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Christine E. Doucet

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# “SEE YOU ON SKYPE!”: RELOCATION, ACCESS, AND VIRTUAL PARENTING IN THE DIGITAL AGE

Christine E. Doucet\*

***Abstract:** Since its emergence in the 1990s, the Internet has been celebrated as a tool for connecting people from all corners of the globe. Electronic communication tools, such as the Internet, now have a significant role in daily life, particularly with young people. While the legal field traditionally lags behind in integrating technological advancements into practice, these developments are increasingly, albeit somewhat slowly, being incorporated in family law disputes. Courts are now considering the use of virtual visitation to facilitate access between noncustodial parents and their children, particularly in contested relocation cases. This paper will examine the use of virtual visitation in the context of contested relocation cases, from both a domestic and international perspective. It will be argued that courts and legislatures alike must recognize that, while virtual visitation offers many benefits, including expanding access between children and non-custodial parents, virtual access should not be used to replace physical visitation, or as a determinative factor in permitting relocation. Using examples of legislation from the United States and Australia, this paper also seeks to encourage provincial legislatures across the country to enact laws to clarify public policy with respect to the appropriate*

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B.A. (Western), B.S.W. (York), J.D. (Osgoode). The author would like to thank Professor Shelley Kierstead for her guidance, encouragement, and support in writing this paper. She would also like to thank the editors of the Canadian Journal of Family Law for their assistance, the peer-reviewers for their insightful feedback, and her father, Michael Doucet, for his helpful comments in the initial editing process.

*scope and use of electronic communication as a form of access between parents and children.*

*Like Humpty Dumpty, a family, once broken by divorce, cannot be put back together in precisely the same way.<sup>1</sup>*

— Judge Titone, *Tropea v. Tropea*

*We are all familiar with the popular saying, ‘they lived happily ever after.’ But divorce and consequent custody and visitation battles change this ideal situation. The idea of virtual visitation is gaining popularity in family courts across the country. Could it be that the new saying may go something like, ‘they lived happily ever after ... over the Internet?’<sup>2</sup>*

— Anne LeVasseur

## I. INTRODUCTION

Since its emergence in the 1990s, the Internet has been celebrated as a tool for connecting people from all corners of the globe. Electronic communication tools, such as the Internet, now have a significant role in daily life, particularly with young people. As LeVasseur commented, “[s]chool children learn at a young age how to navigate the world of computers, video games and the Internet. The Internet is as important to today’s young generation as television was to older generations.”<sup>3</sup>

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<sup>1</sup> *Tropea v Tropea*, 87 NY 2d 727 at 740 (1996).

<sup>2</sup> Anne LeVasseur, “Virtual Visitation: How will Courts Respond to a New and Emerging Issue?” (2004) 17:3&4 *Quinnipiac Probate LJ* 362 at 362.

<sup>3</sup> *Ibid.*

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While the legal field traditionally lags behind in integrating technological advancements into practice, these developments are increasingly, albeit somewhat slowly, being incorporated in family law disputes. Courts are now considering the use of virtual visitation to facilitate access between noncustodial parents and their children, particularly in contested relocation cases. Although some courts have embraced the use of electronic modes of visitation, it is clear from the jurisprudence that this support is not universal. There is, rather, support for the position that while it is important that the law stay in step with technological advancements, it is equally important to recognize the limitations of electronic communication between parents and children. As Schepard argues, virtual visitation should be treated “as an enhancement to face-to-face time between parent and child but nothing more. Parenting plans should not be structured on the assumption that virtual visitation can be a substitute for personal interaction between parent and child.”<sup>4</sup>

Courts and legislatures in Canada have recognized the importance of maximizing contact between both the custodial and non-custodial parent and their children.<sup>5</sup> Issues around mobility and relocation challenge this principle of maximum contact, and virtual visitation has only made the issues more complex. Social science research continues to emphasize the importance of both custodial and non-custodial involvement in the lives of their children.<sup>6</sup> While virtual visitation can provide non-custodial parents and their children with more face-to-face

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<sup>4</sup> Andrew Schepard, “Virtual Visitation: Computer Technology Meets Child Custody Law” (September 18, 2002) 228 NYLJ 3.

<sup>5</sup> See *Divorce Act*, RSC 1985, (2<sup>nd</sup> Supp), c 3, s 16(10); *Gordon v Goertz*, [1996] 2 SCR 27, 19 RFL (4<sup>th</sup>) 177 [*Gordon*].

<sup>6</sup> Kenneth Waldron, “A Review of Social Science Research on Post Divorce Relocation” (2005) 19:2 *Journal of the American Academy of Matrimonial Lawyers* 337.

contact, there has yet to be any social science research on the implications and effects of this type of access on the parent-child relationship.<sup>7</sup>

The purpose of this paper is to examine the use of virtual visitation in the context of contested relocation cases, from both a domestic and international perspective, and to provide a largely descriptive analysis of some of the trends that seem to be emerging from the courts. While there are many benefits to the use of virtual visitation, including expanding access between children and non-custodial parents, this paper will argue that courts and legislatures alike must recognize that virtual access should never be used to replace physical visitation, nor should it be used as a determinative factor in permitting relocation. Using examples from the United States and Australia, this paper also seeks to encourage Parliament and provincial and territorial legislatures to work together to develop and enact legislation to clarify public policy with respect to electronic communication between parents and children, particularly with respect to contested relocation cases.<sup>8</sup>

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<sup>7</sup> While it is beyond the scope of this paper to analyze the effects of virtual visitation on parent-child relationships, it is an important area in need of further research.

<sup>8</sup> In Canada, responsibility for legislating family law is divided between the federal Parliament and provincial legislatures. Section 91(26) of the *Constitution Act, 1867* (UK), 30 & 31, Vict, c 3 reprinted in RSC 1985, App II, No 5, grants exclusive jurisdiction to the federal government with respect to divorce, which includes corollary matters including custody and access, while section 92(13) grants jurisdiction over property and civil rights to the provincial legislatures, which includes matters relating to the separation of unmarried couples. If an action for custody and access is brought within the context of an application for divorce, the action may be resolved under the *Divorce Act*, *supra* note 5. In all other cases, actions for custody and access are resolved under provincial or territorial legislation. See e.g. *Children's Law Reform Act*, RSO 1990, c C 12.

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Part II of this paper will outline the methodology used in the analysis. Part III will provide a brief overview on the law of relocation in Canada and the ‘best interests of the child’ principle. Part IV will provide an introduction to virtual visitation, including its definition and the benefits and limitations of its use. Part V will explore virtual visitation from an international perspective, and will examine how it has been incorporated and discussed in jurisprudence from the United States and Australia. Part VI will provide an overview of Canadian cases involving relocation and virtual visitation, and will offer a descriptive analysis of some of the trends in the use of virtual access. Finally, Part VII will discuss legislative efforts in the United States and Australia and will conclude by offering recommendations for legislative reform in Canada as well as identifying areas for further research.

## II. METHODOLOGY

This article seeks to provide a descriptive analysis of some of the trends emerging from the case law in which virtual visitation has been discussed and incorporated in contested relocation cases. The analysis of the Canadian case law is meant to provide an indication of some of the trends emerging from the courts. As virtual visitation is a relatively new issue, and there has been little discussion in Canada to date, one of the goals of this paper is to provide an introduction to and overview of how this new phenomenon is evolving in the jurisprudence. Through a combination of searches in the Westlaw and Lexis-Nexis Canadian databases, eighty-three cases rendered in English were located that dealt with virtual visitation in contested relocation cases in some way.<sup>9</sup> This

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<sup>9</sup> The search terms entered were “Skype”, “virtual”, “visitation”, “electronic”, “access”, “webcam”, “web”, “Internet” and “relocat!”. The search covered cases rendered between 2003 (the first reported case located in the search) and April 2012.

ranged from a discussion of the benefits and limitations of virtual access, to courts simply ordering some form of virtual visitation with no discussion as to the appropriateness of this type of access at all. The results indicate some trends with respect to the ages of the children and the distance of the requested relocation, which will be discussed further in Part VI, below. Only cases dealing with virtual visitation specific to relocation were included in the analysis. There have been cases involving variations to custody and access orders more generally that have incorporated virtual visitation, but an analysis of these cases is outside the scope of this paper.

The examples from the United States and Australia are in no way meant to be a comprehensive analysis of the jurisprudence, but rather they were selected to provide examples of some of the ways in which courts within other jurisdictions are incorporating virtual access. The United States was selected to provide an international perspective largely because of the developments in the jurisprudence and legislation relating to virtual visitation. The cases from the United States that are used in this paper are some of the leading cases on virtual visitation that have been discussed in other scholarly works.<sup>10</sup>

Australia was chosen to provide an international perspective because virtual visitation has been incorporated into the jurisprudence, and the government has also enacted legislation specific to virtual access. The cases from Australia were selected using the Australian Legal Information Institute

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<sup>10</sup> See LeVasseur, *supra* note 2; Elisabeth Bach Van-Horn, "Virtual Visitation: Are Webcams Being Used as an Excuse to Allow Relocation?" (2008) 21:1 *Journal of the American Academy of Matrimonial Lawyers* 171; Sarah Gottfried, "Virtual Visitation: The Wave of the Future in Communication Between Children and Non-Custodial Parents in Relocation Cases" (2002) 36:3 *Fam LQ* 475.

(AustLII) online database.<sup>11</sup> Given the differences, particularly in geography, between Australia and Canada, the examples from Australia are not meant to be a comparator group to Canadian cases, but rather are meant to provide an international perspective on some of the ways other jurisdictions are incorporating virtual visitation.

