰ According to the Court in *LaMusga*, the burden of the noncustodial parent is only to show that detriment would result from the move sufficient to require a re-evaluation of custody.⁸¹ According to Los Angeles divorce attorney Marshall S. Zolla, under the *LaMusga* standard "[m]ove-away's for a custodial parent will now become more difficult."⁸²

Applying this new standard, the California Supreme Court in *LaMusga* upheld the trial court's determination that the noncustodial father satisfied his burden of showing that the proposed move would be detrimental.⁸³ The trial court reasoned that it was in the children's best interest to "reinforce what is now a tenuous and somewhat detached relationship with

76. *Id.* at 95.

77. *Ellinwood*, *supra* note 21.

78. *Id.*

79. *In re Marriage of LaMusga*, 88 P.3d at 100.

80. *Id.* at 84.

81. *Id.*

82. *Ellinwood*, *supra* note 21.

83. *In re Marriage of LaMusga*, 88 P.3d at 84.

the boys and their father.”⁸⁴ The California Supreme Court conceded that the mother had been the primary care provider, the move was in good faith, and the children would suffer a “significant loss” if the mother moved without them.⁸⁵ However, the Court ultimately ruled that if the mother decided to relocate, the father would gain primary custody.⁸⁶ This holding was partially based on a psychologist’s determination that the relocation would detrimentally jeopardize the father-child relationship, as well as the fact that the custodial mother did little to reinforce or encourage the children’s relationship with their father.⁸⁷

The California Supreme Court recognized that whenever a child moves away from a parent, there is bound to be detriment suffered as a result of the separation.⁸⁸ Furthermore, the Court recognized that if such detriment alone were sufficient to prevent a parent from relocating, then custodial parents would theoretically never be able to move with their children.⁸⁹ Despite these realizations, the California Supreme Court nevertheless held that the probable effect of a proposed move on the noncustodial parent-child relationship is a relevant factor when determining whether the custodial parent’s move would cause detriment to a child.⁹⁰ Consequently, such detriment may be sufficient to prevent the custodial parent from relocating.⁹¹ Without the automatic presumption favoring the custodial parent’s right to relocate with his or her child, the *LaMusga* decision accordingly eliminates the ease and likelihood for custodial relocation that existed in the days of *Burgess*.⁹²

A subsequent case, *In re Marriage of Brown & Yana*, illustrates the difficulty for a custodial parent to relocate with his or her child under California’s current precedent, even for a parent who has both sole legal and physical custody.⁹³ Reaffirming *LaMusga*, the California Supreme Court in *Brown* held that a parent with sole legal and sole physical custody does *not* have a presumptive right to relocate.⁹⁴ Furthermore, the Court in

84. *Id.* at 89 (quoting *In re Marriage of LaMusga*, No. A096012, 2002 Cal. App. Unpub. LEXIS 1027, at *19 (Cal. Ct. App. Apr. 10, 2002)).

85. *In re Marriage of LaMusga*, 88 P.3d at 101.

86. *Id.* at 102.

87. *See id.* at 85–86.

88. *Id.* at 96.

89. *Id.*

90. *Id.* at 84–85.

91. Steven Carlson, *The “Move-Away” Case*, CHILD CUSTODY COACH, <http://www.childcustodycoach.com/moveaway.html> (last visited Mar. 21, 2011).

92. *See id.*

93. *In re Marriage of Brown & Yana*, 127 P.3d 28 (Cal. 2006).

94. *Id.* at 32–36.

Brown held that upon showing detriment to the child, the noncustodial parent is entitled to an evidentiary hearing to ensure that a custody plan furthering the child's best interest is set in place.⁹⁵ Thus, under *Brown*, a parent without any prior custodial rights could theoretically gain custody if able to show the potential for detriment as a result of the custodial parent's proposed move.⁹⁶

Brown illustrates that without a presumptive right in the custodial parent's favor, the custodial parent is bound to face difficulty when attempting to relocate under California law.⁹⁷ Given the Court's lowering the threshold needed to illustrate potential detriment⁹⁸ coupled with the right to an evidentiary hearing,⁹⁹ a legal struggle over the right to relocate is likely to ensue. When faced with a request for relocation, courts now employ a balancing test to determine the child's best interest.¹⁰⁰ The court's concern for the child's welfare exists regardless of whether the parent is relocating to another county, state, or country, though a court is likely to take the distance of the move into account when determining the potential detriment suffered by the child as a result of the relocation.¹⁰¹

By removing the presumption favoring the custodial parent's right to relocate, the courts and legislature seem concerned with fostering parent-child relationships, implying that continued contact and communication is in the child's best interest. Modeling California courts' precedent, the state legislature has enacted legislation conditioning the relocation on the child's best interest.¹⁰² Section 7501 of the California Family Code states, "[a] parent entitled to the custody of a child has a right to change the residence of the child, subject to the power of the court to restrain a removal that would prejudice the rights or welfare of the child."¹⁰³ To determine the "welfare of the child," courts look to section 3011 of the California Family Code for factors to consider when determining the best interest of the child.¹⁰⁴ Such factors include, "[t]he health, safety, and *welfare of the child*;" "[a]ny history of abuse by one parent;" "[t]he nature and amount of

95. *See id.* at 38–39.

96. *Id.* at 33.

97. *See id.*

98. *In re Marriage of LaMusga*, 88 P.3d at 84–85.

99. *See In re Marriage of Brown & Yana*, 127 P.3d at 35.

100. *See In re Marriage of LaMusga*, 88 P.3d at 84–85.

101. *Id.* at 100.

102. *See* CAL. FAM. CODE § 7501 (West 2010).

