

The Current State of Visitation Rights in China and Suggestions for Improvement

Ziwan Yang

Dalian Ocean University, Dalian, China
281710070@qq.com

Abstract: *With the development of society and the transformation of family concepts, conflicts and disputes in marriage and family relations have been on the rise, leading to an increase in family dispute cases, including those related to visitation rights, which are the focus of this paper. Article 38 of the former Marriage Law of China stipulated: "After divorce, the father or mother who does not directly raise the child has the right to visit the child, and the other party has the obligation to assist." This system represents the visitation rights framework. The establishment of this system provides a legal basis for effectively resolving visitation disputes after divorce, contributing to the improvement of the marriage and family system and holding significant importance for building a harmonious society. Article 1086 of the Civil Code continues this provision. However, with the development of society and changes in family models and concepts, the above provisions no longer meet practical needs, leading to various issues in judicial application. Therefore, it is necessary to amend and improve them. This paper explores these issues in this context.*

Keywords: *visitation rights; maximization of children's interests; suspension of visitation rights*

1. Introduction

With the transformation of society and the clash and spread of diverse thoughts and cultures, traditional concepts of marriage and family have been impacted, leading to more frequent occurrences of family disintegration and reorganization. However, the collapse of a family does not negate the inherent blood ties; traditional family ethics still persist in the minds of family members. Thus, maintaining good communication and contact, especially between minor children and their non-custodial parents or other family members, is extremely important. This underscores the rationality and necessity of the visitation rights system.

2. Concept of Visitation Rights

According to Article 1086, Paragraph 1 of the Civil Code, visitation rights refer to the rights of a parent who does not directly raise the child to visit the child after divorce. Visitation rights are an important right within the marriage and family legal system. Their establishment aims to protect the interests of minor children and allow divorced parents to maintain their emotional connection with their children, thereby reducing family conflicts and preserving social stability. With the improvement of marriage and family laws, visitation rights have gradually been recognized by legislatures worldwide, and currently, most countries and regions have defined the content of visitation rights.

3. Value of the Visitation Rights System

3.1. Beneficial for Protecting Minor Children's Interests

The primary purpose of legislating visitation rights is to provide a good growth environment for minor children from divorced families, minimizing the harm caused by parental divorce. The legislation of visitation rights allows the non-custodial parent to fulfill their responsibilities regarding the education, care, and concern for their children. The establishment of visitation rights enables minor children to receive love and care from both parents, fostering a positive and optimistic atmosphere that guides them to develop a correct life attitude.

3.2. Facilitating the Realization of Parental Rights

Visitation rights are a component of parental rights. When visitation rights are effectively implemented, it leads to the realization of parental rights. Even after divorce, the rights and obligations of parents still exist, as they retain the duty to support their minor children. However, when one parent does not live with the children, they often provide fixed support payments and some material conditions. The establishment of the visitation rights system legally grants the non-custodial parent the right to regularly meet and interact with their minor children, which helps cultivate the emotional bond between the parent and child, thereby facilitating the realization of parental rights.

3.3. Contributing to the Resolution of Family Disputes and Maintaining Social Stability

The establishment of the visitation rights system addresses a longstanding challenge in the judicial practice of marriage and family in China. After the dissolution of the marital relationship, the non-custodial parent often struggles to visit their biological children due to non-cooperation from the custodial parent. This anguish can cause severe emotional distress when the non-custodial parent misses their children but cannot fulfill their desire to see them. This situation may escalate tensions and lead to visitation disputes. The increasing number of visitation disputes in judicial practice often stems from overly vague or unclear legislation, resulting in inconsistent rulings in similar cases. The establishment of the visitation rights system provides a legal basis for resolving visitation disputes, helping to settle many family conflicts and maintain social harmony and stability.

4. Issues with the Visitation Rights System

4.1. Neglect of the Best Interests of the Child

Most countries' marriage and family laws establish the "best interests of the child principle" as a primary consideration when addressing issues related to minor children^[1]. Major countries, such as Germany, the US, France, and the UK, fully embody this principle in their visitation rights systems. However, this principle is not adequately reflected in China's provisions regarding visitation rights. In China, the subjects of visitation rights do not include minor children; they are merely seen as the objects of visitation. Courts handling visitation disputes do not genuinely inquire about the minor children's opinions, instead focusing solely on resolving the conflicts between the parties involved.

