

The Enforcement of Child Custody in China: Dilemma and Solution

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Abstract

Child custody enforcement in China is still controversial, and there are also great differences on some key issues of custody. Lacking clear contents of custody enforcement in adjudicative documents, cognitive biases among judges and inadequate supporting measures have become three major elements which lead to difficulties in enforcement of child custody rights. Therefore, child custody enforcement needs to be improved through: (1) to carry out the concept of modest enforcement, (2) to maximize interests of children in realizing child custody rights, (3) and in the adjudication documents to clearly list out the specific content of enforcing the custody right.

Keywords

Child Custody, Enforcement, Custody Enforcement, Compulsory Enforcement

1. Introduction

The right of child custody is the right of bringing up the child. Bringing up children means that parents or guardian provides material conditions necessary for the healthy growth of minor children, including lactation, feeding, nurturing, providing for living expenses, education and activities, etc. In another word, child custody refers to a personal right of parents or guardian to their children. Parents shall have the duty to bring up, educate and protect minor children. Under current concept of maximization of children's interests, the focus of child custody has shifted from parents to children. For a long time, there have been obstacles in the enforcement of child custody rights in China. This thesis analyses the reasons of the difficulties in realizing child custody in China, and proposes the practical solutions of it base on investigation and consideration.

2. The Dilemma of Child Custody Enforcement in China and Its Causes

The divorce judgment in Chinese courts generally consists of three parts: confirming the divorce relationship, the distribution of the joint property and the ownership of the custody of the children. Of the three matters, the first two are easily to be performed. However, there are many uncertainties in the later realization of the right of child custody, which mainly manifested as the absence of the enforcement of child custody and thus cannot realize the relationship of child custody determined by effective legal documents.

If the child has been living with the person who is entitled to child custody before the divorce judgement takes effect, the child custody in the judgment can be naturally realized. However, if on the contrary, it may bring many obstacles to the realization of the child custody right, and the dilemma of the enforcement of child custody right also arises. This situation mainly based on the following factors.

1) The judgment document does not directly specify the relevant obligations

According to a large number of cases in the China Judicial Documents website, the child custody judgment includes two parts: ownership of child custody and maintenance fees. But the vast majority of the verdict only lists who will support the children and how to bear the maintenance support. Even the judgement of child custody dispute only writing out the result of changing the child custody and its maintenance expenses matters. It does not directly list the obligations of one party to assist the other party in achieving the child custody or the duty of eliminating obstructions in realizing the child custody. From the empirical perspective, it is a relatively common state that the judgment document does not directly specify the relevant obligations of the person whose child custody is subjected to execution, which causes obstacles and many inconveniences to the enforcement of child custody right.

2) Cognitive deviations and divergences between the trial and law enforcement officials

As a basis for implementation, “clarity” is a necessary condition rather than a sufficient condition for an effective legal document to be implemented. Just as the legal document of *continued performance* if is simply expressed as “continued to perform”, then the difficulty of performance will be caused by the lack of clear performance content (Jiang & Liu, 2015). If the judgment involving ownership of custody does not specify the obligation of assistance or other obligations of the two parts, then it cannot be applied for enforcement. The majority of the trial judges held that it’s not necessary to specify the obligation of assistance or other obligations of two sides in the judgement, because such kind of obligations is known as the meaning of child custody judgment. The cognitive deviation and difference between the trial judges and the executive judges in this respect lead to the dilemma of child custody execution to some extent. There are two typical cases of this situation:

Case 1: Zhao and Song divorced in 2014. Their first son (aged three and a half) was judged to live with his father, Wang. While the second son (aged one) was judged to live with his mother Song. After divorce, Song took the two sons to live in another city. According to the effective judgment, Wang applied to the court for enforcement, requesting for the realistic upbringing of his eldest son. Song still refused to transfer the eldest son to his father after she was fined 5000 yuan. There was a serious dispute over whether the eldest son should be forcibly taken to his father among professional judges and no consensus could be reached. The custody enforcement in this case was at an impasse.

Case 2: The husband Wang and his wife Chen registered their marriage on October 9, 2012, and gave birth to a girl Wang Moujia in February 2014. On July 21, 2017, Pingyuan County People's Court ruled that both parties were granted a divorce, and the girl Wang Moujia was raised by Chen.