103. *Id.*

104. CAL. FAM. CODE § 3011 (West 2010).

contact with both parents;” and “the habitual or continual illegal use of controlled substances or . . . alcohol by either parent.”¹⁰⁵ These factors, together with those set forth in *LaMusga*, illustrate that courts must consider and weigh a multitude of variables before allowing a custodial parent to relocate with his or her child. Thus, every time a custodial parent wishes to relocate, so long as the noncustodial parent can show how the relocation could potentially be detrimental to the child, the court can conduct a hearing to make an individual, case-by-case determination regarding the relocation, oftentimes creating great uncertainty and expense.¹⁰⁶

Additionally, the California legislature clearly indicated its intention to maintain parent-child relationships in the face of marital dissolution.¹⁰⁷ Section 3020 of the California Family Code states, “[t]he Legislature finds and declares that it is the public policy of this state to assure that children have frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, or ended their relationship . . . except where the contact would not be in the best interest of the child.”¹⁰⁸ Applying section 3020 in the context of move-away cases indicates the state’s objective to safeguard parent-child relationships. The legislation, when considered as a whole, illustrates California’s strong intention to make case-by-case determinations to ensure that the custody decisions rendered reflect what is best for the child.¹⁰⁹ Section 3020 and section 3011 of the California Family Code reflect this goal. Accordingly, implementing a virtual visitation system can be an effective means of ensuring the child’s best interest, while still balancing the wishes and needs of both the custodial and noncustodial parents.

IV. THE CASE FOR VIRTUAL VISITATION IN CALIFORNIA FAMILY LAW

A. Participating in Virtual Visitation Can Serve the Child’s Best Interest

As discussed, California has neither required virtual visitation in any appellate move-away case nor codified legislation on the subject.¹¹⁰ How-

105. *Id.* (Emphasis added).

106. *See In re Marriage of Brown & Yana*, 127 P.3d 28.

107. CAL. FAM. CODE § 3020 (West 2010).

108. *Id.*

109. *Id.*

110. *See* Brook, *supra* note 18; Allison Herr, *Virtual Visitation: The Use of Webcams for Weekly Visits*, PREVENTATIVE FAMILY LAW FOR NEVADA, http://nevadafamilylaw.typepad.com/preventive_family_law/virtual_visitation/ (last visited Mar. 21, 2011).

ever, given the strength and development of the trend throughout the country, California appellate courts should too officially recognize virtual visitation as a valid solution to settle relocation disputes. Such recognition is likely to change the way courts evaluate move-away cases. Under the current judicial standard, the custodial parent has no presumptive right to relocate.¹¹¹ However, if officially recognized and implemented in California, virtual visitation could weigh the factors the courts must consider when determining the child's best interest in favor of the relocation. In addition to allowing the custodial parent to relocate with his or her child, virtual visitation may also simultaneously foster the noncustodial parent-child relationship, notwithstanding the physical distance resulting from the move.

A custodial parent may often have compelling and valid reasons motivating his or her desire to relocate. In such contexts, virtual visitation is a critical tool that can help meet the custodial parent's needs and wishes. For example, relocating can be important in the career context.¹¹² Move-away cases have become more prevalent in part due to the increasing number of stay-at-home custodial mothers who have recently entered the work force.¹¹³ As it becomes markedly more common for both parents to work outside the home, it also becomes more likely that "advancement up the career ladder may require a parent to move to a different community or, indeed, to a different part of the country."¹¹⁴

The need to relocate is further exacerbated by today's economic climate.¹¹⁵ Given the recent financial crisis, relocation may be necessary for a family's financial well-being, especially for a single parent.¹¹⁶ Divorce tends to place additional financial burdens on a single parent, which are only compounded by the current economy.¹¹⁷ It is possible a parent will find it necessary to relocate in order to secure a job or to be closer to family

111. See *In re Marriage of LaMusga*, 88 P.3d 81, 84 (Cal. 2004).

112. See *In re Marriage of Rosson*, 224 Cal. Rptr. 250, 259 (Ct. App. 1986).

113. Kimberly K. Holtz, Comment, *Move-Away Custody Disputes: The Implications of Case-by-Case Analysis & the Need for Legislation*, 35 SANTA CLARA L. REV. 319, 319-20 (1995).

114. *In re Marriage of Rosson*, 224 Cal. Rptr. at 259.

115. See Molly McDonough, *Judge Orders Skype Visits as Condition of Mom's Move*, ABA JOURNAL: LAW NEWS NOW (Aug. 12, 2010), http://www.abajournal.com/news/article/judge_orders_skype_visits_as_condition_of_moms_move.

116. See Betsy Pisik, "Can't Afford" Divorce in Hard Times, WASH. TIMES (Feb. 6, 2009), <http://www.washingtontimes.com/news/2009/feb/06/cant-afford-divorce-in-hard-time-couples-stick-tog/>.

117. See *id.*

members who can help take care of the child.¹¹⁸ Today, courts must be receptive to this reality and balance the interests and needs of the custodial parent against the noncustodial parent's reasons for opposing the move.

Relocation is also important in encouraging finality and allowing divorced parents to move on with their lives.¹¹⁹ Relocation is often necessary when a custodial parent remarries and needs to relocate with his or her new spouse.¹²⁰ There is undoubtedly a legitimate state interest in maintaining a child's relationship with both of his or her parents.¹²¹ However, achieving such interest may become more difficult if the child and noncustodial parent are geographically apart. Nevertheless, courts must recognize that relocation is oftentimes important for the parent's well-being.¹²² So long as the relocation is done in good faith, custodial parents should not have the course of their lives be determined by their former spouse. Virtual visitation can be an amicable solution when relocating is important to a custodial parent. If utilized, virtual visitation can act as a compromise solution, allowing the custodial parent to relocate while helping to still foster an active relationship between the child and the noncustodial parent. Thus, virtual visitation can reconcile both parents' needs while acting in accordance with the child's best interest.