### III. RELOCATION AND MOBILITY IN CANADA<sup>12</sup>

Since the enactment of the *Divorce Act* in 1968, marital breakdown has affected over one million Canadian children.<sup>13</sup> While many families continue to reside in the same city post-divorce, in our increasingly mobile society, relocation of one or both of the parents is becoming more commonplace. As Gottfried notes, “employer-initiated job transfers, economic necessity, and remarriage account for the bulk of relocations.”<sup>14</sup> Pursuant to section 16(7) of the *Divorce Act*,<sup>15</sup> a person with custody of a child may be required to notify any change of residence to anyone who has been granted access privileges. The non-custodial parent then has an opportunity to challenge

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<sup>11</sup> The search terms entered were “Skype”, “virtual”, “visitation”, “electronic”, “access”, “webcam”, “web”, “Internet” and “relocat!”.

<sup>12</sup> The following section is meant to provide a brief overview and introduction to the law of relocation in Canada. For an in-depth discussion on the *Gordon* decision, see Susan B Boyd, “Child Custody, Relocation, and the Post-Divorce Family: *Gordon v Goertz* at the Supreme Court of Canada” (1997) 9:2 CJWL 457. For a more comprehensive analysis of the law of relocation in Canada, see e.g. DA Rollie Thompson, “Movin’ On: Parental Relocation in Canada” (2004) 42:3 Fam Ct Rev 398. See also DA Rollie Thompson, “Ten Years After Gordon: No Law, Nowhere” (2007) 35 Reports of Family Law (6th) 307.

<sup>13</sup> Julien D Payne & Marilyn A Payne, *Canadian Family Law*, 3d ed (Toronto: Irwin Law, 2008) at 474.

<sup>14</sup> Gottfried, *supra* note 10 at 475.

<sup>15</sup> *Divorce Act*, *supra* note 5 at s 16(7).

the relocation of the child or seek a variation in the custody or access order to maintain “meaningful contact with the child.”<sup>16</sup>

The starting point for current discussions of relocation and access in Canada is the Supreme Court of Canada’s decision in *Gordon v. Goertz*.<sup>17</sup> In this case, the custodial parent, Mrs. Gordon, sought to relocate with her daughter to Australia. Upon learning of the proposed relocation, Mr. Goertz, the non-custodial parent, applied for custody of the child, or in the alternative, sought an order restraining the mother from relocating with the child. Mrs. Gordon filed a cross-appeal to vary access that would allow her to relocate with the child. In the majority decision delivered by McLachlin J., as she then was, the Court outlined the principles for evaluating custody and access in mobility cases. First, the parent applying for a change in the custody or access order must demonstrate that there is a “material change in the circumstances affecting the child.”<sup>18</sup> Once this threshold is met, the judge must embark on a fresh inquiry into the best interests of the child. The inquiry is not presumed to favour the circumstances of the custodial parent, although the views of the custodial parent are entitled to “great respect and the most serious consideration.”<sup>19</sup> The Court emphasized that “each case turns on its own unique circumstances [and] . . . the focus is on the best interests of the child, not the interests and rights of the parents.”<sup>20</sup>

The Court outlined several issues that should be considered by the judge, including the relationship between the

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<sup>16</sup> Payne & Payne, *supra* note 13 at 485.

<sup>17</sup> *Gordon*, *supra* note 5.

<sup>18</sup> *Ibid* at para 49.

<sup>19</sup> *Ibid* at para 48.

<sup>20</sup> *Ibid* at para 49.

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child and the custodial parent, the relationship between the child and the non-custodial parent, and the desirability to maximize contact between the child and both parents.<sup>21</sup> As McLachlin J. stated:

In the end, the importance of the child remaining with the parent to whose custody it has become accustomed in the new location must be weighed against the continuance of full contact with the child's access parent, its extended family and its community. The ultimate question in every case is this: what is in the best interests of the child in all the circumstances, old as well as new?<sup>22</sup>

On the facts of the case, the Court held that it was in the best interests of the child to remain with the custodial parent, notwithstanding her intended move to Australia. The decision in *Gordon v. Goertz* sets out the legal framework for analyzing a proposed relocation by a custodial parent. It is clear from this decision that the best interests of the child remain paramount. At the same time, the Court recognized the importance of balancing the needs of both parents to remain in contact with their child and to rebuild their own lives post-divorce.

As one American jurist commented, relocation cases “present some of the knottiest and most disturbing problems.”<sup>23</sup> As technology advances and new forms of communication emerge, cases involving mobility and non-custodial parental access become even more complicated. Although *Gordon v. Goertz* was decided over fifteen years ago, in her minority judgment, L’Heureux Dubé J. noted the possibility of incorporating alternative forms of contact and access, stating

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<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid* at para 50.

<sup>23</sup> *Tropea, supra* note 1 at 736.

that “there are a number of ways other than personal visits to maintain contact, such as telephone calls or other technological devices.”<sup>24</sup> Determining the best interests of the child in relocation cases must be done through a contextual analysis; decisions will necessarily turn on the facts of each case. Increasingly, parents seeking to relocate with their children are proposing alternative forms of visitation in parenting plans to maintain and facilitate access between non-custodial parents and children in contested cases. This paper will now turn to a discussion of virtual visitation, an emerging trend in mobility and relocation cases.

#### IV. VIRTUAL VISITATION

Over the past decade, electronic communication and the Internet have made their way into custody and access disputes, particularly in cases of mobility and relocation, through the use of ‘virtual visitation.’ Parents, courts, and legislatures are increasingly incorporating virtual visitation into more traditional approaches to custody and access, including cases involving relocation. Virtual visitation, also called ‘Internet visitation’ or “electronic communication,”<sup>25</sup> refers to “the use of e-mail, instant messaging, webcams, and other Internet tools to provide regular contact between a non-custodial parent and his or her child.”<sup>26</sup>

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<sup>24</sup> *Supra* note 5 at para LXVIII.

<sup>25</sup> For the purpose of this paper, ‘virtual visitation’ and ‘electronic communication’ are used interchangeably. While the literature tends to refer to ‘virtual visitation’, legislation commonly refers to ‘electronic communication’.

<sup>26</sup> Bach Van-Horn, *supra* note 10 at 172. For a discussion on the various technologies included under the ‘virtual visitation’ umbrella, see generally Kimberly R Shefts, “Virtual Visitation: The Next Generation of Options for Parent-Child Communication” (2002) 36:2 Fam LQ 303 at 312 – 317.

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There are, no doubt, many benefits to the use of virtual visitation as a form of access. The use of visual electronic tools and applications, such as Skype and other webcam applications, provides non-custodial parents with “face-time” with their children via electronic means. As Smith commented, in cases of relocation, “there is a real benefit to being able to see each other in daily conversation, or work on the same document to help with homework – all with essentially zero marginal cost.”<sup>27</sup> Michael Gough, a non-custodial parent and proponent of virtual visitation, explained that by using video conferencing with his daughter he is able to be more involved in her life. For example, he is able to “read his daughter Saige bedtime stories and teach her the ABCs. He's even watched her open Christmas presents from 1,000 miles away.”<sup>28</sup>

Virtual visitation can also provide non-custodial parents and their children with a more consistent level of interaction.<sup>29</sup> In traditional access schedules, in which the non-custodial parent typically spends time with his or her children in blocks of time, for example, every other weekend, virtual visitation can provide interaction on a more frequent basis, particularly on weeknights when access is typically not scheduled. As Schepard notes, “virtual visitation, while not a perfect fix, is a step toward helping parents and children spend a little more time interacting together.”<sup>30</sup>

While virtual visitation is most frequently being used to facilitate communication between parents and children,

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<sup>27</sup> William C Smith, “Just Wait Til Your Dad Logs On!: Virtual Visitation is Catching on to Resolve Child Custody Disputes” (Sept 2001) 87 ABA J 24.

<sup>28</sup> Susan Pigg, “Virtual Visits Amid Real Divorce; More Courts Allowing Parents to Sustain Relationships Online” *The Toronto Star* (13 April 2009) A4.

<sup>29</sup> LeVasseur, *supra* note 2 at 378.

<sup>30</sup> Schepard, *supra* note 4 at 3.

usually in the home via web-cam, as technology continues to advance, new opportunities for parent/child interaction emerge. For example, while in the past, courts have ordered a custodial parent to videotape and send to the non-custodial parent tapes of children's special events, such as piano recitals or a sporting game,<sup>31</sup> advancements in technology now make it possible for non-custodial parents to live stream their child's special events and view such events in real-time. In addition, the Internet can be used to create interactive websites for parents and children to post pictures and messages for one another online.<sup>32</sup>

It is clear that there are many benefits to the use of virtual visitation in fostering and maintaining relationships between non-custodial parents and their children; however, in this author's view, the incorporation of virtual visitation into relocation cases should be used only as a supplement to physical visitation, and not an alternative thereto.<sup>33</sup> As Bach-Van Horne commented:

Children crave warm hugs from both of their parents before going to bed, enjoy feeling their hair being ruffled by a loving hand while they do their homework, and relish in receiving a 'high-five' after a well-played sports match. Although seeing her parent's image on the computer monitor and hearing her parent's voice read her

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<sup>31</sup> See e.g. *Chen v Heller*, 759 A 2d 873 at 886 (NJ Sup Ct App Div 2000), in which the parenting plan stipulated that "[i]f defendant is unable to attend [the special event], plaintiff will videotape the event and send the tape to defendant."

<sup>32</sup> Schepard, *supra* note 4 at 1. See e.g. *McCoy v McCoy*, 764 A 2d 449 (NJ Super Ct App Div 2001), in which the plaintiff proposed building an interactive website that would allow the non-custodial parent to communicate with the child and among other things, review the child's schoolwork and records.

<sup>33</sup> For the purpose of this paper, "physical visitation" refers to in-person visitation and access between a parent and a child.