After receiving the judgment, Wang neither appealed nor fulfilled the obligation of the judgment. Instead, he secretly transferred and hid his three-year-old child Wang Moujia, refused to give her to Chen and prevented her from contacting her mother Chen. Then Chen applied for execution and Pingyuan County People's Court Executive Board made decisions of detention, fines and other punishment to Wang. But because the child has been taken to other places by Wang and can not be found, which resulting in detention, fines can not be implemented.

As Wang kept hiding with his child, the child could not attend to school, which has seriously violated the child Wang Moujia's right to education. In order not to delay the child's normal enrollment, the court transferred the case to the county public Security Bureau for investigation in October 2021 in accordance with relevant laws. In May 2022, the public security organ arrested Wang and brought Wang Moujiaback to Chen to be raised. In September 2022, Wang Moujia, the 8 years old child went through the admission procedures and was sent to school.

On February 8, 2023, the procuratorial organ filed a public prosecution to the People's Court of Pingyuan County for the crime of the defendant Wang Mou for refusing to execute the judgment and order.

3) Relevant supporting mechanisms are not sound

Currently, there are serious obstacles that hinder the enforcement of child custody.

The first situation is that people who subjected to the enforcement (the non-custodial party) intentionally hinder the execution with hiding children and further malicious prosecuting for changing the child custody. There are two typical cases:

Case 1: Zhang and Li registered their marriage in 2008, and gave birth to their son Zhang Xiaoyu in 2016. In 2018, the court decided that the two were divorced, and the custody of the child was awarded to Li, with the father paying a monthly maintenance fee of 1500 yuan. After the ruling took effect, Zhang re-

fused to give the son to his mother, citing the fact that Zhang Xiaoyu lived in his grandfather's home for a long time. Li then applied to the court for enforcement according to the effective judgment, request to realize the realistic raising of her son. The enforcement judge failed to find Zhang Xiaoyu and his grandfather after several searches, and finally the enforcement was fruitless.

Case 2: Zhu Mou (male) and Yu Mou (female) are husband and wife in a village of Haidian District, Beijing. The two sides decided to divorce by agreement because of discordant temperament.

On October 8, 2015, the two people have agreed to divorce went to the local civil affairs bureau to make a divorce registration. The two sides agreed in the divorce agreement: after divorce, their son Zhu Xiaomou temporarily raised by the his mother. His father pays monthly maintenance. If the woman remarries, Zhu Xiaomou will be raised by his father. If both parties remarry or the man remarries, Zhu Xiaomou is still raised by the woman.

In February 2016, Yu remarried, Zhu asked her to fulfill the child support agreement in the divorce agreement, and went to Yu's residence to pick up his son Zhu. But Yu and her family members together with her remarried husband stopped Zhu from taking the son away.

On March 25, 2016 Zhu Mou and his family members came to Yu's place again to forcibly taking the son away.

On July 3, 2016, Yu Mou sued Zhu Mou in court, asking Zhu Mou to send her son back. Zhu Mou argued: raising the child by him is in line with the divorce agreement, the court should reject the plaintiff's lawsuit request.

Opinion of the court about case 2:

After hearing, the court found out the fact that the plaintiff and the defendant had disputes due to the fulfillment of the agreement on child support in the divorce agreement. The court held that the divorce agreement signed by the plaintiff and defendant is valid and should be implemented. However, there are two different opinions on how the defendant Zhu Mou forcibly took his son Zhu Xiaomou away from Yu's residence. One view is that according to the divorce agreement, the plaintiff directly raised his son Zhu Xiaomou. The defendant forcibly took Zhu Xiaomou away from the plaintiff's residence without the plaintiff's consent, which infringed on the plaintiff's right of custody, constituted infringement, and should bear the civil liability for the restoration of the original state.

Another view is that according to the divorce agreement between the plaintiff and the defendant, both parties have custody of their children. Since the divorce agreement signed by both parties is valid, then either party should honor it. The reason that the defendant forcibly took the child away from the plaintiff's residence is because the plaintiff did not perform the agreement, to prevent the defendant from taking the child away for raising. Although the behavior of the defendant is improper, it still constitutes the performance of the agreement and does not constitute infringement. On the contrary, it was the plaintiff's failure to honor the agreement that violated the defendant's right to custody of the child.

In the end, the court accepted the latter opinion, holding that the case was still a child support dispute between a man and a woman after divorce, rather than a tort dispute. The divorce agreement signed by the plaintiff and the defendant does not violate the provisions of the law, and both parties shall perform according to the agreement. It is more beneficial for the plaintiff's son Zhu Xiaomou to be raised by his biological father who did not remarry. Subsequent judgment: the plaintiff, the defendant to fulfill their divorce agreement, the child Zhu Xiaomou should be raised by his father Zhu.