In addition to recognizing and facilitating the custodial parent's desire to relocate,¹²³ virtual visitation can frequently further the child's welfare. Specifically, when courts are determining the child's best interest, virtual visitation can help weigh essential factors in favor of the relocation. If virtual visitation can fulfill one of the factors that would otherwise prevent a custodial parent from relocating, then virtual visitation can play a substantial role in California court decisions. In such cases, virtual visitation should thereby be recognized and utilized.

California court decisions denying a custodial parent's relocation request are typically dependent on the court's conclusion that relocating away from the noncustodial parent would not serve the child's best interest.¹²⁴ The court reaches this conclusion based upon, among the list of factors identified in *LaMusga*, the interest in preserving the noncustodial parent-child relationship and the parents' inability to cooperatively co-parent and communicate with each other. The rationale in rejecting reloca-

118. See *Baker v. Baker*, N.Y.L.J., Aug. 4, 2010, at *2, *5 (Suffolk Cnty. Sup. Aug. 4, 2010).

119. See LeVasseur, *supra* note 9, at 365.

120. *Id.*

121. See CAL. FAM. CODE § 3020 (West 2010).

122. See Holtz, *supra* note 113, at 319-20.

123. See LeVasseur, *supra* note 9, at 365.

124. See *In re Marriage of LaMusga*, 88 P.3d 81.

tion requests on these grounds is that problems arising from these issues would only be exacerbated by a move.¹²⁵ The factors identified in *LaMusga* are weighed to determine the best interest of the child, and these issues in particular can strongly weigh against a court's granting a relocation request.¹²⁶ As described below, adopting a virtual visitation plan could ease the court's concerns, and if implemented as part of the decision, make it more likely for a court to grant a move-away request.

When the quality of the child's relationship with the noncustodial parent would be jeopardized by the custodial parent's relocation, virtual visitation could provide a means to maintain the noncustodial parent-child relationship.¹²⁷ In *LaMusga*, one of the reasons the California Supreme Court denied the custodial parent's request to relocate stemmed from the court's concern that the noncustodial parent-child relationship would deteriorate and be unable to develop and improve if the child were to relocate out of state.¹²⁸ Virtual visitation could be a viable solution alleviating the Court's concern.

Noncustodial parents have voiced their support for virtual visitation, testifying to the quality of communication between them and their children via the technological portal.¹²⁹ For instance, Chuck Mason, a divorced father whose daughter lives out of state, experienced the benefits of communicating with his daughter twice weekly for three years via virtual visitation.¹³⁰ He shares that the two play online checkers together and that he watches her play songs on her recorder, claiming he can "do virtually everything online that he does during the in-person visits he gets with [his daughter] four times a year."¹³¹

This testimonial illustrates the potency virtual visitation can have in ensuring that quality relationships between the child and noncustodial parent are maintained despite physical distance. Applying this idea to *LaMusga*, if virtual visitation had been an option considered by the Court, the mother might have been allowed to relocate with her children. If so applied, virtual visitation could assure the *LaMusga* Court that the noncusto-

125. *Id.* at 88–89.

126. *Id.* at 100.

127. See Tovia Smith, *When an Ex Moves Away, Do the Kids Go Too?*, NATIONAL PUBLIC RADIO (May 29, 2006), <http://www.npr.org/templates/story/story.php?storyId=5425699>.

128. *In re Marriage of LaMusga*, 88 P.3d at 88.

129. See Smith, *supra* note 127.

130. *Id.*

131. *Id.*

dial parent-child relationship would continue and develop, thus alleviating the court's noted reservations. With virtual visitation, not only will communication continue, but the noncustodial parent and child will also be able to interact with each other to further build and enhance their relationship. Court orders stipulating the mandatory schedules for virtual visitation (just as is done for in-person visitation) can ensure that the parties have the sufficient quantity of time needed to generate quality communication. Ensuring sufficient quantity of time also alleviates the court's concern that the nature and depth of the relationship would suffer as a result of the move.¹³² Therefore, virtual visitation offers a feasible means to allow a noncustodial parent-child relationship to develop when a child relocates.

Virtual visitation can also be implemented to ameliorate the court's concern that relocating would not only deteriorate the quality, but also effectively end a child's relationship with his or her noncustodial parent. The destruction of such relationship would consequently not serve the child's best interest and would accordingly violate section 3020 of the California Family Code, which emphasizes the importance of a child's maintaining relationships with both his or her parents.¹³³ The case *Oliver v. Gaines* illustrates this concern.¹³⁴ In *Oliver*, the Court denied the custodial mother's petition to relocate from California to Texas partly on the grounds that the child would lose his relationship with his noncustodial father as a result of the move.¹³⁵ The Court reasoned that the geographic distance and economic expense of the travel could easily prevent the noncustodial parent from visiting and thereby severely jeopardize and eventually end the relationship with the child.¹³⁶ The Court noted various factors that must be taken into account that could easily burden maintaining a relationship, including expensive airfare, lost work, the expense of staying in the new area, and the cost of local transportation.¹³⁷ According to the Court, these factors could prevent a noncustodial parent from visiting his or her child.¹³⁸

Virtual visitation, however, could alleviate the Court's concerns in this case by allowing the relationship to continue and develop via the virtual visits, which would allow for frequent contact and interaction between physical visits. As previously mentioned, virtual visitation systems are relatively inexpensive, and courts can additionally order the relocating par-

132. See Fass, *supra* note 14.

133. FAM. § 3020.

134. See *In re Matter of Oliver and Gaines*, No. B209327, 2009 Cal. App. Unpub. LEXIS 10149 (Dec. 22, 2009).

135. *Id.* at *6–8.