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a bedtime story from a computer speaker can be more fulfilling for a child than not seeing or hearing that parent at all, the availability of such technology should not be used as a substitute for the physical presence of a parent whenever possible.<sup>34</sup>

While there have yet to be any empirical studies on the effects of virtual visitation versus physical visitation on children in relocation cases, sociological research continues to emphasize the importance of the involvement of both parents in the lives of their children.<sup>35</sup> As Waldron notes, “[a] review of the research on the effects of increased [non-custodial parent] involvement is unambiguous: a child does better in every aspect of adjustment that has been measured, both long-term and short-term, if there is active [non-custodial parent] involvement.”<sup>36</sup> Referring specifically to cases involving relocation, Waldron further argues that “children of divorced parents who are separated from one parent due to the custodial or non-custodial parent moving beyond an hour’s travel time from the other parent are significantly less well off on many child mental and physical health measures compared to those children whose parents do not relocate after divorce.”<sup>37</sup> While virtual visitation can be used to connect non-custodial parents and their children living across the globe, the practicality of this type of access becomes an issue, particularly in situations involving a significant time difference between a parent and child.

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<sup>34</sup> Bach Van-Horn, *supra* note 10 at 172.

<sup>35</sup> See generally Waldron, *supra* note 6. See also Svetlana Yarosh, Yee Chieh “Denise” Chew & Gregory D Abowd, “Supporting Parent-Child Communication in Divorced Families” (2009) 67:2 *International Journal of Human-Computer Studies* 192.

<sup>36</sup> Waldron, *ibid* at 359.

<sup>37</sup> *Ibid* at 366.

Canadian courts are increasingly including virtual visitation in orders for access when the custodial parent is permitted to relocate with the child. As it is relatively new in the Canadian context, the extent to which virtual visitation will be used as a deciding factor in determining whether or not relocation is in the best interests of the child is not yet clear from the jurisprudence. This paper will now turn to a discussion of international jurisprudence from the United States and Australia, a sample of which provides an indication of some of the trends in the use of virtual visitation in contested relocation cases.

## **V. VIRTUAL VISITATION IN THE COURTS – AN INTERNATIONAL PERSPECTIVE**

### **United States**

The following section provides a sample of the ways in which courts in the United States have dealt with virtual visitation in contested relocation cases. As noted above, this is not meant to provide a comprehensive analysis of the case law in the United States, but merely to provide a sampling of some of the trends emerging from the jurisprudence. Over the past decade, courts across the United States have increasingly considered virtual visitation in contested relocation cases and access arrangements. While many courts are incorporating virtual visitation, the scope and extent to which it is being used is not universal. In one of the first cases to consider virtual visitation, the Supreme Court of New York considered alternative forms of visitation in determining whether to permit a mother to relocate to Saudi Arabia with her six-year-old child. In its decision in *Lazarevic v. Fogelquist*,<sup>38</sup> the court held that relocation was in the best interests of the child and permitted the relocation. In reaching the decision, however, Bransten J.

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<sup>38</sup> *Lazarevic v Fogelquist*, 175 Misc 2d 343 (NY Sup Ct 1997).

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ordered that the mother be responsible for ensuring that the proper technology and equipment was in place:

[The custodial mother] shall hire, at her expense, a computer consultant in both New York and Dhahran to select, purchase and set up compatible computer systems with laser printers in both Petitioner’s residence in New York and in Adrian’s [the child] new residence in Dhahran to enable Petitioner and son to communicate on the Internet and by fax.<sup>39</sup>

Since *Lazarevic*, courts in New York have frequently and increasingly recognized virtual visitation as a “viable supplement” to physical visitation agreements.<sup>40</sup>

Some courts have heralded virtual visitation as a creative alternative to traditional physical visitation. The New Jersey Court of Appeals grappled with the issue of virtual visitation in *McCoy v. McCoy*.<sup>41</sup> In this case, the Court of Appeals reversed the lower court’s decision denying the mother’s request to relocate with her nine-year-old daughter to California. At trial, Mrs. McCoy proposed a visitation schedule that included the same amount of physical visitation per year. In addition, Mrs. McCoy proposed alternative forms of visitation to supplement physical visitation, which included:

building a web site, which would include the use of camera-computer technology to give defendant, his family and friends, the ability to communicate directly with Katherine on a daily basis and review her school work and records.

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<sup>39</sup> *Ibid* at 356.

<sup>40</sup> LeVasseur, *supra* note 2 at 373.

<sup>41</sup> *McCoy v McCoy*, 764 A 2d 449 (NJ Super Ct App Div 2001).

Defendant would be afforded daily face-to-face communication with Katherine, albeit through an electronic medium.<sup>42</sup>

The trial judge held that “there was insufficient proof by the plaintiff that her suggested visitation, which included daily Internet communication, would be a comparable substitute for in-person weekly communication with [the child].”<sup>43</sup> On appeal, Lintner J.A.D. held that Mrs. McCoy’s proposed plan to develop an interactive website was “both creative and innovative.”<sup>44</sup> In reaching its decision, the court recognized the valuable role virtual visitation could play in supplementing physical visitation and held that the trial judge “merely stated the obvious conclusions that defendant’s relationship will be substantially altered by the move” and did not adequately consider the proposed alternative visitation plan.<sup>45</sup>

In *McGuinness v. McGuinness*,<sup>46</sup> the trial judge denied the mother’s request to relocate with her child from Nevada to Wisconsin. On appeal, the Supreme Court of Nevada held that “physical separation does not preclude each parent from maintaining significant and substantial involvement in a child’s life, which is clearly desirable. There are alternate methods of maintaining a meaningful relationship, including telephone calls, e-mail messages, letters, and frequent visitation.”<sup>47</sup> In remanding the case back to district court, Shearing J., emphasized that instead of focusing on the fact that a move would render the current joint custody arrangement impossible,

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<sup>42</sup> *Ibid* at 452.

<sup>43</sup> *Ibid* at 453.

<sup>44</sup> *Ibid* at 454.

<sup>45</sup> *Ibid*.

<sup>46</sup> *McGuinness v McGuinness*, 970 P 2d 1074 (Nev Sup Ct 1998).

<sup>47</sup> *Ibid* at 1077-1078 .

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the court must “seriously consider the possibility of reasonable, alternative visitation.”<sup>48</sup>

In some cases, courts are requiring that the parent seeking to relocate must provide the other parent with the equipment and technology necessary to participate in virtual visitation as a condition of the relocation. In a more recent decision, the Supreme Court of Suffolk County in New York specifically referred to the use of Skype in deciding whether to permit a mother to relocate from New York to Florida with her two children, who were nine and six-years old. In *Baker v. Baker*,<sup>49</sup> Garguilo J. permitted the relocation, but held that the move was conditional, ordering that:

The Petitioner, at her own cost and expense, will see to it, prior to re-location, that the Respondent, as well as the children, are provided the appropriate internet access via a Skype device which allows a real time broadcast of communications between the Respondent and his children. Thereafter, the Petitioner will make the children available three times per week for not less than one hour per connection to communicate via Skype with their father.<sup>50</sup>

As the mother’s move to Florida with the children was conditional upon the implementation and use of Skype, it appears that the court gave considerable weight to the use of virtual visitation in rendering its decision to permit the relocation.

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<sup>48</sup> *Ibid* at 1078.

<sup>49</sup> *Baker v Baker*, 29610-2007, NYLJ 1202464436957 1 (Suffolk Cty Sup Ct 2010).

<sup>50</sup> *Ibid* at para 6.

The Supreme Court of North Dakota has stressed that virtual visitation can be used as a supplement to physical visitation in determining contested relocation cases. In *Gilbert v. Gilbert*,<sup>51</sup> the Court overturned a district court decision denying a mother's request to move with her children from North Dakota to West Virginia. In concluding the district court's ruling that visitation could not be restructured was "clearly erroneous," the Supreme Court held that the lower court can also "consider whether virtual visitation can be used to supplement in-person visitation."<sup>52</sup> The court went on to discuss the appropriate use of virtual visitation:

It is most useful in cases such as this where the child and noncustodial parent are accustomed to seeing each other on a regular basis but no longer will be able to because of the relocation. Virtual visitation is not a substitute for personal contact, but it can be a useful tool to supplement in-person visitation. Virtual visitation is becoming more widely recognized as a way to supplement in-person visitation.<sup>53</sup>

The court concluded that virtual visitation another option that the court can consider "to help maintain and foster the relationship the child has with Gilbert and her extended family."<sup>54</sup>

While many courts have favoured incorporating virtual visitation in decisions permitting relocation, other courts have expressed doubts as to the effectiveness and appropriateness of

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<sup>51</sup> *Gilbert v Gilbert*, 730 NW 2d 833 (N Dak Sup Ct 2007).

<sup>52</sup> *Ibid* at para 22.

<sup>53</sup> *Ibid*.

<sup>54</sup> *Ibid*.

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this form of access. In *Marshall v. Marshall*,<sup>55</sup> the trial judge granted custody to Mrs. Marshall and permitted her to relocate from Pennsylvania to South Carolina with her two children, ages five and six. While the trial judge appreciated the incorporation of virtual visitation in Mrs. Marshall’s proposed access plan, on appeal, the Superior Court of Pennsylvania held a different view. In overturning the trial judge’s decision, Bowes J. concluded that:

While the Internet undoubtedly has fostered a myriad of ways for people to maintain communication and while computer video cameras allow people to ‘feel’ closer even when they are separated by hundreds of miles, such technology cannot realistically be equated with day-to-day contact between parents and young children.<sup>56</sup>

Having regard for the lack of meaningful access between Mr. Marshall and his two sons, the court determined that relocation was not in the best interests of the children and denied Mrs. Marshall’s request. Referring specifically to the use of virtual visitation, Bowes J. held “that substitute visitation via the Internet will not sufficiently foster the on-going relationship between the boys and [their] Father.”<sup>57</sup>

### **Australia**

As noted above, the following examples from Australia are not meant to serve as a direct comparison to Canadian cases. Rather, they are meant to provide another international perspective on the use of virtual visitation. Courts in Australia

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<sup>55</sup> *Marshall v Marshall*, 814 A 2d 1226 (Pa Super Ct 2002).

<sup>56</sup> *Ibid* at 1233.