From the perspective of Article 1086 of the Civil Code and judicial interpretations, the establishment of visitation rights is primarily considered from the parents' perspective, failing to adequately reflect the rights of minor children. When the visitation party exercises their rights, minor children are treated as passive participants, overlooking their genuine feelings.

4.2. Narrow Scope of Visitation Rights Subjects

First, visitation rights are only granted to the father or mother regarding their children, without acknowledging children's rights to visit their parents. The purpose of establishing visitation rights is to meet the emotional needs of both parents and children while minimizing the harm caused by parental divorce, thereby protecting the interests of minors to the greatest extent. Thus, visitation rights should not solely belong to parents; children should also possess independent rights to request visits from their parents.

Secondly, the rights of extended family members are not addressed. Excluding grandparents and other close relatives who share blood ties with minors from visitation rights is both highly restrictive and inconsistent with public order and good customs, contrary to traditional ethical views on family ties^[2]. According to the relevant provisions of the Civil Code, after the death of parents, capable grandparents may raise their grandchildren, indicating that if capable grandparents can fulfill the duty of raising children, they should also enjoy the right to visit. Therefore, some grandparents should have the right to visit their grandchildren^[3].

Lastly, the visitation rights of parents of non-marital children are not addressed. Article 1086 of the Civil Code stipulates that the application of visitation rights is contingent upon divorce. However, with the evolution of society, many changes have occurred in relationships and family structures, and traditional marital models no longer align with contemporary developments. This shift in mindset has led to various living arrangements, such as cohabitation during dating or being in a third-party relationship^[4].

Additionally, many couples may be in a state of separation, where their marital relationship is essentially non-existent. Although these parties have not divorced, the minor children typically find it difficult to see the non-custodial parent due to separation. In these situations, the law does not grant visitation rights to the non-custodial parent. The Civil Code provides that both marital and non-marital children enjoy equal rights and obligations, and thus should not be treated differently.

4.3. Unclear Methods of Exercising Visitation Rights

The goal of exercising visitation rights is to ensure that the right holder can continue to participate meaningfully in the child's growth process. Regardless of the method used, as long as it is reasonable, lawful, and positively influences the child's worldview and values, it should be valid. However, the legal provisions regarding visitation rights lack specific guidelines on how to exercise these rights, making it difficult for courts to adjudicate such matters. Judges often lack reference standards when making decisions, leading to dissatisfaction from divorced spouses regarding court rulings and resulting in repeated appeals, which wastes judicial resources. Additionally, the overly general nature of the regulations on visitation rights leads to inconsistent judgments by judges in similar cases, potentially undermining the authority of the judiciary^[5].

4.4. Flaws in the Suspension of Visitation Rights

Paragraph 3 of Article 1086 of the Civil Code emphasizes the protection of the child's interests, focusing on the child's physical and mental health when it comes to the suspension of visitation rights. However, the standards and definitions for what constitutes "harmful to the child's physical and mental health" are unclear. When the custodial parent believes that the visitation parent's actions seriously affect the minor child's well-being, they can request the court to suspend the visitation rights. Yet, there are no established criteria for determining which actions may be harmful to minors. Neither the Civil Code nor its judicial interpretations provide explanations regarding the grounds for suspending visitation rights. As a result, the grounds for suspension become very vague and complex, and it is also challenging to determine when such grounds have ceased to exist. The current legislation's general and principle-based language creates many operational problems and makes it difficult to define what constitutes harm to a minor's physical health, complicating the judicial process and increasing the pressure on courts and judges.

4.5. Challenges in the Enforcement of Visitation Rights

Article 68 of the Judicial Interpretation of the Marriage and Family Section of the Civil Code provides for the compulsory enforcement of visitation rights. However, this provision is somewhat vague, resulting in poor operability during enforcement, which has made enforcement a significant issue in visitation disputes. This is reflected in several ways:

First, the regulations regarding the assisting enforcers of visitation judgments are unclear. The phrase "relevant units and individuals shall bear the responsibility to assist in enforcement" lacks specific definitions for what constitutes "units" and "individuals," leading to many loopholes in the enforcement process.

Second, the enforcement of visitation rights lacks effective measures. Legal measures such as detention and fines are relatively light penalties that do not serve as effective deterrents. Even if the party being enforced against faces penalties like fines or detention, they may still fail to fulfill their obligations, leaving the issue of enforcing visitation rights unresolved.