136. *Id.* at *10–12.

137. *Id.* at *11.

138. *Id.* at *11–12.

ent to cover the costs of the system as a condition for the move.¹³⁹ Although courts are careful to stipulate that virtual visitation is best used as a *supplement* to actual in-person visits,¹⁴⁰ virtual visitation can greatly decrease the likelihood of the relationship deteriorating. Virtual visitation would allow the noncustodial parent and child to maintain their relationship virtually when frequent physical visitation may be financially burdensome or logistically difficult.

As mentioned, the Court in *Oliver* was concerned that given the geographical distance between the child and noncustodial parent, physical visitation would be difficult and lead to the relationship deteriorating.¹⁴¹ This effect would be extremely problematic, given California's legislative stance on ensuring a child's continued relationships with both parents.¹⁴² Ordered virtual visitations, however, could ensure the child will continue to have frequent accessibility to his or her parent even when geographically apart. Michael Gough, a father who launched efforts to bring the first virtual visitation legislation to his home state of Utah, praises virtual visitation as a means for him to preserve a relationship with his four-year-old daughter.¹⁴³ He explains how virtual visitation has helped revive their relationship:

After my daughter was relocated from Utah to Wisconsin I had not seen her for about three months when I flew . . . to be with her for the weekend. She did not immediately run up and greet me, but hesitated . . . A few weeks after I started using video calls with her I visited again and this time when she saw me, she ran up and hugged me. The difference: she had just seen me days earlier on the computer via a video call. I was able to read her stories, show her that I was there for her, which helped us to build lasting memories and the security that children need to have with their parents.¹⁴⁴

If the noncustodial parent is ordered to virtually visit with the child on

139. See *supra* Part II.

140. Welsh, *supra* note 3, at 222.

141. *In re Matter of Oliver and Gaines*, 2009 Cal. App. Unpub. LEXIS 10149, at *6–8.

142. See FAM. § 3020.

143. Michael Gough, *Virtual Visitation: New Technology Is Changing the Way Divorced Fathers Can Connect with Their Children*, LEVING'S DIVORCE MAGAZINE (Mar. 3, 2009), <http://divorcemagazine.wordpress.com/2009/03/03/virtual-visitation-new-technology-is-changing-the-way-divorced-fathers-can-connect-with-their-children>.

144. *Id.*

a consistent basis, the relationship can sustain, ameliorating the court's concerns.¹⁴⁵ Additionally, if virtual visitation is used, the economic burdens of physical visitation can be alleviated. By participating in virtual visitation, parties will not be forced to rely solely on physical visitation as the *only* opportunity to see their child or to maintain the noncustodial parent-child relationship.¹⁴⁶

Furthermore, virtual visitation can ameliorate communication and cooperation issues that arise between divorced parents, a factor California courts consider when determining whether relocating would be in the child's best interest.¹⁴⁷ Courts often assume that if a child is geographically distanced from his or her noncustodial parent, there will be less likelihood and motivation for the custodial parent to help maintain and foster the noncustodial parent-child relationship.¹⁴⁸ Virtual visitation can alleviate this concern.

For instance, returning to *LaMusga*, the Court expressed concerns that the custodial mother would not attempt to facilitate contact between the children and their father if she relocated with them.¹⁴⁹ This uncertainty was a significant factor affecting the Court's denying the relocation request.¹⁵⁰ However, virtual visitation, especially when utilized by older children, could be a viable solution to the problem of poor parental interaction.¹⁵¹

Virtual visitation requires very little effort or involvement from the custodial parent, as the communication is only between the child and the noncustodial parent. Specifically in regard to older children, other than providing the software and equipment, which can be achieved through mandatory court order,¹⁵² neither the noncustodial parent nor the child will rely on the custodial parent for the virtual visits. This idea is contrasted with traditional forms of physical visitation that often require the custodial parent to physically transport the children to or from the other parent's home. Virtual visitation is done from the comfort of one's own home and can be organized around the child's and noncustodial parent's schedules. Additionally, because the court can be very specific in its orders in terms of implementing the virtual visitation schedule (such as the number of visits and the duration of the visits), any violation or attempt to prevent the chil-

145. *See, e.g., id.*

146. *See id.*

147. CAL. FAM. CODE § 3011 (West 2010).

148. *See In re Marriage of LaMusga*, 88 P.3d at 88–89.

149. *Id.* at 96.

150. *See id.*

151. *See id.*

152. *See Baker*, N.Y.L.J. at *5.

dren from communicating with the other parent could result in the custodial parent being held in contempt of the court's order.¹⁵³ The fact that many older children have personal computers and use the Internet independently prevents the custodial parent from negatively interfering with the virtual visits.¹⁵⁴ These hypothetical applications of virtual visitation to past California court decisions that denied relocation requests illustrate that virtual visitation has the great potential to weigh the relevant factors determining the best interest of the child in favor of the custodial parent's ability to relocate. Consequently, virtual visitation has the vast capability to affect the way California courts evaluate move-away cases.¹⁵⁵