The second situation that hinders the enforcement of child custody is the judicial weakness in this respect which leading to the execution of child custody is a mere formality: excessive reliance on mediation; lack unified applicable standards on compulsory measures and lacking effective supporting measures. Especially in the process of soliciting opinions from minor children, professional investigation participation and intervention are seriously insufficient. In judicial practice, the executive judge asks the opinions of minor children in a simple way, and the minor children subject to the interference of external factors can not fully and freely express their true opinions. At the same time, relevant professional organizations are not fully developed although they have achieved some results in participating in the protection of minors (Lin, 2018). The lack of professional social organizations and imperfect supporting mechanisms in the execution of child custody seriously restrict the effectiveness of execution.

3. Disputes over the Implementation of Child Custody Rights in China

The deeper reasons behind the difficulties that hinder the realization of child custody mainly out of the different understanding of the enforcement of the right of child custody.

1) Disputes over the subject matter of the right of custody

Since a child himself/herself cannot be taken as the object of execution, how to understand the object of child custody execution becomes the key problem of whether child custody can be enforced. One point of view is that the child himself/herself is the object of the right of custody, and because person is not enforceable, the right of child custody is not enforceable. Another point of view is that the object of the right of child custody is not the child himself/herself, but a kind of assistance behavior or obligation. It is the behavior obligation of the person who are subjected to the execution of the child custody, such as surrender the child to the applicant, or assist with related procedures, etc. (Yang, 1989).

2) Dispute over the nature of the judgment of child custody

The right of custody includes three levels which includes power, privilege and claim. The civil law theory distinguishes the right and the protection claim based on the right. Therefore, the custody right in the narrow sense refers only to the right as a privilege. But the broad right of custody can include the right of privilege and the claims derived from it (Chen, 2023). There has always been a dis-

pute over the nature of the judgment of child custody ownership. One point of view is that it is the confirmation of the rights as well as obligations to bring up and responsible for the child after his/her parents divorced (Tang, 2014). It is a confirmation of judgment in nature. Another point of view is that, in the form of the judgment of the ownership of child custody, it is to confirm which party will take care of the children after parents' divorce, but it still has certain contents of payment. This part of the judgment requires the person subject to execution to provide necessary assistance for the applicant to achieve realistic upbringing, which is essentially a kind of assistance behavior and payment behavior. Therefore, the custody ownership judgment with payment content contains payment behavior, which meets the conditions of execution application, and has the legal basis for compulsory execution.

This article agrees that the right of child custody can be enforced in order to avoid the result that the decision of ownership of child custody-the important content of the effective legal documents of divorce-become "a blank paper" due to cannot be implemented by enforcement. Moreover, the decision of ownership of child custody is made under the guiding of maximizing the interests of minors and fully considering the will of them. Base on the analysis of the following part, this paper also agrees that the enforcement of child custody is feasible.

4. Justification and Possible Solutions for the Compulsory Execution of Child Custody in China

1) The concept of compulsory enforcement of child custody

The compulsory enforcement of child custody is different from general property enforcement and also different from general conduct enforcement. It has special characteristics of itself. The object of the enforcement involves parents or other relatives of the minor children, and if directly impose compulsory measures on the person subject to execution, it may be detrimental to the enforcement of child custody and the healthy growth of minor children. In order to prevent the compulsory enforced party losing control of his emotions and taking excessive actions, tough measures cannot simply be taken. Instead, the way and method of the execution of child custody right should be paid more attention and the concept of modest execution should be incorporated into the compulsory enforcement. The concept of modest enforcement was first proposed by the Supreme People's Court of China, which aims to seek the appropriateness between the means and the aim of enforcement; the means of enforcement should be reasonable and moderate; the adoption and specific application of enforcement measures should serve the purpose of enforcement, with the realization of the enforcement goal as the fundamental. The concept of modest enforcement includes humanistic concern, and the enforcement of child custody is to realize the realistic aim of bring up the child by the applicant. Modest enforcement is conducive to promoting mutual understanding between the parties and to facilitating the children living with the applicant.

The divergence in knowledge and cognition of trial and enforcement judges means the separation of trial and enforcement, it is one of the reasons why the enforcement of maintenance rights in China is in trouble. This divergence is mainly reflected in two aspects, one is the enforcement judges' solidified concept of "property-based payment enforcement", and the other is the bias and divergence in the perception of enforceability of custody rights in the effective judgment. How to reduce or bridge the divergence and facilitate the enforcement of maintenance rights?

