Visitation Rights of the Parent Without Custody

John M. Shaw
most that could be said was that the employer refused to arbitrate the issue and that this fact alone did not constitute a violation of Section 8(a)5 of the Labor Management Relations Act.45

In the great majority of cases in which the grievance procedure reaches the arbitration stage both parties fulfill their agreement to arbitrate. It is possible, however, that the very absence of an adequate sanction to enforce arbitration will cause harm to the arbitration process. In states which have passed or will pass specific statutes allowing the enforcement of arbitration agreements in labor cases no real problem will arise. Assuming the National Labor Relations Board follows the precedent set in the Textron case, enforcement as an unfair labor practice under Sections 8(a)5 or 8(b)3 of the Labor Management Relations Act seems not to be available as a method of enforcement. Although a simple amendment of either the Labor Management Relations Act or the Federal Arbitration Act could provide the necessary remedy to enforce arbitration it is not likely that Congress will pass such a statute in the near future. As was noted above, Section 301 of the Labor Management Relations Act has been used successfully in some jurisdictions to enforce the agreement to arbitrate. Thus, in the absence of a state statute, Section 301 provides the method which is most likely to meet with success in the immediate future.

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The Louisiana Civil Code provides that upon separation or divorce the custody of a minor child of the marriage is given to one of the parents.1 No provision in the legislation recognizes a

45. "Thus, the record establishes, at the most, that the Respondent refused to comply with the Union's request that the Respondent submit to arbitration the dispute arising out of that discharge. Whether or not such refusal constituted a breach of the collective bargaining agreement, it did not in itself, constitute a violation of Section 8 (a) (5) and (1) of the Act. Accordingly we shall dismiss the complaint." Id. at 2.

1. Art. 157, LA. CIVIL CODE of 1870, as amended, La. Acts 1924, No. 74, p. 114: "In all cases of separation and of divorce the children shall be placed under the care of the party who shall have obtained the separation or divorce unless the judge shall, for the greater advantage of the children, order that
right in the non-custodian parent to enjoy the company of the child. Yet it may be assumed that there was never any intention to give the custodian parent the power to deny completely to the other the possibility of being with the child at least on occasions. This would be particularly unjust if the custodian and not the non-custodian parent is at fault in the divorce or separation. Thus it may be said that here is a situation for which the legislation should contain a provision, but in fact does not. The judiciary has recognized this gap in the law and has attempted to formulate a proper norm to regulate the problem. In so doing it has rejected in principle a solution often adopted in other states, that of divided custody. Indeed, such a solution in Louisiana would run counter to the legislation giving custody to one parent. Instead, the Supreme Court has come to recognize “a right of visitation” in the non-custodian parent.

Although this problem must have existed from the time of the enactment of the Civil Code of 1808, nothing could be found in the decisions of the Louisiana Supreme Court dealing with it as such before 1923. Hayden v. Hayden, decided in that year, was an appeal from a district court judgment ordering the child to be shifted to the other parent's custody every three months. The Supreme Court annulled this divided custody judgment, stating that under the Civil Code there was no provision other than that granting the custody of a child to only one parent. If the Supreme Court meant to recognize rights in the other parent it did not mention this in its opinion.

Nine years later, however, in Jacquet v. Disimone, the Supreme Court carefully elaborated a right of visitation in the non-custodian parent, referring to this as a natural right flowing from parentage which, like the fact of parentage itself, was not negated by the provision of the Civil Code giving the custody of the child to one of the parents. The district judge, evidently

some or all of them shall be entrusted to the care of the other party. The party under whose care a child or children is placed, or to whose care a child or children has been entrusted, shall of right become natural tutor or tutrix of said child or children to the same extent and with the same effect as if the other party had died."

Before 1921 in the case of divorce, the custodian parent also became the tutor of the child, but in the case of separation the custodian, though entitled to exclusive custody, did not become tutor. By La. Acts 1921(E.S.), No. 38, p. 42, the custodian after divorce was denied tutorship and placed in the same position as the custodian after a separation. By La. Acts 1924, No. 74, p. 114, the custodian after separation or divorce becomes the natural tutor. These changes did not, however, affect the subject under discussion.