Critics may argue that virtual visitation cannot adequately satisfy the best interest of the child, as the relationship is limited to the confines of the computer screen.¹⁵⁶ As a result, noncustodial parents who are unhappy with the prospect of their child relocating tend to claim that the quality of their relationship that comes from being physically with the child is lost.¹⁵⁷ Critics contend that virtual visitation cannot replace the value of a hug or a parent's being at a child's sporting game.¹⁵⁸ However, proponents of virtual visitation assert that virtual visitation is only designed to *supplement*, not replace in-person visitation.¹⁵⁹ Virtual visitation is designed to foster the noncustodial parent-child relationship in between actual visits, sustaining relationships in the face of geographic separation when frequent in-person visits are impractical or even impossible.¹⁶⁰ Virtual visitation is a means for the noncustodial parent to maintain an active role in the child's life, upon the court's determination that the move is in the child's best interest. Thus, concerns and comparisons about the quality of virtual versus actual relationships are unwarranted, as virtual visitation is designed to

153. See *McCoy v. McCoy*, 764 A.2d 449 (App. Div. 2001); see also *Baker*, N.Y.L.J. at *5; LeVasseur, *supra* note 9, at 365; Gottfried, *supra* note 6, at 584.

154. See *How Do Kids Use the Internet?*, NATIONAL ACADEMIC PRESS, http://www.nap.edu/netsafekids/inter_kids.html (last visited Feb. 20, 2011).

155. Virtual visitation will not always trump issues and weigh in favor of the custodial parent's relocation, as other factors are involved that make virtual visitation non-applicable or inappropriate. See *In re Marriage of Melville*, 122 Cal. App. 4th 601 (2004) (holding a custodial mother could not relocate with her disabled son, as it was in the child's best interest to have stability and continuity, making virtual visitation an impossible solution for sufficiently alleviating the court's concerns).

156. Welsh, *supra* note 3, at 222.

157. *Id.*

158. *Id.*

159. *Id.*

160. See UTAH CODE ANN. § 321 (2004).

supplement—as opposed to replace—physical, in-person visitation.¹⁶¹

Virtual visitation is a viable solution when the court fears that relocating will sever the child’s relationship with his noncustodial parent or when it appears as if the relocating custodial parent will not help foster that relationship. Virtual visitation can alleviate the court’s concerns by providing a means for continued contact between noncustodial parents and children, thereby ensuring that noncustodial parent-child relationships continue despite the physical distance between them. Move-away cases are fact-specific in nature, and therefore a case-by-case analysis remains essential to determine the child’s best interest.¹⁶²

B. Past Virtual Visitation Case Law and Legislation Are Analogous and Readily Applicable to California Legal Principles

California jurisprudence is well equipped to utilize virtual visitation in its relocation decisions, especially given the fact that other states with similar legal standards (namely, the best interest of the child standard) have employed virtual visitation.¹⁶³ Parallels can also be drawn between states that have passed specific virtual visitation legislation and provisions of California’s Family Code, designed to foster parent-child relationships in the face of dissolution and uphold the best interest of the child.¹⁶⁴ These similarities further illustrate that virtual visitation is readily applicable to California law and thus should be explicitly codified.

1. Other State Court Decisions Regarding Virtual Visitation Are Consistent with California Legal Principles

By applying the identical standard California courts use to render relocation decisions, other states have ordered virtual visitation to further the best interest of the child.¹⁶⁵ Given that California family courts operate under the fact-intensive best interest of the child standard,¹⁶⁶ relocation can prove to be an unclear area in the law. Thus, it is useful to look to out-of-state jurisdictions that have adopted virtual visitation to understand the context in which decisions utilizing virtual visitation have been rendered. Out-of-state family courts order virtual visitation as a means to achieve the

161. Welsh, *supra* note 3, at 222.

162. Holtz, *supra* note 113, at 329.

163. See *McCoy*, 764 A.2d 449; see also *Baker*, N.Y.L.J. at *5; LeVasseur, *supra* note 9, at 366–68; Gottfried, *supra* note 6, at 584.

164. FAM. § 3011; FAM. § 3020.

165. FAM. § 3011; FAM. § 3020.

166. FAM. § 3011; FAM. § 3020.

same goal set forth in section 3011 of California's Family Code: to serve the best interest of the child.¹⁶⁷ Thus, out-of-state cases ordering virtual visitation demonstrate that virtual visitation is readily adaptable, applicable, and relevant to California's family law jurisprudence.

Courts across the country have ordered virtual visitation when a custodial parent feels compelled to relocate, such as for financial reasons or to gain a support network from family members who reside out-of-state.¹⁶⁸ Courts that order virtual visitation in these situations do so when it is believed that the gained economic opportunities or emotional support will further and help serve the child's best interest.¹⁶⁹

The August 2010 *Baker v. Baker* decision exemplifies this trend. In *Baker*, a New York judge in Suffolk County allowed a mother to relocate from New York to Florida with her two children under the condition she make the children available three times per week for at least one hour to have Skype sessions with the father.¹⁷⁰ In its decision to order virtual visitation, the Court reasoned that the move, along with the mandatory Skyping, would be best for the children's welfare.¹⁷¹ According to the Court, the custodial mother was in "dire financial straits," as she had been laid off work, was unable to find a new job, and faced immediate foreclosure on her home.¹⁷² If allowed to relocate, the mother would move to Florida and live with her parents until she was able to secure a job. The mother would additionally have the benefit of her parents and extended family members to act as her support network.¹⁷³ In its decision, the Court was able to strike an appropriate balance by means of virtual visitation. The Court allowed the move because relocating would serve the children's best interest by ensuring their financial security, while maintaining the noncustodial parent-child relationship via the virtual visits.¹⁷⁴

Baker was not the first case in which a court ordered virtual visitation to serve the child's best interest. In the Connecticut case *Armstrong v. Armstrong*, the custodial mother wanted to relocate from Connecticut to

167. FAM. § 3011; FAM. § 3020.

168. See, e.g., *Baker*, N.Y.L.J. at *2; LeVasseur, *supra* note 9, at 366.

169. *Baker*, N.Y.L.J. at *4.

