“Sometimes You Just Need a Hug” – Virtual Visits Between Parents and Their Children

COVID-19 has changed every court in North Carolina in one way or another. In abuse, neglect, and dependency court, the most consistent concern I have heard from parent attorneys over the last few months has to do with COVID-19 fallout affecting visits between parents and their kids.

Suspension of Visits

Since the beginning of the coronavirus, many counties have made heavier or exclusive use of remote technology in lieu of in-person visits. For the people responsible for arranging or supervising visits during an epidemic, the upsides are obvious: for one, less face-to-face interaction means a lower chance of virus transmission. From DSS’ vantage point, virtual communications may be less taxing of resources and time.

In some counties, Social Services reportedly has decided to suspend all in-person visits, in all cases, due to the pandemic. Attorneys in some districts have reported that district court judges entered administrative orders halting in-person visits in all cases.

This gives rise to several questions. To what extent can DSS or the court make use of electronic communication between parents and their children? Is there legal authority for suspending in-person visits altogether? How does virtual communication compare to an in-person visit? What are the consequences of relying on remote technology so heavily in parent-child communication? This post explores these questions.

Can Parents’ Visits Be Made Virtual under the Law? One question to consider is whether video and telephonic communication between parents and their children are considered visits under the Juvenile Code. The answer is that only in-person communication between parents and their children qualify as visits. In *In re T.R.T.*, 225 N.C. App. 567 (2013), the court held that video communication, such as via Skype, “does not constitute visitation” under the Juvenile Code. The court in *In re T.R.T.* reasoned:

> Nothing in our juvenile code states that electronic communication may be substituted for in-person visitation. To the contrary, our General Statutes state that “[e]lectronic communication with a minor child may be used to supplement visitation with the child. Electronic communication may not be used as a replacement or substitution for custody or visitation.” N.C. Gen. Stat. § 50–13.2(e) (2011).

Id. at 828. *See also In re J.L.*, 826 S.E.2d 258, 269 (N.C. Ct. App. 2019) (holding that “the trial court effectively denied respondent visitation when it prohibited face-to-face visitation but instead

allowed respondent to communicate" via the telephone with the juvenile).

The court in *In re T.R.T.* determined that although the language prohibiting electronic communication as a substitute for visitation is in Chapter 50, the law applies in Chapter 7B cases as well. *Id.* at 828–29. The court held that unlike other provisions that apply to orders "entered pursuant to this section," the opening words of subsection (e), "[a]n order for custody of a minor child," indicates that it is "a generic provision which applies to all custody actions." *Id*. (citations omitted).

If a parent is entitled to court-ordered visitation, DSS cannot change those visits to virtual communications by merely informing the parties of the change. As a matter of law, electronic communication is not a substitute for face-to-face visitation. Further, DSS cannot deny a parent visits when they are entitled to visits by court order, at least without further court review. G.S. 7B-905.1(b) gives DSS the discretion, in response to an illness, a scheduling conflict, or extraordinary circumstances, "to determine who will supervise visits when supervision is required, to determine the location of visits, and to change the day and time of visits . . . ." The COVID-19 pandemic is certainly an extraordinary circumstance, but this provision appears limited to scheduling details involving supervision, location, and time of visits. Changing the nature of a visit from in-person to remote is not merely a scheduling detail. To make this change, DSS would have to involve the court under the second part of G.S. 7B-905.1(b), which provides that "[i]f the director makes a good faith determination that the visitation plan is not consistent with the juvenile's health and safety, the director may suspend all or part of the visitation plan." However, the director must "expeditiously file a motion for review and request that a hearing be scheduled within 30 days." Converting in-person visits to virtual communication, and disallowing parents from seeing and holding their children, constitutes a suspension of visits. Under the quoted provision, DSS must determine that visits are inconsistent with the juvenile's health and safety and must expeditiously seek court review. DSS does not have the power to suspend visits, even in the face of extraordinary circumstances, without immediately seeking the approval of the court.

What about a judge's authority to order virtual communication between parents and their children? In individual cases, when a judge enters an order that places a juvenile outside the home or continues the juvenile's placement outside the home, the judge must "provide for visitation that is in the best interests of the juvenile consistent with the juvenile's health and safety, including no visitation." G.S. 7B-905.1(a). This statute gives a judge the authority to deny visits, a power the appellate courts have repeatedly held requires the court to make certain findings to exercise. *See, e.g., In re J.L.*, 826 S.E.2d 258 (N.C. Ct. App. 2019) (holding trial judge did not abuse discretion by denying the respondent visitation as the judge made a finding, based on the evidence, that visits were inappropriate and not in the child's best interest consistent with his health and safety); *In re J.S.*, 182 N.C. App. 79 (2007) (affirming the trial judge's order denying the respondent visits after determining that it cannot be in the juvenile's best interest or consistent with the juvenile's health and safety to have contact with the respondent, who repeatedly physically abused the juvenile); *see also In re K.C.*, 199 N.C. App. 557 (2009) (holding that "even if the trial court determines that

visitation would be inappropriate in a particular case or that a parent has forfeited his or her right to visitation, it must still address that issue in its dispositional order" by "specifically determin[ing] that such a plan would be inappropriate in light of the specific facts under consideration") (citations omitted).