2. 154 La. 716, 98 So. 162 (1923).
3. 175 La. 617, 143 So. 710 (1932).
following the opinion in *Hayden v. Hayden*, had considered the father without legal right to complain that the child's mother-custodian had denied him all access to the child. In annulling this judgment the Supreme Court used language which certainly is justifiable under Article 21 of the Civil Code and which remains the fundamental and clearest statement on the right of visitation:

"But the judgment of divorce did not have the effect of divesting defendant of his fatherhood, and the child is still his child, notwithstanding its custody was awarded to the mother.

"A parent against whom an adverse judgment of divorce has been rendered possesses certain natural rights with respect to his child whose custody is given to the other parent. One of these is the right of access to his child. And the exercise of this right under such reasonable restrictions as the circumstances warrant within the discretion of the court should not be withheld, unless the parent has forfeited the privilege by his conduct, or unless the exercise of the privilege would injuriously affect the welfare of the child."\(^5\)

While the Supreme Court had anticipated the right of visitation in *Jacquet v. Disimone*, it deliberately left the specification of this right to the lower court and had not hinted what it might consider a proper definition of that right even for the facts in that specific case. This same procedure was followed in *Shipp v. Shipp*,\(^6\) decided in 1935. In 1939, however, in *Cormier v. Cormier*,\(^7\) the Supreme Court, in accepting the district judge's opinion and reproducing it as its own, necessarily put its stamp of approval on the manner in which the district judge had specified the right of visitation for the particular case. The order of the district judge was that the father should be allowed to see the child once a week at the mother's home on a day and hour agreeable to her, and in addition, to take the child to his home on the last Saturday of each month between the hours of 9 A.M. and 5 P.M. We must assume the Supreme Court considered this specification reasonable. Yet it must be remembered that the Supreme Court was not itself giving specification to the right of visitation, but was merely approving by implication the specification which had been made by the district judge.

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4. 154 La. 716, 98 So. 162 (1923).
5. 175 La. 617, 619, 143 So. 710, 711 (1932).
7. 193 La. 158, 190 So. 365 (1939).
Another factor should be noted in connection with the Cormier case. The district judge had proceeded to state what he regarded as a minimum to satisfy the husband’s right of visitation even though he recognized expressly in his opinion that the mother had not been arbitrary in this matter. Thus it may be said that the Supreme Court in accepting the district judge’s opinion approved of the specification of visitation rights even in the absence of a showing that the custodian parent had unreasonably denied or restricted the other parent’s access to the child.

It was not until the decision in Pierce v. Pierce in 1948 that the Supreme Court itself offered any indication of what it might consider a proper arrangement in satisfaction of non-custodian’s right of visitation. The lower court had given the father possession of the child every weekend and during the months of July and August. On appeal of the non-custodian parent, the Supreme Court struck down the weekend custody arrangement in this judgment on the theory that it amounted to a divided custody award. At the same time, however, it refrained from setting aside that portion of it giving the child to the non-custodian parent during the summer months because it had not been attacked. Inasmuch as the Supreme Court in annulling the order for weekend custody had commented on how unwise this would be for the child during the school year, it may be that the court is willing to accept a divided custody arrangement if agreed upon by the parties and the lower court, provided that in the particular case the welfare of the child is not affected.

A similar indication seems to be contained in the opinion rendered the following year in Johnson v. Johnson. There a father sought a revision of a custody judgment rendered some years before under which he had been given the right to visit his child twice a month for two hours and forty minutes on each occasion, alleging that since the child was older, he should be permitted to see it more often. The lower court had refused to revise its previous judgment but the Supreme Court, Justice Hawthorne writing the opinion, indicated that the parent should be allowed more frequent visits of a longer duration during the school year and that the child should be allowed to visit the parent from time to time during vacations. In this case, however, Justice Hawthorne indicated that the lower court should specify

8. 213 La. 475, 35 So.2d 22 (1948).
the hours and times of visitation only if the parents could not agree.