<sup>57</sup> *Ibid*.

have also incorporated virtual, or electronic, visitation in contested relocation cases. In *M. v. S.*,<sup>58</sup> the Family Court of Australia considered the proposed relocation of the custodial parent, the mother, with her eight-year-old daughter, to the United Kingdom for a temporary period of three years. In reaching the decision to allow the mother to relocate, Dessau J. considered the use of virtual visitation, and held:

[T]hat other methods of communication, via telephone, email, MSN, or Skype, are no substitute for face to face contact. However, they are useful tools and means by which to lessen the tyranny of distance, and in this case they are within the grasp of the parties. At least Skype enables the conversants to see each other. All these methods of communication are familiar to [the child]. They are already a normal part of her life.<sup>59</sup>

As part of the access order, the court mandated virtual visitation through the use of telephone, e-mail, and Skype.<sup>60</sup>

In *Height v. Rhett*,<sup>61</sup> the court considered an application by a mother to relocate to New South Wales with her two children, ages 11 and eight. In considering the implications of relocation, the court noted that, generally, “children are frequently able to maintain their relationships with significant people, including a parent, by less frequent periods of quality time spent in school holidays, which is supplemented by other forms of communication, such as telephone, webcam or

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<sup>58</sup> *M v S*, [2006] FamCA 1408 (AustLII).

<sup>59</sup> *Ibid* at para 93.

<sup>60</sup> *Ibid* at para 127.

<sup>61</sup> *Height v Rhett*, [2010] FMCAfam 1268 (AustLII).

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letters.”<sup>62</sup> The court also considered the mother’s commitment to facilitating face-to-face contact between the children and their father. In reaching the decision to permit the relocation, the court assessed the impact of the time and distance apart between the children and their father and found that:

These periods are likely to be augmented by telephone, email and webcam communication – so called “electronic visitation.” However, such media, although sophisticated and available, are no substitute for direct physical exchanges between parent and child. Notwithstanding these obvious criticism, such media will nonetheless enable [X] and [Y] to feel their father as a living presence in their lives.<sup>63</sup>

As this case illustrates, the courts in Australia have stressed the importance of using virtual visitation as a supplement, not an alternative, to physical visitation.

Not all courts have embraced the use of virtual visitation, even as a supplement to physical visitation. In *Pitken v. Hendry*,<sup>64</sup> the Family Court of Australia once again considered the use of alternative forms of visitation in assessing a mother’s request to relocate to the United States with her two children, ages six and three. Murphy J. considered the proposed virtual visitation scheme at length, including evidence from the Family Consultant:

Equally, inherent in the proposal are lengthy periods where the only contact between the children and their father will be by telephone

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<sup>62</sup> *Ibid* at para 262.

<sup>63</sup> *Ibid* at para 347.

<sup>64</sup> *Pitken v Hendry*, [2008] FamCA 186 (AustLII).

and webcam. It was suggested by counsel for the mother that telephone and webcam communication would, as it were, make up for that loss. In that context, Mr C [the Family Consultant] referred to matters such as physical touching, the children responding to non-verbal cues; allowing a full range of emotions between children and father and the difficulties in maintaining interest in, and commitment to, webcam contact for young children, and, in particular, a child of L's age. In response to my question that, in effect, for children of this age nothing can take the place of a loving parent's hug, Mr C responded that he observed the children in this case seek out hugs from their father. Ultimately, Mr C was of the view that telephone and webcam contact "was not anywhere near on a par" with personal touch and contact afforded by face to face time between children and their father. I agree.

Whether, as a matter of semantics, time or communication in the form of telephone or webcam amounts to "personal" relations or "direct" contact, I consider it to be considerably less valuable for the children than face to face time spent with their father.<sup>65</sup>

In denying the mother's request to relocate, the court held that relocation to the United States would involve significant changes to the relationship between the children and their father, and the use of virtual visitation would be unlikely to "bridge that gap."<sup>66</sup>

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<sup>65</sup> *Ibid* at paras 158-159.

<sup>66</sup> *Ibid* at para 220.

## VI. VIRTUAL VISITATION IN CANADIAN JURISPRUDENCE

Similar to the United States and Australia, family courts in Canada are increasingly incorporating virtual visitation in contested relocation cases. The courts, however, have rendered conflicting decisions on the extent to which virtual visitation should be used, and whether or not it should be used at all. Since the first reported case in 2003, there have been eighty-three cases involving virtual visitation and contested relocation. Since 2010, there has been a sharp jump in the number of cases reported each year, with 24 reported in 2010, and 23 reported in 2011.<sup>67</sup> As courts become more familiar with virtual visitation and technology continues to develop, it is likely that these numbers will only continue to increase.

The following analysis is meant to provide an overview of some of the trends emerging from the jurisprudence in Canada. While some factors are more easily quantifiable, such as the ages of the children and the distance of the proposed relocation, other factors are less so, such as the application of virtual visitation to the principle of maximum contact.

### **Maximizing contact between non-custodial parents and their children**

Some courts have considered the use of virtual visitation and suggest that maximum contact can be augmented or supplemented through virtual access. In one of the first relocation cases in Canada to make reference to virtual visitation, the Ontario Superior Court of Justice examined a

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<sup>67</sup> The number of reported cases is as follows: 2003 – 2; 2004 – 4; 2005 – 5; 2006 – 2; 2007 – 5; 2008 – 8; 2009 – 7; 2010 – 24; 2011 – 23; 2012 (as of March 2012) – 3.

request by a custodial parent, the mother, to relocate with her two children, ages five and three, to California. In *F.J.N. v. J.L.N.*,<sup>68</sup> the court recognized that the proposed relocation would impact the contact and relationship between the non-custodial parent, the father, and his children. The court seemed to appreciate both the benefits and limitations of virtual visitation, and held that “[t]he totality of access would be comparable to that at present; however, the regular weekly time would be lost. To some extent, this may be offset by telephone and Webcam communication.”<sup>69</sup> In assessing the use of virtual visitation in this case, Gordon J. found that “[t]elephone and Webcam communication is necessary for the children and both parents, as often as daily, if schedules permit.” In her proposed access schedule, the mother offered to purchase a computer and the necessary video equipment to facilitate the webcam communication between the father and the children.

In this case, the court held that the proposed relocation was in the best interests of the children. In permitting the move to California, Gordon J. ordered that, in addition to physical visitation every fourth month, the father shall have access to the children through “[u]nlimited telephone, e-mail, webcam and postal communication by either party at all reasonable hours.”<sup>70</sup> In addition, the court ordered that the mother “shall purchase a computer and necessary video equipment and deliver same to father prior to relocation.”<sup>71</sup> As this case illustrates, courts often place the responsibility of purchasing the necessary equipment for virtual visitation on the custodial parent seeking the relocation.

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<sup>68</sup> *FJN v JLN*, [2004] OJ No 3336, 9 RFL (6th) 446 (Ont Sup Ct).

<sup>69</sup> *Ibid* at para 37.

<sup>70</sup> *Ibid* at para 47.

<sup>71</sup> *Ibid*.

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In *Hejzlar v. Mitchell-Hejzlar*,<sup>72</sup> the British Columbia Court of Appeal overturned a lower court’s decision that denied a mother’s request to relocate with her nine-year-old son from Vancouver, British Columbia, to Edmonton, Alberta. The Court of Appeal held that the trial judge, among other things, failed to properly consider the merits of the mother’s proposed plan of access:

One aspect of maximizing contact with the respondent in this case was the degree of access that the respondent could realistically enjoy if the child moves. Here the amount of "in person" time with the respondent, during the school year, in the event of a move to Edmonton, would likely be one weekend a month, rather than alternating weekends as provided in the separation agreement. On the other hand, summer vacation access would be more than doubled, as would Christmas access, and there is room for flexibility around statutory holidays and spring break. This access would be amplified by electronic communication. The reasons for judgment, on my reading, do not reflect these features.<sup>73</sup>

In allowing the appeal, the court commented on the use of virtual visitation:

“A plan is laid out for access, which although providing less "in person" contact at times, also provides longer, and consequently more normal, contact at other times. Modern technology provides opportunity for greater communication,

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<sup>72</sup> *Hejzlar v Mitchell-Hejzlar*, 2011 BCCA 230, BCI No 885.

<sup>73</sup> *Ibid* at para 51.

even video visiting, than was the case only a few years ago.”<sup>74</sup>

In *Ben-Tzvi v. Ben-Tzvi*,<sup>75</sup> the Ontario Superior Court of Justice examined a request by the mother, Ms. Ben-Tzvi, to move back to Israel with her five-year-old daughter. In rendering the decision to permit the relocation, Frank J. recognized that contact between parents and children should not be limited to being “physically together”:

Technology makes it easy and inexpensive to be in contact both orally and visually. The Ben-Tzvi’s are accustomed to using webcam and voice communications through the internet. They are able to speak long distance without time limit at no cost through internet programs such as Skype. Photographs can be sent almost instantaneously, also at no cost. I accept Ms. Ben-Tzvi’s evidence that she believes that Timor should have regular contact with her father. I accept that Ms. Ben-Tzvi would cooperate in facilitating this.<sup>76</sup>

The court held that Ms. Ben-Tzvi would be responsible for ensuring frequent telephone and webcam access between Mr. Ben-Tzvi and his daughter. The court recognized the difficulties that the time difference between Israel and Ontario may pose, and held that facilitating virtual visitation and telephone access would require “greater commitment on the part of Ms. Ben-Tzvi to incorporating calls from Timor’s father into her day.”<sup>77</sup>

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<sup>74</sup> *Ibid* at para 53.

<sup>75</sup> *Ben-Tzvi v Ben-Tzvi*, [2006] OJ No 2986, 150 ACWS (3d) 158 [*Ben-Tzvi*].

<sup>76</sup> *Ibid* at para 72.

<sup>77</sup> *Ibid* at para 107.