Since electronic communication is the equivalent of "no visits," then it stands to reason that a judge may substitute electronic communication for face-to-face visits between a parent and child only if the judge makes findings that the denial of visits is consistent with the juvenile's health and safety. Even when a judge decides to supplement face-to-face visits with electronic communication, and not eliminate face-to-face visits altogether, the judge must comply with G.S. 50–13.2(e), which governs such communications. *In re T.R.T.*, 225 N.C. App. 567 (2013). Specifically, the judge must consider if the electronic communication is in the juvenile's best interest and whether "equipment to communicate by electronic means is available, accessible, and affordable to the parents of the minor child." *Id*. at 829 (citing G.S. 50–13.2(e)).

There appears to be no authority in Chapter 7B that allows a chief district court judge to enter an administrative order suspending visits for parents in all cases. Individual decisions "must be made on a case-by-case basis," with consideration given to the particular facts and circumstances. *See* Sara DePasquale, "Catastrophic Conditions," Statutory Timelines, and Other Issues in A/N/D Court Cases, On the Civil Side, UNC Sch. Gov't Blog (Mar. 17, 2020).

Should Parents' Visits be Made Virtual? To the extent that virtual communication is permissible in lieu of actual visits, we are still left with the question of whether it is the best way for parents and their children to communicate with and see each other. What are the effects of electronic communication being the only way parents and their children connect?

The School of Government recently hosted the 2020 Parent Attorney Conference over the course of two days. (Ironically given the subject of this post, the conference was virtual only.) One of the conference speakers was psychologist Dr. Jennifer Sapia, who taught the session "Bonding and the Importance of In-Person Visits." Dr. Sapia's session was a deep dive into virtual communication between parents and their children, and the many implications that attorneys and judges need to consider. She discussed how the bonding process works in humans, and why that process is impeded by electronic communication.

I was struck by Dr. Sapia's point that we often think about the child's ability or inability to participate in remote communication—does the child have the right maturity or attention span, for example—but we rarely consider the adult's ability to participate. Parents may have any number of issues that could complicate this equation. The parent may be suffering from mental or physical health issues or the effects of substance abuse. They may have cognitive delays or impairments, or difficulty paying attention and processing information. Or the parent may just be under the enormous stress of life and having an abuse, neglect, and dependency case. Any one of these factors, or a combination of them, could inhibit a parent's ability to meaningfully participate in

virtual communications.

Dr. Sapia also noted that often remote communication between a parent and their child may only be a good, quality exchange for the first several minutes. After that, our own limitations and the limits of technology can become apparent and the remaining time spent together suffers. It made me wonder whether attorneys whose clients are engaging in electronic communication with their child should consider advocating for those communications to be broken up into smaller, more frequent bites. For example, rather than a mother "seeing" her son through Skype for one hour a month, would it not be better for everyone, both the mother and the child, to have six ten-minute Skype calls over the course of that month? The family is spending the same total amount of time together, but the time spent together may be more meaningful and of a higher quality. I followed-up with Dr. Sapia about this, who responded: "I absolutely agree with the shorter, more frequent visits to better ensure quality and increased contact. With the variety of parental limitations we routinely come across, I think remote is a challenge for both children and parents and I would certainly recommend advocating for the non-traditional visitation schedule."

The lesser quality time spent together during virtual communications is also concerning because of the potential ways it could be held against the parent later in court. Reunification determinations frequently involve assessing the quality of visits between a parent and child. It might be alleged that during remote communications the child rarely pays attention to their parent, often playing on their own. Or, it may be said that the conversation between the two lacks depth or feeling. DSS, or the court, may conclude that the parent and child are not bonded. But, the remote nature of the communication may be contributing to or causing these outcomes, raising doubts about the accuracy of conclusions that are drawn from virtual contact.

Another presenter at the conference was Professor Dorothy Hairston Mitchell, the Supervising Attorney with the Juvenile Law Clinic at North Carolina Central University School of Law. Professor Mitchell discussed the importance of advocacy during a pandemic and stressed that attorneys should not wait until the case is at the termination of parental rights stage before putting on evidence that COVID-19 is causing the parent difficulty in complying with the court's orders. Attorneys should engage those issues in real time as they arise. Similarly, it is important to address anything that may be negatively affecting the parent-child bond. Do not wait until the child has not seen the parent in person for six months or a year to bring these concerns to the judge's attention.

Ultimately, virtual communications do not provide parents and their children the same experiences and bonding opportunities as face-to-face visits. As Dr. Sapia said, "sometimes you just need a hug."

If you are interested in viewing the 2020 Parent Attorney Conference, video recordings of the program will be posted on the School of Government's Public Defense Education website in the coming days. Those videos will be available for purchase for CLE credit or for free for those interested in viewing the programs. If you are a parent attorney and are facing any of the issues

addressed in this post, please reach out and let me know how things are going. Are visits in your jurisdiction being addressed on an individual case-by-case basis? Have you seen a change in reliance on virtual technology for communication between your clients and their children? You can reach me at Heinle@sog.unc.edu or (919) 962-9594.