170. *Id.* at *5.

171. See *id.*

172. *Id.* at *2.

173. *Id.* at *3.

174. See *id.*

Illinois to be near her extended family.¹⁷⁵ The mother suffered from multiple sclerosis, and doctors felt her stress could be alleviated from being close to her family in Chicago.¹⁷⁶ The noncustodial father objected on the grounds that if the mother relocated, he would be unable to maintain an active role in the children's lives.¹⁷⁷ The Court rationalized that it would not only be in the best interest of the mother to relocate, but also in the best interest of the children to have the familial support network available to them.¹⁷⁸ The Court granted the relocation request so long as a virtual visitation schedule could be utilized to ensure a continued relationship between the children and their father.¹⁷⁹ This rationale also fits within California's best interest of the child standard, as the Court in *Armstrong* used virtual visitation to render a decision aimed to serve the children's welfare.

Similarly, in the Massachusetts case *Cleri v. Cleri*, the Court allowed the custodial mother to relocate to New York because she had a greater support system available there to assist with raising her children.¹⁸⁰ The Court granted the relocation along with a schedule of bi-weekly virtual visits for the noncustodial father to have with his children, which would allow him to continue fostering a relationship with them.¹⁸¹ In fact, the Judge explicitly noted that with virtual visitation, the father would be able to help the children with their homework and read them stories.¹⁸² The Judge also ordered both parents to purchase the necessary equipment to facilitate the virtual visitation as a condition to the move.¹⁸³

The court's reasoning in these out-of-state cases complements California's current stance on relocation, as the court is ensuring the children's best interest while still adhering to principles set forth in California Family Code section 3020, which stresses the importance of frequent contact and communication between parents and children following marital dissolution.¹⁸⁴ Virtual visitation is essential in achieving this balance. These cases are especially relevant given the current economic crisis, in which single parents face a greater need to relocate in order to find work and support

175. LeVasseur, *supra* note 9, at 366.

176. Gottfried, *supra* note 6, at 585.

177. LeVasseur, *supra* note 9, at 366.

178. *Id.*

179. *Id.* at 367.

180. Gottfried, *supra* note 6, at 584.

181. *Id.*

182. Lee Rosen, *Virtual Visitation: Technology Hits Home*, WRAL.COM (Jan. 22, 2007), http://wraltechwire.com/business/tech_wire/opinion/story/1172531/.

183. Gottfried, *supra* note 6, at 584.

184. FAM. § 3020.

their families.¹⁸⁵

Virtual visitation is a means to preserve the parent-child relationship when the noncustodial parent objects on the grounds that he or she will no longer be able to maintain an active role in the child's life if the child were to move.¹⁸⁶ Courts have often stated that a change in the noncustodial parent-child relationship alone is insufficient to deny a relocation request if alternative plans or solutions could feasibly be utilized to maintain the relationship.¹⁸⁷ Thus, virtual visitation can be used as a type of defense, recognizing that various forms and modes of communication exist to maintain the relationship. This conception of virtual visitation is consistent with California law, as many of the decisions ordering the use of virtual visitation are justified by citing the best interest of the child standard.¹⁸⁸

The New Jersey appellate court case *McCoy v. McCoy* exemplifies utilizing virtual visitation as a compromise that serves the child's welfare as well as the parents' wishes.¹⁸⁹ In *McCoy*, the custodial mother wanted to move from New Jersey to California, claiming that she would be able to obtain a job that would allow her to spend more time at home with her daughter.¹⁹⁰ She also asserted that California's climate would be better for the child's asthma.¹⁹¹ The trial court rejected the relocation request, reasoning that the cross-country move would negatively impact the child's relationship with the noncustodial father.¹⁹² The appellate court overturned the lower court's decision, calling the mother's proposed virtual visitation plan of building and maintaining a personalized website for communication "creative and innovative."¹⁹³ The appellate court held that the trial court erred when it concluded that the noncustodial parent-child relationship

185. See, e.g., *Baker*, N.Y.L.J. at *2.

186. See *McCoy*, 764 A.2d at 454 (noting that virtual visitation can be utilized to preserve the parent-child relationship upon the child's relocation); see also LeVasseur, *supra* note 9, at 366-68 (discussing *Armstrong v. Armstrong*, No. FA 01-0728168-S, slip op. at 1 (Super. Ct., Jud. Dist. of Hartford, July 25, 2002), in which the court-ordered virtual visitation to preserve the noncustodial parent-child relationship following relocation); *Armstrong*, No. FA 01-0728168-S, at 1.

187. See *McCoy*, 764 A.2d at 452-53 (holding that ex-wife's suggested use of Internet to enhance visitation rights was sufficient to establish good faith reason for relocating); see also LeVasseur, *supra* note 9, at 363-72.

188. See *McCoy*, 764 A.2d 449; see also *Baker*, N.Y.L.J. at *4; LeVasseur, *supra* note 9, at 366.

189. *McCoy*, 764 A.2d 449.

190. *Id.* at 451.

191. *Id.*

192. *Id.* at 454.