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In *Shiplack v. Shiplack*,<sup>78</sup> Wilson J. permitted Mrs. Shiplack, the custodial parent, to relocate from Saskatchewan to Alberta with her nine-year-old. The court considered the impact the proposed move would have on the relationship between Mr. Shiplack and his daughter, but ultimately held that relocating with her mother was in the best interests of the child. As Wilson J. stated:

I am not suggesting that the father is not all of the things that the multitude of affidavits filed on his behalf suggest. I believe the father has been a good father to Carly and that he will continue to be a good father to Carly. . . . Although I recognize the father will have less physical time with Carly after the mother moves to Medicine Hat, the mother must do everything possible to ensure the father maintains a significant role in Carly’s life. Frequent phone calls, emails, and even the purchase of a webcam so that Carly can see her father, via computer, are encouraged.<sup>79</sup>

While virtual visitation was not specifically included in the access order, the court encouraged the use of webcam and other alternative forms of access to maintain the relationship between Mr. Shiplack and his daughter.

In *Cochrane v. Graef*,<sup>80</sup> the Ontario Superior Court of Justice looked at a request by the mother, Ms. Cochrane, to relocate to the United Kingdom with her twin sons, who were nine years-old, for reasons related to employment and an

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<sup>78</sup> *Shiplack v Shiplack*, 2008 SKQB 254, SJ No 392.

<sup>79</sup> *Ibid* at para 23.

<sup>80</sup> *Cochrane v Graef*, 2010 ONSC 4479, OJ No 3756.

anticipated marriage to a British citizen. Although Ms. Cochrane had custody of the twins, the father, Mr. Graef enjoyed liberal access. In addition to ten weeks of physical visitation, Ms. Cochrane proposed access through virtual visitation:

In addition to the [physical visitation], there would be telephone contact along with all the technical gadgets that might supplement that including webcam, the magic jack, Skype, etc. Both children would have their own computer so that they could talk to the respondent whenever they wished. She adopted as well the idea that the respondent has in his plan of providing video recordings of the various activities of the children.<sup>81</sup>

In permitting the relocation, Scott J. increased the amount of physical visitation with the father and ordered that visitation be supplemented with “reasonable telephone and webcam access.”<sup>82</sup>

In *Marcuzzi v. Lindo*,<sup>83</sup> the court assessed a mother’s request to temporarily relocate with her children, ages five and two, to Prince Edward Island, where she was offered a ten-month contract position as a lecturer with the University of Prince Edward Island. Specifically, Ms. Lindo sought an order permitting her to temporarily remove the children from Ontario for a defined period of ten months. Under the principles set out in *Gordon v. Goertz*, the court considered the custodial parent’s willingness to facilitate access. Spies J. was satisfied that the mother supported a relationship between Mr. Marcuzzi and the

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<sup>81</sup> *Ibid* at para 42.

<sup>82</sup> *Ibid* at para 70.

<sup>83</sup> *Marcuzzi v Lindo*, 2010 ONSC 4739, OJ No 3679.

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children, including the use of virtual visitation to facilitate access:

[T]he Mother has offered to permit the children to communicate with their Father on a daily basis by video telephone such as Skype. ... Although there would be an impact, with a generous impact [*sic*] schedule, and given the fact the children have already bonded with their Father, in my view his close relationship with the children could be maintained.<sup>84</sup>

In permitting the temporary relocation, the court incorporated the use of virtual visitation and ordered that “[w]hile in PEI, the Mother shall ensure that the children have regular contact with the Father by Skype at least every other day.”<sup>85</sup>

While many decisions in Canada have incorporated the use of virtual visitation in access plans, it is clear that the support for its use is not universal. Some courts seem to be wary of the effects and implications that virtual visitation can have on the desirability to maximize contact between the child and both parents, particularly in cases where the relationship between the child and the non-custodial parent appears to be strong.

In *Prest v. Cole*,<sup>86</sup> the Nova Scotia Supreme Court denied a mother’s request to relocate with her four-year-old daughter from Halifax to Victoria, British Columbia. In reaching this decision, Pickup J. commented on the impact the relocation would have on the father’s relationship with his young daughter:

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<sup>84</sup> *Ibid* at para 81.

<sup>85</sup> *Ibid* at para 97.

<sup>86</sup> *Prest v Cole*, 2003 NSSC 243, NSJ No 463.

I am satisfied on the evidence access will be difficult and less frequent should Ms. Prest remove Kennedy to Victoria. It is clear on the evidence that such a move would nullify Mr. Cole's access rights to the child as he now knows them. Ms. Prest's suggestion of unlimited phone calls, email and a web cam, will not replace physical one-on-one contact between Mr. Cole and Kennedy. The effect will be an erosion of the relationship between Kennedy and her father. The distance between Nova Scotia and Victoria will preclude the present weekly contact Mr. Cole and his daughter obviously enjoy.<sup>87</sup>

The court further commented on the implications of virtual visitation as a form of access and held that “telephone, letters, email, including a video web cam, is not the same as one-on-one contact: a father's hand, a walk in the park and other personal interaction as normally happens between a father and his young daughter.”<sup>88</sup>

In *Meijers v. Hasse*,<sup>89</sup> the mother, Ms. Meijers, remarried and sought the court's permission to relocate to the Netherlands with her two children, ages six and five-years-old, where her new husband resided. Relying on the decision in *Ben-Tzvi*, Ms. Meijers proposed an access schedule that included daily access via webcam between the children and their father.<sup>90</sup> Thorburn J., however, distinguished that case from the case at bar, and held that:

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<sup>87</sup> *Ibid* at para 33.

<sup>88</sup> *Ibid* at para 34.

<sup>89</sup> *Meijers v Hasse*, [2007] OJ No 2506, 39 RFL (6<sup>th</sup>) 115.

<sup>90</sup> *Ibid* at para 118.

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Given their ages and their close emotional bond with their father, I do not think a Webcam or Skype facility is an appropriate substitute for regular physical contact. I would distinguish this case from the Ben-Tzvi decision as in that case . . . [w]ebcam and Skype facilities were not held to be an appropriate substitute for regular physical contact. In the circumstances of that case, however, they were a means to lessen the burden of the inevitable separation given that the mother had to return to Israel. Moreover, the parties in that case were accustomed to using the technology, which they are not in this case.<sup>91</sup>

In denying Ms. Meijers’ request to relocate, the court placed considerable weight on maximizing contact between parent and child. The court found that “both [parents] are essential caregivers” and held that the proposed relocation was not in the best interests of the child.<sup>92</sup>

### **Age**

An analysis of the eighty-three cases involving virtual visitation and contested relocation cases indicates that age may be a factor in determining whether virtual visitation is an appropriate form of access.<sup>93</sup> Courts have taken a slightly more cautious approach in their use of virtual visitation in cases in which the youngest or only child was of a pre-school age,

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<sup>91</sup> *Ibid* at para 121.

<sup>92</sup> *Ibid* at paras 173-175.

<sup>93</sup> As many of the cases involved more than one child, the analysis with respect to age was done by examining cases in which the youngest or only child was under six years of age, and comparing them to cases in which the youngest or only child was six years of age or older.

under six years old. Of the eighty-three cases total, relocation was permitted in sixty-two cases (75 percent), and denied in twenty-one cases (25 percent). Interestingly, of the cases in which relocation was denied, fifteen involved children under six years of age (71 percent), while seven involved children who were six and older (29 percent). In cases where relocation was permitted, there was an even split between cases involving children under six (thirty-one cases) and children aged six and older (thirty-one cases). Looking at the numbers in another way, there were forty-six cases in which the youngest or only child was under six years old, and the courts permitted relocation in thirty-one cases (67 percent), while it denied the parental request to relocate in fifteen cases (33 percent). Where the youngest or only child was six years of age or older, the court allowed the relocation at a higher rate, in thirty cases (81 percent), while the request was denied in only seven cases (19 percent).

As relocation cases are determined through a contextual approach, it is hard to determine how much weight is given to each factor, including the use of virtual visitation. While these statistics are not conclusive, the cases illustrate a more cautious approach by the courts to the treatment and incorporation of virtual visitation in cases involving younger children. While some courts have specifically commented on the use of virtual visitation with respect to a child's age, others have failed to address whether this was a factor in deciding whether or not to incorporate virtual visitation. The following cases are examples of cases in which age seemed to play a significant factor in determining whether or not virtual visitation is an appropriate form of access in contested relocation cases.

In *McArton v. Young*,<sup>94</sup> the court examined the appropriateness of virtual visitation with respect to the child's

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<sup>94</sup> *McArton v Young*, 2010 ONSC 3962, OJ No 5927.

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age. In this case, the mother sought permission to relocate from Ottawa to Montreal with her four-year-old child. In finding that the proposed move would not adversely affect the bond between Mr. Young and his daughter, the court permitted Ms. McArton to move to Quebec.<sup>95</sup> The court, being mindful of the principle of maximum contact, ordered that Mr. Young have access:

by telephone two evenings per week. . . . Such conversations should be for a reasonable length of time given the age of Montana. When Montana is capable, access may be supplemented through other electronic means such as e-mail, texting or webcam as may be available to both he and Montana.<sup>96</sup>

In this case, the court appeared to appreciate the limitations of virtual visitation technologies with respect to the age of the child.

In *A.D.P. v. T.E.W.*,<sup>97</sup> the Nova Scotia Family Court denied a mother’s request to relocate to Georgia with her two-year-old child to reside with her new husband. The parties enjoyed joint custody and were co-parenting the child for his entire life. In denying the mother’s request to relocate with the child, Levy J. assessed the impact the relocation would have on the child’s relationship with his father. The court discussed the use of virtual visitation, however, this was held to be inappropriate, given the age of the child and the nature of the bond and relationship between father and son:

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<sup>95</sup> *Ibid* at para 35.

<sup>96</sup> *Ibid* at para 37.

<sup>97</sup> *ADP v TEW*, [2005] NSFC 22, NSJ No 497.