Third, the enforcement procedures for visitation rights lack specificity. The prolonged nature of exercising visitation rights can extend the enforcement process significantly, with no clear endpoint, leading to potential repeated applications for enforcement. As long as the party experiences obstacles in exercising visitation rights, they can apply for enforcement, which may create a cycle of repeated litigation, raising litigation costs for the parties involved and increasing the burden on judicial authorities, ultimately wasting judicial resources.

5. Suggestions for Improving the Visitation Rights System in China

5.1. Implementing the Principle of the “Best Interests of the Child”

Currently, the principle of maximizing children's interests is well reflected in the legislation of most countries. While this principle is also present in Chinese legislation, the influence of the parent-centered perspective has led to a considerable neglect of the interests of minor children within the visitation rights system. Thus, this principle has not been adequately reflected. The author believes the following points should be considered:

First, the rights and obligations associated with visitation rights must be clarified. It should be made clear that visitation rights should not only be a right for parents but also a legal obligation. When this obligation is not fulfilled, certain penalties should be imposed.

Second, the suggestions of children should be thoroughly considered. Judges must take the opinions of minor children into account when adjudicating visitation disputes, treating them as significant factors in their decisions.

Finally, judges should comprehensively consider the physical and psychological conditions of the minor child and the economic situation of the party with whom the child currently resides. The opinions of minor children should be an important reference point to ensure that judgments are more rational.

5.2. Expanding the Subjects and Scope of Visitation Rights

5.2.1. Including Minor Children as Subjects of Visitation Rights

Establishing the status of minor children as subjects of visitation rights is essential to upholding the principle of the best interests of the child. Although minors may have immature thoughts due to their age and experiences, they should be respected as individuals with their own thoughts and capabilities. The best interests of the child principle is universally recognized, and minors should have subject status in visitation rights. Minor children's visitation rights should encompass two aspects: first, the right to be visited; when a parent fails to fulfill their visitation obligations, the child has the right to request visitation. Second, minor children have the right to visit their parents. Visitation rights embody both rights and obligations; the visitation of minor children by a parent is both a right and a duty, and similarly, minors, as independent rights subjects, should enjoy both the right to visit and be visited.

5.2.2. Granting Visitation Rights to (Grand)Parents Under Certain Conditions

It is necessary to establish the subject qualifications for (grand)parents' visitation rights to meet the practical needs of caring for and educating minor children^[6]. Traditional Chinese culture values ethical family ties, and the relationship between (grand)parents and grandchildren is based on blood ties that do not disappear with the breakdown of parental marriages. Especially in cases where one parent has passed away, recognizing the subject status of (grand)parents becomes even more important. Establishing the visitation rights of (grand)parents aligns with the general public's perception of familial affection in China. China should consider its unique national conditions and not directly replicate the visitation rights regulations of other countries concerning (grand)parents^[7].

5.2.3. Broadening the Application Conditions for Parents' Visitation Rights

Regarding the scope of visitation rights in China, it should be appropriately expanded to include invalid or annulled marriages, separations, and non-traditional family situations, taking into account advanced experiences from other countries^[8].

First, in cases of invalid or annulled marriages, although parents lose their legal spousal relationship, their relationship with their children remains intact. Parents still have the need to visit their children, and children have the right to be visited; therefore, non-custodial parents should retain visitation rights.

Second, in cases of spousal separation, couples may have irreconcilable conflicts, and the custodial parent may obstruct visitation by the non-custodial parent. In such situations, the non-custodial parent should still possess visitation rights.

Finally, Chinese law recognizes that non-marital children enjoy the same legal status as marital children, meaning that if marital children have the right to be visited, non-custodial parents of non-marital children should also have visitation rights, ensuring no discrimination.

5.3. Clarifying the Specific Content and Implementation Forms of Visitation Rights

First, the time criteria for exercising visitation rights should be clearly defined. Determining when to exercise visitation rights requires considering the actual living conditions, leisure time, and age of the child being visited. Sufficient negotiation between the parties is necessary to resolve scheduling conflicts. If peaceful negotiations fail, the final visitation times can be determined by court judgment^[9].

Second, the locations for exercising visitation rights should be clarified. Generally, it is reasonable to arrange visitations at the residence of the custodian or nearby, especially when the child is young. As the child grows older and adapts better to different environments, visitation locations can become more diverse. The choice of visitation locations should be flexible, based on agreements between the visitation rights holder and the custodian, or judicial mediation. However, the choice should always prioritize the principle of maximizing the child's interests.