193. *Id.*

would be substantially altered without investigating whether other possible means, such as implementing a website for daily communication, could be used to maintain the relationship.¹⁹⁴

In *McCoy*, the appellate court stated that relocation alone cannot automatically be considered detrimental to the child's relationship when there are alternative means to preserve the parent-child relationship.¹⁹⁵ Virtual visitation takes on the important task of maintaining such relationships.¹⁹⁶ Courts enacting virtual visitation decisions are thereby beginning to realize that "[i]n our modern mobile society it may be possible to honor a visitation schedule and still recognize a custodial parent's right to move."¹⁹⁷ This rationale fits well within California's *LaMusga* precedent, which requires the noncustodial parent to show potential detriment to the child in order for the court to determine whether the move serves child's best interest.¹⁹⁸ Virtual visitation can thereby limit the circumstances when the noncustodial parent can claim the child will suffer detriment sufficient to prohibit the relocation. Courts will be less likely to find that the child will face detriment simply as a result of relocating, when virtual visitation could be a viable solution to maintain and foster the relationship in between physical visits. The reasoning in *McCoy* illustrates that virtual visitation can readily be applied to the California precedent grounded in *LaMusga*, as the motivation behind out-of-state virtual visitation decisions is to effectuate the child's best interest and ensure his or her welfare.¹⁹⁹

The rationales courts use to justify virtual visitation orders in the out-of-state decisions discussed above mirror California's concern for the child's best interest.²⁰⁰ Furthermore, the cases previously discussed illustrate that California family courts should adopt virtual visitation to ensure that the noncustodial parent-child relationship will sustain and continue.²⁰¹ Virtual visitation is a means to alleviate both the court's and the noncustodial parent's concerns that the noncustodial parent-child relationship will terminate as a result of the move.²⁰² Therefore, in a jurisdiction recogniz-

194. *Id.*

195. *McCoy*, 764 A.2d at 454.

196. See LeVasseur, *supra* note 9, at 365.

197. *McCoy*, 764 A.2d at 453.

198. *In re Marriage of LaMusga*, 88 P.3d at 84–85.

199. See *id.*; see also *Baker*, N.Y.L.J. at *4; LeVasseur, *supra* note 9, at 365–68.

200. See *McCoy*, 764 A.2d 449; see also *Baker*, N.Y.L.J. at *4; LeVasseur, *supra* note 9, at 365–68. See generally FAM. § 3011.

201. See Gottfried, *supra* note 6, at 593 (explaining "virtual visitation can be an extremely useful tool in maintaining and even strengthening ties between children and their non-custodial parents in relocation cases").

202. See Gottfried, *supra* note 6, at 570.

ing virtual visitation, the fear that the noncustodial parent-child relationship will deteriorate is unlikely to be the determining factor or sole reason for a court's preventing the custodial parent from relocating.²⁰³

2. Virtual Visitation Statutes Complement California Family Law's Statutory Scheme

Six states thus far have enacted virtual visitation legislation further indicating the growing significance of the trend.²⁰⁴ When analyzed as a whole, this legislation, like the case law that has ordered virtual visitation, is grounded in the familiar best interest of the child standard.²⁰⁵ Virtual visitation legislation is thereby very compatible with California's current statutory scheme, which encompasses the state's public policy to maintain parent-child relationships following marital dissolution,²⁰⁶ as well as the California Family Code's commitment to serving and protecting the child's best interest.²⁰⁷ Consequently, similarities can be drawn between California's Family Code and the virtual visitation legislation that has recently been enacted throughout the country.²⁰⁸

The very nature of virtual visitation complements the intent of section 3020 of the California Family Code, which encourages the "frequent and continuing contact with both parents after the parents have separated or dissolved their marriage"²⁰⁹ As discussed, the realities of life post-dissolution compounded with today's economic climate make relocation necessary for many custodial parents.²¹⁰ Thus, by issuing virtual visitation orders, California would fulfill its public policy goals by allowing the child to continue his or her relationship with the noncustodial parent, regardless of the geographic distance separating them as a result of the move.²¹¹

Looking beyond California's own legislative scheme, similarities can be drawn between California's current law and the specific statutes dealing

203. See *McCoy*, 764 A.2d at 453.

204. *Virtual Visitation*, ROSEN LAW FIRM: NORTH CAROLINA DIVORCE (Nov. 4, 2008), <http://www.rosen.com/childcustody/articles/virtual-visitiation/?output=pdf>.

205. See WIS. STAT. § 767.481(3) (2010); 2004 Utah Laws 321 § 2 (12); TEX. FAM. CODE ANN. § 153.015(b)(1) (Vernon 2010).

206. FAM. § 3020.

207. FAM. § 3011.

208. See Elisabeth Bach-Van Horn, Comment, *Virtual Visitation: Are Webcams Being Used As An Excuse to Allow Relocation?*, 21 J. AM. ACAD. MATRIM. LAW. 171, 186–87 (2008).

209. FAM. § 3020(b).

210. See *supra* Part IV.A.

211. See FAM. § 3020; Gottfried, *supra* note 6, at 593–94.

with virtual visitation enacted by other states. In 2004, Utah became the first state to enact legislation on virtual visitation in the context of dissolution or paternity actions.²¹² The legislation generally states that “if available, reasonable virtual access [shall] be permitted and encouraged between children and a noncustodial parent.”²¹³ The statute stipulates that courts can use virtual visitation as a supplement to physical visitation to allow a custodial parent to relocate with his or her child, but cannot use virtual visitation to replace physical visitation.²¹⁴

Much like California’s standard, Utah courts must consider the child’s best interest in determining whether to allow the relocation and to order the virtual visitation.²¹⁵ Utah’s virtual visitation legislation also commands each parent to permit and encourage communication between the other parent and the child, including Internet communications.²¹⁶ This part of Utah’s virtual visitation statute parallels California’s Family Code section 3020, which acknowledges the state’s public policy of maintaining a child’s relationship with both parents.²¹⁷ The fact that Utah is connecting virtual visitation with the importance of maintaining parent-child communication and relationships further illustrates that virtual visitation is readily adaptable and applicable to California’s family law goals and policies.