The consequences of the mother's desired move to Georgia will inevitably be to rupture the co-parenting that has been the constant in this child's life. If the child goes with her, her proposal or any similar proposal for the father to have access for a few weeks every three months, and telephone access, or webcam communication, would simply not allow for a fulsome continuation of the father-son bond. This child is still less than three years old and it is highly unlikely that a voice on the telephone or a grainy picture on a computer will be any substitute for a flesh and blood father sitting him on his lap or kissing him goodnight.<sup>98</sup>

The court further emphasized the importance of maintaining contact between the child and both parents. As Levy J. stated, "[t]he child's loss would be every bit as real and substantial if the child were to remain here with his father while the mother moved away and the access or contact provided for was similar. She is no less a part of his life, her in-person contact with the child no less beneficial for him."<sup>99</sup>

In another case, the court examined a proposed plan of access, including virtual visitation and telephone access, and held that a mother's proposed move from Nova Scotia to Newfoundland was not in the child's interest. In *Coughlin v. Coughlin*,<sup>100</sup> the court held that the mother's proposed plan was insufficient and that relocation would lead to the "devastation" of the relationship between the non-custodial parent, the father, and his twenty-two month old son.<sup>101</sup> In considering the use of

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<sup>98</sup> *Ibid* at para 23.

<sup>99</sup> *Ibid* at para 24

<sup>100</sup> *Coughlin v Coughlin*, 2011 NSSC 204, NSJ No 272.

<sup>101</sup> *Ibid* at para 60.

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virtual visitation, the court looked at the child’s age in its assessment of the appropriateness of ordering such access:

Ms. Coughlin was asked how often Noah talks on the phone. She said that she and he use Skype with family in Newfoundland. I'm told that Noah says "hi and bye" and that "he tries to vocalize." Ms. Coughlin said that "the phone is an option when [Noah] has a vocabulary".<sup>102</sup>

The most significant aspect of removing Noah from Nova Scotia would be its impact on his relationship with his father. Based on Noah's current use of Skype, his limited vocabulary and his inability to use a phone, Noah's entire relationship with his father will be dependent on face-to-face visits.<sup>103</sup>

The court concluded that an order of telephone or other virtual access was not appropriate at the present time, but indicated it would be an suitable form of access in the future: “At Noah's age, I am not specifying telephone access. That is not appropriate at this age, but I would expect it to exist by the time Noah is three years old and I would expect that each parent would be entitled to speak with Noah before he goes to bed when Noah isn't with him or her.”<sup>104</sup>

In *Taylor v. Wanless*,<sup>105</sup> the age of the children again appeared to be a significant factor in assessing the appropriateness of virtual access. In this case, the mother sought to relocate with her three children, ages eight, six and

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<sup>102</sup> *Ibid* at para 28.

<sup>103</sup> *Ibid* at para 57.

<sup>104</sup> *Ibid* at para 64.

<sup>105</sup> *Taylor v Wanless*, 2011 NSSC 336, NSJ No 483.

four, from Nova Scotia to British Columbia. In her plan for access, the mother proposed phone calls, Skype and e-mail contact. In assessing this type of contact, the court held that virtual access would not be appropriate, given the age of the children and their individual capabilities:

I have evidence that only Sam can read and write. For Joshua and Autumn, email does not provide direct interaction with their father. It's not clear that contact by telephone and Skype can be initiated by the children on their own: this contact may depend on someone else. If Mr. Wanless remains in Nova Scotia, phone calls and Skype visits are constrained by the significant time difference between Halifax and Victoria.<sup>106</sup>

While the above are examples of cases in which virtual visitation has been determined to be inappropriate for young children, there are cases in which courts have considered this type of access to be more appropriate for older children. In *Templeman v. Whelen*,<sup>107</sup> a mother sought to relocate with her seven-year-old daughter from Newfoundland to Minnesota, USA. In commenting on the appropriateness of virtual visitation, the court acknowledged that the child was old enough to meaningfully participate and that this was a viable alternative form of access: “with video conferencing programs such as Skype and other social networking tools, the ability for people to stay in touch while living far apart is constantly improving. Mackenzie is now of an age at which she can fully participate in such means of communication.”<sup>108</sup> In permitting

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<sup>106</sup> *Ibid* at para 53.

<sup>107</sup> *Templeman v Whelen*, 2010 NLUFC 3, NJ No 68.

<sup>108</sup> *Ibid* at para 77.

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the relocation, the court specifically included virtual visitation in the access order.<sup>109</sup>

In another case, the court seemed to be mindful that the appropriateness of virtual visitation would develop as the child grows older. In *Johnston v. Kurz*,<sup>110</sup> the court permitted a mother to relocate with her four-year-old daughter from Saskatchewan to New Brunswick. The court held that as the child matures, virtual visitation would be a more regular form of contact: “As Reese matures, telephone access can occur regularly, and the respondent will install high speed internet access in her new home so that communication can also occur via webcam.”<sup>111</sup>

The court further ordered access via letter, telephone, email and webcam between the father and his child.<sup>112</sup> As the above cases illustrate, some courts have been more explicit in considering age as an important factor in determining whether or not virtual visitation is an appropriate form of access in contested relocation cases.

### **Distance**

The distance of the proposed relocation also may be a factor in determining whether virtual visitation is a viable form of access. In twenty-two cases, the proposed move was less than 1000 kilometres, while in eighty-one cases, the relocation was over 1000 kilometres. In two cases, the location of the proposed move only identified as out of country or out of province. Of the cases that involved relocations of less than 1000 kilometres, four were denied (18 percent), while eighteen

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<sup>109</sup> *Ibid* at para 86.

<sup>110</sup> *Johnston v Kurz*, 2005 SKQB 362, SJ No 558.

<sup>111</sup> *Ibid* at para 28.

<sup>112</sup> *Ibid* at para 49.

were permitted (82 percent). In cases where the proposed move was over 1000 kilometres, there was a slightly higher percentage that were denied; in seventeen of the cases, the relocation was denied (28 percent), while in fifty-nine cases, the relocation was permitted (72 percent). In the twenty-eight cases that involved proposed relocations outside of Canada, relocation was permitted in twenty-two of the cases (79 percent) and denied in six cases (21 percent). Seventeen of the cases involved relocation on a different continent, and the refusal of relocation was also higher. In these cases, twelve were permitted (71 percent), while five were denied (29 percent).

When age and distance are examined together, it appears that courts are more cautious to incorporate virtual visitation in cases involving younger children and longer distances of proposed relocations. As noted above, in the cases in which the proposed relocation was over 1000 kilometres, seventeen of the fifty-nine cases were denied, and of those eleven were cases in which the youngest or only child was under six years old (65 percent).

As Bala and Wheeler note, social science research suggests that the distance of a proposed relocation is an important factor in assessing the impact of the move on the relationship between the child and non-custodial parent, particularly in the time it takes to travel between the two locations.<sup>113</sup> Similarly, when cases involve a significant time difference, the lack of access or viability of electronic forms of access may have an effect on the relationship between parent and child. It may not be practical to order virtual visitation in situations in which the significant time difference would make it difficult for parents and children to communicate online. It is important that courts are clear in their understanding and

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<sup>113</sup> Nicholas Bala & Andrea Wheeler, "Canadian Relocation Cases: Heading Towards Guidelines" (2012) 30:3 Can Fam LQ 271 at 295.

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application of virtual visitation as a viable and practical form of access with respect to time differences between parents and children.

An analysis of the cases by the time difference between the current location and the proposed relocation indicates the courts may be alert to the challenges and practicality of virtual visitation, although it is not always explicitly addressed. In the sixty-seven cases in which the time difference was less than six hours, courts permitted relocation in fifty-one cases (76 percent), while the request was refused in sixteen cases (24 percent). When the time difference was six hours or greater, courts refused relocation requests at a higher rate. In nine cases, relocation was permitted (64 percent), while in five cases, the request was denied (36 percent). In the five cases involving a time difference of ten hours or greater, the rate of refusing requests to relocate was significantly higher. In three of the cases, relocation was denied (60 percent), and in two of the cases, it was permitted (40 percent).

In some of the cases involving greater distances, courts have specifically acknowledged the potential effects that the time difference might have on the practicability of virtual visitation.<sup>114</sup> In *Valyashko v. Poustovetov*, the court determined that the mother’s proposed move to New Zealand was not in the best interests her eight-year-old child. Ms. Valyashko proposed a schedule of access that included the use of Skype and webcam. It was her position that this technology would not only compensate for the reduced physical visitation, but would “enhance the quality of time [Mr. Poustovetov] spends with his daughter.”<sup>115</sup> In denying the interim motion to permit the relocation, the court looked contextually at the use of virtual

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<sup>114</sup> See *Ben-Tzvi*, *supra* note 75; *Valyashko v Poustovetov*, 2010 ONSC 2917, 87 RFL (6<sup>th</sup>) 429 [*Valyashko*].

<sup>115</sup> *Valyashko*, *ibid* at para 11.

visitation and considered the effect the time difference would have on the viability of virtual visitation:

[The mother's] assertion that the father-child relationship can not only be maximized but enhanced by technological tools, does not in my view take into account the sixteen hour time difference between New Zealand and Kingston. The time difference alone will mean the child's contact with Alexei will be at awkward hours either for the child or for the parent, and would necessitate a complicated schedule. Such schedule would necessarily preclude the daily and weekly involvement in the child's activities that exists in the current contact between child and father.<sup>116</sup>

In reaching its decision, the court examined the current relationship between Mr. Poustovetov and his daughter and held that the relocation would not be in the best interests of the child. While this case is an example of courts acknowledging the effect that long distance relocations can have on the use of virtual visitation, in other cases where courts have permitted long distance relocation and virtual visitation has been incorporated, some courts have failed to address this issue.<sup>117</sup>

## VII. VIRTUAL VISITATION LEGISLATION

As the jurisprudence demonstrates, there is inconsistency

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<sup>116</sup> *Ibid* at para 22.

<sup>117</sup> See e.g. *RB v EB*, 2010 ABQB 44, AJ No 62, in which relocation was permitted from Alberta to Israel, and virtual visitation was ordered without a discussion of the impact that the 9 hour time difference would have on the viability and practicality of virtual access. See also *Hibbert v Escano*, 2010 ONSC 1445, OJ No 944 in which relocation was permitted from Ontario to Singapore.