In Roshto v. Roshto,\(^\text{10}\) decided on the same day as the Johnson case, the Supreme Court went so far as to state that a father should be allowed to visit his child at least twice a month and during periods of illness. In separate concurring opinions, Justices Hawthorne and McCaleb took exception to this portion of the majority opinion, both justices objecting that only the lower court should affirmatively set the time of visitation; and Justice McCaleb objecting to the blanket statement that the parent should be permitted to visit his child during illness, on the theory that the primary consideration should be the welfare of the child.

The above jurisprudence certainly indicates that a right of visitation is recognized by the Supreme Court, and that, as specified, it must not in principle equal divided custody. Moreover, it seems clear that except for what may be regarded as an unintentional statement in the majority opinion of Roshto v. Roshto, the Supreme Court will leave the actual specification of the hours and times of the visits to the agreement of the parties or, in the absence of an agreement, to the sound discretion of the trial judge, striking a particular arrangement with nullity only if it finds it contrary to the best interest of the child.

A further problem remains, however. Suppose the parent who has been given custody desires to change his or her residence. Should the practical defeat of the other parent's right of visitation be regarded as unavoidable, or should that parent have the right to demand a redetermination of a custody and visitation order? In Sanford v. Sanford,\(^\text{11}\) decided in 1945, a non-custodian father had asked the court to redetermine the custody arrangement after the custodian mother had remarried and moved out of the state. The trial judge, finding that the father would never be able to see the child if he were taken out of the state, while the mother, on the contrary, would be able to visit the child several times a year if he were to be placed in the custody of the father, gave judgment accordingly. On appeal the Supreme Court reversed the trial judge and left the former judgment standing. Thus, whereas the trial judge had in fact provided for the maximum possible respect for the rights of both parents, the Supreme Court's judgment in effect negated the right of visitation.

\(^{10}\) 214 La. 922, 39 So.2d 344 (1949).

\(^{11}\) 208 La. 1073, 24 So.2d 145 (1945).
tion. Of course it is to be recognized there will always be situations where one of the parents may not be able to enjoy in fact the visitation rights he would have if he and the custodian parent lived in the same locality, but it would seem that the action taken by the trial judge in the Sanford case was more consistent with the actual interests involved in any custody problem when both parents are living. In such instances there are actually three interests, and not only one. There is, of course, the welfare of the child; but as long as this is not violated it would seem that the custody and visitation order should be so designed as to facilitate the maximum contact of both parents with the child. It is submitted that it is the recognition of these three interests that prompted the decision in the recent United States Supreme Court case of May v. Anderson, under which a custody judgment is not entitled to full faith and credit when opposed by a parent who was not before the court which rendered it.

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Hearsay and Non-Hearsay as Reflected in Louisiana Criminal Cases

The Louisiana Code of Criminal Procedure provides that "Hearsay evidence is inadmissible except as otherwise provided in this Code." No definition of hearsay evidence is given, nor is there a setting out of the exceptions. As a consequence, one who would understand the nature of hearsay evidence in Louisiana criminal jurisprudence must glean his rules and definitions from

13. This paper does not go into the question of whether a custodian parent who is also natural tutor under Civil Code Articles 157 and 246 may remove his child and domicile beyond the limits of the state without seeking permission of the court which rendered the custody judgment. This matter was considered in the case of Wilmot v. Wilmot, 223 La. 221, 65 So.2d 321 (1953), and there it seems to have been assumed that such permission would be required. A good discussion of that case is contained in The Work of the Louisiana Supreme Court for the 1952-1953 Term—Tutorship and Custody, 14 Louisiana Law Review 127 (1953).
1. Civil cases are not discussed because the exclusionary rules of evidence as used in civil matters most often go to the weight rather than the admissibility of the evidence.