In addition to Utah, Texas enacted section 153.015 to its Family Code in 2007, which endorses frequent contact between parents and children by phone, e-mail, instant messaging, or video conferencing.²¹⁸ Under this section, courts can order reasonable periods of electronic communication between the noncustodial parent and child.²¹⁹ Paralleling California’s standard of ensuring the child’s welfare, the first factor Texas courts analyze when determining whether virtual visitation should be ordered is whether such electronic communication would serve the child’s best interest.²²⁰ Other considerations include: what equipment is necessary to facilitate the virtual visitation, the parties’ accessibility to such equipment, and any other variables the courts in their discretion deem appropriate.²²¹

Similarly to Utah’s and Texas’ legislation, Florida’s legislation codifies its courts to consider virtual visitation when such electronic communi-

212. Bach-Van Horn, *supra* note 208, at 181 n.50.

213. 2004 UTAH LAWS 321.

214. *Id.* § 321(1)(2d).

215. *Id.* § 321(2)(a).

216. *Id.* § 321(1)(2)(d).

217. FAM. § 3020(b).

218. TEX. FAM. CODE ANN. § 153.015 (Vernon 2010).

219. *Id.* § 153.015(b).

220. *Id.* § 153.015(b)(1).

221. *Id.* § 153.015(b).

cation is supplemented with periods of in-person visitation.²²² When deciding whether to order virtual visitation, Florida courts must consider the child's best interest.²²³ Florida's law is very explicit and includes provisions specifying the court's ability to allocate expenses arising from the electronic communication based on the parents' finances²²⁴ as well as mandating a seven-day deadline for one parent to provide the other with the access information needed to facilitate the virtual visits.²²⁵

The number of states that are enacting and codifying virtual visitation legislation indicates that the virtual visitation trend is likely to continue and take on a permanent role in both the judicial and legislative branches. In addition to the states already discussed, New Jersey and South Carolina have also enacted comparable virtual visitation legislation.²²⁶ When analyzed as a whole, other states' virtual visitation legislation indicate not only the increasing development and application of the virtual visitation trend, but also illustrate a concern for ensuring the best interest of the child. Such legislation amalgamates well with California's interest in protecting the child's welfare and maintaining parental relationships following marital dissolution, and specifically subsequent relocation. Thus, it seems as if California is well-equipped to enact similar types of virtual visitation legislation that are being codified throughout the country.

V. CONCLUSION

Given the importance of virtual visitation's role in facilitating non-custodial parent-child relationships in the face of geographical separation, along with the growing number of out-of-state courts and legislatures formally recognizing virtual visitation in their appellate decisions and statutes,²²⁷ virtual visitation's lack of formal recognition in California family law jurisprudence is a substantial void. California should adopt virtual visitation in family law decisions when a custodial parent's relocation is contested on the grounds that the noncustodial parent will adversely be separated from the child.

Virtual visitation is a practical solution in its application. Virtual visi-

222. FLA. STAT. § 61.13003(4) (2010).

223. *Id.* § 61.13003(1)(a)(1).

224. *Id.* § 61.13003(2).

225. *Id.* § 61.13003(3).

226. Bach-Van Horn, *supra* note 208, at 186.

227. *See supra* Part IV.A–B.

tation is not meant to be a substitute for in-person, physical visitation,²²⁸ but instead a feasible means to maintain a relationship despite physical distance.²²⁹ Virtual visitation fits well within California's best interest of the child standard, and in fact can play a substantial role in weighing the necessary factors in determining the child's best interest in favor of the relocation.²³⁰ Virtual visitation also supports California's public policy of encouraging a child's relationship with both his parents in the face of marital dissolution, as the supreme goal of virtual visitation is to promote the continuance of the noncustodial parent-child relationship, albeit through virtual means.

Moreover, today's technology makes virtual visitation plausible. Communicative technology has become commonplace in today's increasingly digitally-dependent society. Thus, using technology such as Skype to communicate with a parent or child is both familiar and relevant to today's generations. This relevance will continue to grow as new mediums of virtual communicative technology continue to develop in the future.²³¹ The rise of communicative technology is not static, but continues to grow in its influence and application. Thus, virtual visitation will continue to play a critical role well into the future.

Virtual visitation illustrates how technology has the vast capability to interact with the law to consequently serve a legal and meaningful purpose. When a court orders virtual visitation, the court is effectively recognizing the role technology plays in the judicial process. Thus, technology becomes a potent tool to help carry out the goals of family law courts throughout the country. In the context of virtual visitation, technology is being put to positive social use, in effect helping to foster and maintain relationships among people. By formally codifying and thereby recognizing virtual visitation, California would become part of the extraordinary process that amalgamates technology, culture, and interpersonal relationships to help serve and impact people in their daily lives.

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228. *See* Welsh, *supra* note 3, at 222.

229. *See supra* Part II.

230. *See supra* Part III.

231. *See supra* Part II.A.

· J.D. Candidate, Loyola Law School Los Angeles, 2012, B.A. University of Southern California, 2009. This Comment is dedicated to my family, friends, and teachers who have inspired me—and especially to my loving Grandfather, Dr. Edward Spatz. Although he is no longer physically here, he remains one of the greatest influences in my life and taught me the importance of hard work and kindness. I am also very grateful to my family, (specifically, my Mother, Lala, Micalla, Jean, and Isabella), for their constant support and love. I would also like

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