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amongst the courts with respect to the use of virtual visitation in contested relocation cases. One way to address this inconsistency is to enact legislation, which provides guidance to the courts regarding the scope and appropriate use of virtual visitation. This paper will now turn to a discussion of legislation that has been enacted in the United States and Australia with respect to virtual visitation and electronic communication between parents and children.

### **United States**

While courts across the United States are increasingly incorporating virtual visitation in relocation cases and access agreements, state legislatures have not been as quick to address these advancements in technology and their impact on relocation disputes.<sup>118</sup> Currently, six states have enacted laws concerning virtual visitation. While many of the essential elements are similar, there are distinctions amongst state laws regarding the extent to which virtual visitation should be used, particularly in cases involved relocation.

#### *Utah*

In 2004, Utah became the first state to introduce legislative action with respect to virtual visitation. Generally, the law in Utah “provides that, if available, reasonable virtual access be permitted and encouraged between children and a non-custodial parent.”<sup>119</sup> In defining “virtual parent time” the law expressly states that courts are not authorized to use virtual visitation to replace physical visitation between non-custodial

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<sup>118</sup> David Welsh, “Virtual Parents: How Virtual Visitation Legislation is Shaping the Future of Custody Law” (2008) 11:1 *JL & Fam Stud* 215 at 219.

<sup>119</sup> US, HB 82 *Virtual Visitation Amendments*, 2004, Gen Sess, Utah, 2004 (enacted).

parents and children: “Virtual parent-time is designed to supplement, not replace, in-person parent-time.”<sup>120</sup>

In addition, the law states that parents must “permit and encourage . . . communications with the child, in the form of . . . virtual parent-time if the equipment is reasonably available.”<sup>121</sup> If the parents cannot agree whether the equipment is reasonably available, the courts can step in and make a determination, taking into consideration “(a) the best interests of the child; (b) each person’s ability to handle any additional expenses for virtual parent-time; and (c) any other factors the court considers material.”<sup>122</sup> The law in Utah does not specifically refer to the scope or extent to which virtual visitation can be used in determining relocation cases.

### *Wisconsin*

Wisconsin became the second state to incorporate virtual visitation into its laws, enacting legislation in 2006. Similar to Utah, the law in Wisconsin emphasizes the use of virtual visitation as a supplement to physical visitation. The law states that “[e]lectronic communication with the child may be used only to supplement a parent’s periods of physical placement with the child. Electronic communication may not be used as a replacement or a substitute for a parent’s periods of physical placement with the child.”<sup>123</sup> In addition, the law in Wisconsin also stipulates that when determining whether or not to order virtual visitation, a court must take into consideration the best

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<sup>120</sup> Utah Code tit 30 c 3 §32(3)(f) (2004).

<sup>121</sup> *Ibid* at §33(14).

<sup>122</sup> *Ibid*. For a discussion on the availability and accessibility of virtual visitation technology and equipment, see e.g. Welsh, *supra* note 118 at 218 – 219.

<sup>123</sup> Wis Stat § 767.41(4)(e) (2007).

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interests of the child and whether the necessary equipment is “reasonably available” to both parents.<sup>124</sup>

While Utah’s law was somewhat ambiguous as to the extent virtual visitation can be used in determining whether or not to permit relocation, the law in Wisconsin is quite clear, stating: “The court may not use the availability of electronic communication as a factor in support of a modification of a physical placement order or in support of a refusal to prohibit a move.”<sup>125</sup> As a result of the stronger language under Wisconsin law, if a court permits a custodial parent to relocate with the child, in theory, “it will not be attributable to the moving parent’s ability and willingness to install webcams in each of the parent’s homes.”<sup>126</sup>

### *Texas*

In 2007, Texas enacted laws similar to Utah and Wisconsin, incorporating virtual visitation into its *Family Code*. Once again, the law in Texas underscores the importance of using virtual visitation as a supplement to in-person visitation, although the language is not quite as strong. The law states that electronic communication is “not intended as a substitute for physical possession of or access to the child, where otherwise appropriate.”<sup>127</sup> Similar to Utah’s legislation, the law in Texas does not specifically refer to the use of virtual visitation in relocation cases.

### *Florida*

Shortly after Texas enacted its legislation, Florida became the

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<sup>124</sup> *Ibid.*

<sup>125</sup> *Ibid* at § 767.481(5m)(b).

<sup>126</sup> Bach-Van Horn, *supra* note 10 at 183.

<sup>127</sup> Tex Stat *Family Code* tit 5 subtit B c 153 §153.015(d) (2007).

fourth state to legislate virtual visitation. Florida used much stronger language than its predecessors in outlining the extent to which electronic communication may be used between parents and children. Florida's law states that "[e]lectronic communication may be used *only* to supplement a parent's face-to-face contact with his or her minor child. Electronic communication *may not* be used to replace or as a substitute for face-to-face contact."<sup>128</sup> As cases involving relocation, custody and access are highly contextual and discretionary, it is almost impossible to determine how much weight is given to a single factor in each case; as Bach-Van Horne suggests, however, "the stronger language makes Florida's intentions unmistakable."<sup>129</sup>

Similar to Wisconsin's provisions, Florida's law refers to the use of virtual visitation in relocation cases. Unlike Wisconsin's prohibition on using virtual visitation as a factor in permitting relocation, Florida's law merely prohibits courts from considering the availability and use of virtual visitation as "the *sole* determining factor when considering relocation."<sup>130</sup> Therefore, under Florida's legislative scheme, a court can consider, along with other factors, the availability of webcams and other technology, when deciding whether or not to permit the relocation.<sup>131</sup>

### *North Carolina*

In 2009, North Carolina enacted virtual visitation legislation, which authorizes the court to order visitation by electronic communication after consideration of:

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<sup>128</sup> Fla Stat tit 6 c 61 § 61.13003(4) (2007) (emphasis added).

<sup>129</sup> Bach-Van Horn, *supra* note 10 at 185.

<sup>130</sup> *Supra* note 128 at § 61.13003(6) (2007) (emphasis added).

<sup>131</sup> Bach-Van Horn, *supra* note 10 at 186.

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(1) Whether electronic communication is in the best interests of the child; (2) Whether equipment to communicate by electronic means is available, accessible, and affordable to the parents of the minor child; and (3) Any other factor the court deems appropriate in determining whether to grant visitation by electronic communication.<sup>132</sup>

The law prohibits the use of virtual visitation as a replacement for physical visitation, stating 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.”<sup>133</sup> Similar to the law in Wisconsin, legislators in North Carolina also included a provision prohibiting the use of virtual visitation as a factor in permitting relocation. Through the strong wording of the provision, the intent of the legislature is once again clear. The law states that “[t]he amount of time electronic communication is used shall not be . . . used to justify or support relocation by the custodial parent out of the immediate area or the State.”<sup>134</sup>

### *Illinois*

In 2010, Illinois became the sixth state to enact virtual visitation legislation. The law is somewhat ambiguous with respect to the scope and use of virtual visitation, defining visitation as “in-person time spend between a child and the child’s parent. In appropriate circumstances, it may include electronic communication under conditions and at times

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<sup>132</sup> NC Stat c 50 § 50-13.2(e) (2009).

<sup>133</sup> *Ibid.*

<sup>134</sup> *Ibid.*

determined by the court.”<sup>135</sup> The law is silent with respect to the appropriate use of virtual visitation, and whether it should be incorporated as a substitute for or supplement to physical visitation. Similar to the laws in Wisconsin and North Carolina, however, the law is clear with respect to the consideration of virtual visitation in relocation cases, stating that “[t]he court may not use the availability of electronic communication as a factor in support of a removal of a child by the custodial parent from Illinois.”<sup>136</sup>

### *Hawaii*

The most recent state to enact legislation, Hawaii, incorporated virtual visitation into law in 2011. The legislature included a comprehensive definition of electronic communication that is sufficiently broad to incorporate future forms of virtual technology: “‘Electronic communication’ means communication that is facilitated by any wired or wireless technology via the Internet or any other electronic media, including but not limited to communication by telephone, electronic mail, instant messaging, video conferencing, and web camera.”<sup>137</sup> The law permits courts to consider visitation by electronic means, provided that courts also consider three factors:

- (A) The potential for abuse or misuse of the electronic communication, including the equipment used for the communication, by the person seeking visitation or by persons who may be present during the visitation or have access to the communication or equipment;

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<sup>135</sup> Ill Stat 750 ILCS 5/Pt. VI § 607(a)(1) (2010).

<sup>136</sup> *Ibid* at § 609(c) (2010).

<sup>137</sup> Haw Rev Stat tit 31 § 571-2 (2011).

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- (B) Whether the person seeking visitation has previously violated a temporary restraining order or protective order; and
- (C) Whether adequate provision can be made for the physical safety and psychological well-being of the child and for the safety of the custodial parent.<sup>138</sup>

The legislation clearly limits the use of electronic communication as a form of access by indicating that electronic communication “shall not be used to”:

- (A) Replace or substitute an award of custody or physical visitation except where:
  - (i) Circumstances exist that make a parent seeking visitation unable to participate in physical visitation, including military deployment; or
  - (ii) Physical visitation may subject the child to physical or extreme psychological harm; or
- (B) Justify or support the relocation of a custodial parent.<sup>139</sup>

The law is clear that courts are not to consider electronic communication virtual visitation as a factor in permitting relocation.

Seven states have now enacted some form of virtual visitation legislation, and other states are considering the implications of technology and access in contested relocation cases. Ohio, for example, introduced legislation in the Senate in the 2005–2006 session that dealt with electronic

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<sup>138</sup> *Ibid* at § 571-46(15).

<sup>139</sup> *Ibid*.

communication, access and relocation.<sup>140</sup> The state has yet to enact this piece of legislation.