Finally, limits on the extent and frequency of visitation should be defined. The exercise of visitation rights must not harm the interests of the child being visited. The primary consideration should always be the best interests of the minor; any actions detrimental to these interests should be deemed obstructive to visitation rights. Exercising visitation rights is an ongoing process that requires collaboration with the child's custodian to ensure smooth implementation.

5.4. Clarifying Grounds for Suspending Visitation Rights

5.4.1. Using Exemplary Regulations to Specify Grounds for Suspension

The principle of what is harmful to the child's physical and mental health should be clearly stated. To clarify the grounds for suspension of visitation rights in China, the principle can be supplemented with specific examples. For instance, if the visitation rights holder has a temporary infectious disease, severe mental illness, or engages in behaviors that seriously endanger the child's physical and mental health, the affected party may apply to the court to suspend the visitation rights of the other party.

5.4.2. Establishing Standards for Restoring Visitation Rights

Current laws do not specify the standards for restoring visitation rights. The author believes two aspects should be clearly defined: First, regarding the restoration standards for mental and infectious diseases, the rights holder should provide relevant evidence, including their treatment status, to ensure they can safely visit the child without causing physical or psychological harm. Second, for cases other than mental and infectious diseases, a specific duration should be set. Judges, when hearing cases, should assess the impact of the incident on the minor's physical and mental health, setting a time limit for restoration. Once this period expires, visitation rights should be automatically restored.

5.5. Improving the Enforcement of Visitation Rights

5.5.1. Introducing Compensation for Mental Damages

A system should be established for compensating mental damages when custodians fail to fulfill their obligations. This addresses situations where the custodial parent deliberately obstructs the visitation of the other parent, thereby violating the latter's legitimate rights. The affected party should have the right to seek compensation for mental damages, and for obstinate custodians who repeatedly disregard obligations, changes in child custody might be warranted. However, caution is necessary in applying this measure, considering various factors, such as whether the visitation holder voluntarily assumes custody and their ability to do so, along with taking the minor's opinions into account.

5.5.2. Changing Custody for Obstinate Custodians

If custodians seriously obstruct the visitation rights holder's meetings with the child, the court may award custody to another visitation rights holder. This could significantly resolve difficulties in enforcing visitation rights. However, careful consideration of many factors, such as the willingness and ability of the visitation holder to take custody and the minor's opinions, is crucial during this process.

6. Conclusion

Currently, disputes regarding visitation rights in China are on the rise. With social development, the existing legal provisions on visitation rights have become inadequate for the needs of practical judicial

practice. Many disputes require legal system support to be convincingly resolved. The visitation rights system in China clearly exhibits deficiencies in areas such as subject range, implementation methods, grounds for suspension, and enforcement. Therefore, improving the visitation rights system is an urgent issue that needs to be addressed.

References

- [1] Cai Chaojie, Liu Hanqing. *Analysis of the visitation right system from the perspective of the Civil Code* [J]. *Journal of Wuhan Metallurgical Management Cadre College*, 2022, 32 (1): 27-30
- [2] Yao Lu. *Research on the Expansion of the Scope of Visitation Rights Subject* [J]. *Journal of Henan University of Technology*, 2018 (04): 31-38
- [3] Pu Chunyu. *On the Legal Nature and Legislative Concept of Intergenerational Visitation Right: A Perspective from the First Intergenerational Visitation Right Case in Jiangsu Province*[J]. *Journal of China Women's University*, 2016 (06): 36-42
- [4] Wu Weiyi. *Collection of Perspectives on Court Trial of Marriage and Family Cases* [M]. Beijing: China Legal Publishing House, 2012:16-18
- [5] Gao Rui. *Research on the Construction System of Visiting Rights in China* [D]. Shanghai Normal University, 2019
- [6] Zhuang Xulong. *Legal Basis, Rights Attributes, and Type Differentiation of Intergenerational Visits* [J]. *Application of Law*, 2017 (23)
- [7] Lv Chunjuan. *Shaping the Right of Third Parties Other than Parents to Visit Minors: Based on Article 1086 of the Civil Code* [J]. *Journal of Yanbian University (Social Sciences Edition)*, 2021, 54 (03): 111-117+143
- [8] Zhang Na, Shen Hongzhong. *Legal Reflections on the Visitation Right System in China: A Perspective from the Visitation Right Subject* [J]. *Fujian Law*, 2018 (02): 55-60
- [9] Li Xiangying, Wu Guanghui, Kan Dongguang. *Resolving difficulties in enforcing visitation rights based on the principle of maximizing the interests of minors* [N]. *People's Court News*, July 21, 2021 (007)