First of all, such differences are caused by the lack of effective communication between the trial and enforcement personnel and the lack of clarity in the adjudication documents under the separation of trial and enforcement. The reduction and bridging of such differences should also be handled respectively according to the specific situation. For the ongoing enforcement of a judgement regarding child custody right, the trial and enforcement departments should conduct necessary communication to clarify the content of enforcement, i.e., the court requires the executor to fulfill the "definable obligations" in the judgment upon application. In the long run, it should strengthen to play the function of trials to facilitate judgement enforcement, by further improving the quality of trial documents and clarify the specific content of enforcement, i.e., to set out the duty of assistance of the person subjected to execution. *The Opinions of the Supreme People's Court on the Coordinated Operation of Case Docketing, Trial, and Enforcement by People's Courts, No. 9* [2018] states that a legal document shall be definite and specific in its body. For example, regarding the right to visit children, it should be listed out in the judgement document about the manner, the specific time, and the venue for visitation, and the methods of transferring the child. It is an effective means to crack the dilemma in child custody enforcement to clarify the obligations and duty of the person subjected to execution to assist or not to hinder the realizing of the child custody of the applicant, and this is also in line with the trend and requirements of current work of coordinating trial and enforcement in China.

2) Justification of compulsory execution of child custody

Child custody enforcement has an ethical basis. Because of the blood relations, parents are generally the best candidates to raise children. Due to the gender differences and the social division of labor, fathers also have different roles and responsibilities in raising children, compared with mothers. An analysis reports also show that more women are awarded child custody decisions than men for the purpose of achieving the best interests of children and protecting rights of women. Analysis further shows that the younger the child is, the more possibilities that the child custody decision is awarded to the woman; and by the child age growing, the opportunities of child custody decisions awarded to the man is increasing. Overall, a large proportion of children were awarded to the female parent to raise. Since mothers are the majority of petitioners, the compulsory execution of child custody can help the realization of the child custody right.

The compulsory execution of child custody is thus in line with family ethics, in accordance with the rules of child custody and education, and is conducive to achieving the goal of “the best interests of the child”. In addition, the content of child custody right is richer and has greater legal benefits than the visitation right. Since visitation rights can be compulsory enforced, child custody rights should be able to be compulsory enforced as well. Otherwise, the decision on child custody is likely to be reduced to “a piece of paper”.

3) Specific application of enforcement measures of child custody

At present, the enforcement measures available for the enforcement of child custody rights in China include: mediation, compulsory measures for the person subjected to enforcement, forced removal of children, etc.

Child custody enforcement is aimed at realizing the realistic maintenance of the applicant, and the selection and specific application of enforcement measures should be closely focused on achieving this goal.

First of all, diversified and professional mediation should be used. The successful experience of many years of family trials can provide beneficial reference for cracking the dilemma of child custody enforcement. Family trials adhere to the people-oriented approach, attach importance to mediation to repair family feelings, and promote the dual enhancement of judicial and social efficacy. The enforcement of child custody rights could be seen as the later extension of family trial, and mediation still has a large space and application possibility.

However, there are still limitations on the work of mediation in both trial and enforcement, mainly shows that mediation is mostly reduced to a court-led dialogue and negotiation between the parties while professional and social characteristic of mediation are not prominent. The enforcement personnel lacks enough professional knowledge, which makes their work of mediation difficult to adapt the needs of enforcement (Yue, 2018). *Opinions of the Supreme People’s Court on Conducting the Pilot Program of the Reform of the Mode and Working Mechanism of Family Trial* states that professional, socialized and humanized ways to solve family disputes should be explored well. One way is to cultivate professional mediation talents and introduce personnel with professional knowledge such as psychology and sociology into mediation work of child custody enforcement. Another way is to actively introduce social units which includes natural persons, legal persons (social organizations, party and government organs and institutions, non-governmental organizations, party and mass organizations, non-profit organizations, enterprises and so on) to form a synergy to achieve child custody enforcement.