### *Australia*

In 2006, the *Family Law Amendment (Shared Parental Responsibility) Act 2006*<sup>141</sup> amended the *Family Law Act 1975*<sup>142</sup> to include a broad provision with respect to electronic communication between parents and children. Section 63C(2) of the *FLA* outlines the meaning of a parenting plan and its related terms. The *FLA* distinguishes between the time a child spends with a parent and communication between children and parents. Section 63C(2)(b) states that a parenting plan may deal with “the time a child is to spend with another person or other persons.”<sup>143</sup> Pursuant to section 63C(2)(e), the parenting plan may also include the “communication a child is to have with another person or other persons.”<sup>144</sup> The meaning of communication is defined as including, but not limited to, communication by letter,<sup>145</sup> and “telephone, email or any other electronic means.”<sup>146</sup> In its revised explanatory memorandum, the Australian Parliament clarified the intent of the amendments. In addition to providing clarity with respect to types of communication, “[t]he intention is for parents to consider a variety of ways by which they can have a

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<sup>140</sup> US, SB 341, *A Bill to enact section 3109.21 of the Revised Code to allow a child to use electronic communication as a method to supplement the contact between the child and a party who is subject to court-ordered parenting time, companionship, or visitation, or shared parenting arrangement*, 126<sup>th</sup> Gen Assem, Reg Sess, Ohio, 2005-2006.

<sup>141</sup> *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth).

<sup>142</sup> *Family Law Act 1975* (Cth) [*FLA*].

<sup>143</sup> *Ibid* at s 63C(2)(b).

<sup>144</sup> *Ibid* at s 63C(2)(e).

<sup>145</sup> *Ibid* at s 63C(2C)(a).

<sup>146</sup> *Ibid* at s 63C(2C)(b).

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meaningful involvement in their children's lives, not just physical time with a child. This might include SMS, video hook-ups or attending sporting or social events their child is involved in.”<sup>147</sup> As Susskind argues, the wording of the provision is intentionally broad so as to include current technologies as well as to allow for the incorporation of future forms of electronic communication as they emerge.<sup>148</sup> Although it is important that the law be adaptable to advancements in technology and communication, the law must also be sufficiently clear so as to provide standards for courts to effectively determine the appropriate use of virtual visitation in each case.

Although the legislation does not specify the extent to which virtual visitation should be used in contested relocation cases, the Family Law Council (the “Council”) stressed the importance of incorporating virtual visitation only as a supplement to physical visitation. In its report on relocation to the Attorney General, the Council found that, while there are benefits to the use of virtual visitation in contested relocation cases, this type of communication “is not sufficient for the child to maintain a meaningful relationship with a parent who lives elsewhere at some distance.”<sup>149</sup>

While it is beyond the scope of this paper to provide a comprehensive analysis of how the legislation has impacted the case law, there have been cases in Australia in which courts have incorporated virtual visitation using the wording of the

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<sup>147</sup> Austl, Commonwealth, Revised Explanatory Memoranda: *Family Law Amendment (Shared Parental Responsibility) Bill, 2006* at para 153 (AustLII).

<sup>148</sup> Anne Susskind, “New Technology Narrows the Gap for Long-Distance Parents” (2008) 46(3) *Law Society Journal* 16 at 16.

<sup>149</sup> Austl, Commonwealth, Family Law Council, *Relocation: A Report to the Attorney-General Prepared by the Family Law Council* (Commonwealth of Australia, 2006) at 3.

legislation into access orders when permitting relocation. In *Lay v. Winter*, the court permitted the mother to relocate from Sydney to Queensland and ordered that “[w]hen the children are living with the Wife, the Husband have unrestricted communication with each child by letter, telephone, email or any other electronic means” and vice versa.<sup>150</sup>

### *Legislating Virtual Visitation in Canada*

While the use of virtual visitation has been incorporated into law in the United States and Australia, there has been no discussion by the provinces or the federal government to introduce this type of legislation in Canada. As the jurisprudence has illustrated, courts across the country have incorporated virtual visitation to varying degrees. While some courts have recognized the benefits of this type of communication, others have discounted it altogether. Although it is almost impossible to determine how much weight a court has given to virtual visitation in each case, or whether the availability of such technologies has been used as a deciding factor in permitting relocations, legislation would address the inconsistencies within the common law. Legislation, moreover, would provide clear guidelines for courts regarding the appropriate use of virtual visitation in relocation cases.

As technology continues to develop, incorporating virtual visitation into custody and access legislation is a logical next step. By enacting laws, governments make policy decisions, and, as Welsh notes, “it is better that such judgments be made uniformly by the state rather than subjectively by judges.”<sup>151</sup> It is important that legislatures across the country address the issue and determine the extent to which virtual visitation should be used in contested relocation cases.

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<sup>150</sup> *Lay v Winter*, [2008] FamCA 400 (AustLII).

<sup>151</sup> Welsh, *supra* note 118 at 221.

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Additionally, as the case law has demonstrated, many courts are wary of the incorporation of new technology; legislation also helps in this regard to legitimize virtual visitation and familiarize the courts with appropriate standards for its use.<sup>152</sup>

As discussed above, legislatures in the United States and Australia have enacted legislation regarding virtual visitation and electronic communication. Parliament and provincial and territorial legislatures across Canada must work together to develop comprehensive legislation, and should look to these international examples as a guide to formulate domestic law and policy regarding the use of virtual visitation. To be effective, legislation should include a definition of electronic communication and outline the scope of its use. Drawing from the international examples of legislation, the following is a proposed definition that clarifies the types of access that may be appropriate, as well as leaves room for future technological developments: “electronic communication” means any communication facilitated by electronic means, including by telephone, electronic mail, instant messaging, video teleconferencing, wired or wireless technologies via the Internet, or any other electronic medium or mode of communication.

Moreover, the legislation should also refer to the appropriate use and scope of virtual visitation generally, but also must recognize the limitations of its use in contested relocation cases. Furthermore, legislation should emphasize that virtual access should only be used as a supplement, and not as a replacement of physical, in-person visitation. Again, drawing from the examples from the United States and Australia, effective legislation should include the following considerations:

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<sup>152</sup> *Ibid.*

(a) In addition to physical visitation, a court may order electronic communication between a parent and a child, taking into consideration:

- (i) Whether electronic communication is in the best interest of the child;
- (ii) Whether equipment necessary to facilitate electronic communication is available, accessible, and affordable to the parents of the child; and
- (iii) Any other factor the court considers material in determining whether to order electronic communication between a parent and a child.

(b) Electronic communication may only be used to supplement face-to-face contact between a parent and his or her child. Electronic communication may not be used as a replacement or as a substitute for face-to-face contact.

(c) The court may not use the availability of electronic communication as a factor in support of a removal of a child by the custodial parent from the jurisdiction.

The common law on the use of virtual visitation has so far been inconsistent; by enacting legislation, governments across Canada can develop clear guidelines for courts to follow when incorporating virtual visitation in contested relocation cases.

## VIII. CONCLUSIONS AND RECOMMENDATIONS

Although there are many benefits to the use of virtual visitation as a form of access in contested relocation cases, its use must be limited to supplementing or enhancing physical visitation, and not a replacement thereof. While it is important that the

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law be flexible and acknowledge the benefits of technological advancements in enhancing communication, parents, courts and legislatures alike must recognize that virtual visitation cannot replace face-to-face interaction between parents and children. As Waldron notes, “it would be difficult to make a convincing argument that seeing each other on a computer monitor is comparable to a hug, or showing a baseball trophy on the screen is comparable to having a parent at a game.”<sup>153</sup> There have yet to be any studies that address the issues and implications of virtual visitation as a form of access in contested relocation cases, and this is an important and emerging area that is in need of further research.

Jurisprudence from the United States and Australia provides two international perspectives on the use of virtual visitation in cases involving contested relocation. It is clear that the support for this type of access is not universal. A more comprehensive analysis of Canadian cases indicates that age and distance, including the time difference between the non-custodial parent and child, appear to be factors that courts are considering in determining whether or not virtual visitation is an appropriate form of access. Courts are more likely to incorporate virtual visitation in cases in which the youngest or only child is six years of age or older. Furthermore, some cases have acknowledged the barriers that a significant time difference has on the practicality of virtual access, although this is not always the case. Legislation and case law require that courts consider the principle of maximum contact in determining issues of custody and access. Issues of mobility and relocation most certainly complicate these issues, and the emergence of virtual visitation makes the issues all the more complex. Courts are now considering how virtual access impacts the principle that a child should have as much contact as possible with both parents, though again, the application of

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<sup>153</sup> Waldron, *supra* note 6 at 352.

virtual visitation and its effect on maximizing contact has been inconsistent.

While some courts have embraced virtual visitation, others have expressed doubt as to the appropriateness of its use. One way to address the inconsistencies within the common law is to enact legislation that clarifies the appropriate scope and use of virtual access, particularly in contested relocation cases. Seven state legislatures in the United States have enacted legislation regarding virtual visitation and electronic communication between parents and children, with some states specifically referring to the appropriate use of this type of access in relocation cases. The Australian government has also enacted virtual visitation legislation. While it is beyond the scope of this paper, an interesting area for further research would be an analysis of the effects that legislation has had on the case law.

Technology will no doubt continue to evolve and new modes of communication will emerge. Recently, a research team at Queen's University developed a system that produces three-dimensional, life-size holograms that could have a significant effect on the way people communicate.<sup>154</sup> This new technology may eventually find its way into family law, and it may soon be possible for parents to be "virtually" present in the same room as their child, as a hologram, and be able to give their children virtual hugs and high-fives. Although technology such as this continues to develop at a rapid pace, the law has failed to remain in step. By enacting legislation that addresses the appropriate use and scope of virtual access, legislatures across the country can bring some degree of clarity to this emerging issue in family law.

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<sup>154</sup> Elliot Ferguson, "Queen's Research Team Launches Hologram System" *The Kingston Whig-Standard* (3 May 2012) online: The Kingston Whig Standard <<http://www.thewhig.com/ArticleDisplay.aspx?e=3551954>>.