Secondly, in the case of fruitless mediation, in order to ensure the fulfillment of the obligations in the effective judgment and the realization of the applicant’s rights and interests, coercive measures can be taken against the person subject to execution. The coercive measures could include: 1) credit disciplinary measures, to put the name of the person subject to enforcement in the trust-breaking list. 2) Impose fines and detention on the person subject to enforcement to urge

them to hand over the children to the applicant. In some countries fines have become the main measure of custody enforcement. Although the measure of fines is inconsistent with the purpose of enforcement and is difficult to achieve a more desirable effect in custody enforcement cases because it tends to lead to a declining living standard of the children (Liu, 2016), it can psychologically deter the person subject to enforcement. Fines could be an option under appropriate conditions. For the serious non-compliance with the judgment, could give criminal punishment with the crime of refusing to execute the effective judgment or decision. Considering the purpose and special nature of the enforcement of child custody, this measure can only be taken as a “bottom-line measure” and should not be used more often.

4) The applicability of compulsively taking away children and its limitations

Whether the child could be forced taken to the applicant is still controversial. The party who does not advocate the compulsory taken away believes that it may be harmful to the physical and mental health of minors. They prefer alternative coercive measures. While some other scholars hold the idea that the actual realization of the applicant’s rights can be through forced measure, which mainly based on the following considerations: 1) the minors in such cases are generally young, lack of awareness and judgment, and forced taken away will not violate their will; 2) forced taken away is not a compulsory measure for children themselves, but a method of implementing the judgment of transferring the child to applicant; 3) if forbid forced taken away, it will indulge the person subjected to execution go on to refuse implement the judgement and cannot protect the rights and interests of the applicant; 4) forced taken away can help prevent such cases from protracting to execute (Dong, 2003). Based on the particularity of child custody enforcement, in some cases forced taken away could be permitted and is practical.

However, this compulsory measure is not workable all the time, nor does it have its application space and possibility in all child custody enforcement cases. There are certain restrictions on it. First, Article 241 of the *Draft Compulsory Enforcement Law* stipulates that for those who have reached age of 10, the children themselves should be asked for their opinions. If the children themselves clearly express that they do not want to change the actual upbringing relationship, the judgement should not be compulsory enforcement (Wang & Zhang, 2018). However, the “binding force” of the will of minor children on the judgement of direct custody is very limited. In particular, it is difficult for the court to prioritize or judge the actual will of the minor children when deciding the direct custody (Li, 2023). Therefore, this kind of situation should be changed. Further, this article believes that the age of the children should be adjusted from 10 to 8. Because minors who have reached the age of 8 have had a certain life experience and have a certain ability to realize and judge the external situation (Wang, 2017). They have a strong independent will. The wishes of minor children shall be considered before mandatory measure was made. Secondly, *the Civil Code of China* has lowered the age of persons with limited capacity for civil conduct

from 10 years old to 8 by integrating various social factors. It is the important embodiment of the legal system to keep pace with the times, and the objective requirement of the unification of the legal system.

Besides, the establishment of child custody is fundamentally to maximize the interests of minor children, and the implementation of child custody should not divorce from this fundamental goal. If a child had been lived with the people who should transfer the custody of him or her for a certain period of time since the judgment came into force, then the application of compulsory taking away should also be limited. Because the de facto custody relationship has been formed and should not be forcibly destroyed. The compulsory taking away of an actual dependent will otherwise cause great harm to the physical and mental health of the minor children, unless facts show that the actual upbringing is inappropriate. Therefore, forced taking away of the child is not applicable at this time. If the child voluntarily to be or the actual raising party voluntarily transfer the child through mediation, the restriction of “a certain period of time” shall not apply. The “certain period of time” can be consistent with the general limitation of action, that is, once the actual custody relationship has been formed for 3 years or more, the mandatory separation is not applicable.

5. Conclusion

Currently there is a dilemma in China concerning child custody enforcement. Its causes mainly come from three reasons: first of all, the judgment document does not directly specify the relevant obligations; secondly, there are cognitive deviations and divergences between the trial and law enforcement officials; and thirdly, the relevant supporting mechanisms are not sound enough as people expected. The deeper reasons behind the difficulties that hinder the realization of child custody mainly out of the different understanding of the enforcement of the right of child custody. Facing the disputes over the implementation of child custody rights which includes disputes over the subject matter of the right of custody and dispute over the nature of the judgment of child custody, the first and most important is to confirm the Justification of the compulsory execution of child custody in China and then further provide possible solutions for it. In short, Child custody is enforceable and should be compulsively enforced when necessary in China. Solving the problems of enforcement of child custody right is not only to realize the relationship of rights and obligations determined by effective legal documents, but more importantly to change the state of raising minor children through the realization of child custody right, so as to provide a more appropriate growth environment for minors, promote their healthy growth and improve social welfare.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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