

## Louisiana Law Review

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Volume 16 | Number 2

*The Work of the Louisiana Supreme Court for the*

*1954-1955 Term*

*February 1956*

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# The Evolution of the Regime of Tutorship in Louisiana

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### Repository Citation

Henry R. Sachse, *The Evolution of the Regime of Tutorship in Louisiana*, 16 La. L. Rev. (1956)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol16/iss2/26>

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## The Evolution of the Regime of Tutorship in Louisiana

A study of the development of the law of tutorship in Louisiana reveals that the legal treatment of the orphaned minor's status in society has constantly changed. The original concept of tutorship, based on the old Spanish régime, was greatly altered in the nineteenth century through the influence of the *Code Civil*, and more recently by innovations of equal importance. An analysis of this development should prove helpful in promoting an understanding of the law of tutorship as it exists today and should be of aid in the event revision of this area of the law is considered in the future.

### *The Spanish Provisions*

The first significant law in Louisiana on the subject of tutorship was the system provided by Spain<sup>1</sup> in *Las Siete Partidas*.<sup>2</sup> The *Partidas* defined tutorship as "the guardianship which is given and conferred over minors of free condition [*sui juris*] who are under fourteen years of age, when they are males, and under twelve years, when they are females, as being incapable and not knowing how to defend themselves."<sup>3</sup> This definition provided two prerequisites to the régime of tutorship, first, that the minor be of free condition and, second, that he be below the age of puberty. To be "of free condition" the authority of the father over the minor must have terminated; the death of the mother had no effect upon the status of the child.<sup>4</sup>

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1. There is no apparent direct connection between the pre-Spanish French law in Louisiana and subsequent systems of tutorship. The great French influence in tutorship came only after the *Code Civil*. See page 417 *infra*.

2. *Las Siete Partidas*, written in 1256, and promulgated as law in 1343, became the basic law of Spain in 1505. In varying degrees the *Partidas* was the law of Louisiana from the Spanish acquisition in 1769 to the second quarter of the nineteenth century. In 1820 it was still considered in effect in Louisiana despite the Digest of 1808, and for that reason the Legislature commissioned its translation. The origin of many of the present articles of the Civil Code and the Code of Practice lies in the *Partidas*. All quotations of the *Partidas* in this Comment are from the official Moreau-Lislet, Carleton translation of 1820.

3. LAS SIETE PARTIDAS 6.16.1. The definition is similar to that of the Institutes of Justinian. "Tutelage, as Servius defined it, is a right and power exercised over an independent person, given and allowed by the civil law for the protection of one who on account of his tender age is not able to be his own defender." INSTITUTES 1.13.1. Translation by LEE, *THE ELEMENTS OF ROMAN LAW* 91 (3d ed. 1952).

4. Indeed, in the early Roman law the woman was deemed a subject of perpetual tutorship. On the *perpetua tutela mulierum*, see BUCKLAND, *A TEXTBOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN* 165 (2d ed. 1950); JOLOWICZ, *HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW* 120 (1932); LEE, *THE ELEMENTS OF ROMAN LAW* 88, 344 (2d ed. 1952).

The Spanish concept of "paternal authority" embodied in *Las Siete Partidas* may be traced to the Roman family organization.<sup>5</sup> At Roman law the oldest surviving male was the *pater familias*, the head of the family.<sup>6</sup> He alone of the family was considered *sui juris*, that is, as having a legal personality; those under his control were *alieni juris* and were necessarily without legal personality.<sup>7</sup> The power which the oldest male exercised over the family was called the *patria potestas* and was almost dictatorial in nature.<sup>8</sup> So long as there existed an older male in the direct ascending line, persons under his control remained *alieni juris* regardless of their age.<sup>9</sup> Those under the control of the *pater familias* could acquire a legal personality only at the termination of the *patria potestas*.<sup>10</sup> Thus if the *patria potestas* terminated while one was below the age of puberty, although he then became *sui juris*, he also became subject to the rules of tutorship.<sup>11</sup> After puberty, the minor could act through a curator if he chose to do so.<sup>12</sup>

This Roman background was evident in the Spanish law in force in Louisiana. Under it, the régime of tutorship began when the child was no longer under paternal authority and continued until the minor reached the age of puberty. Between the age of puberty and the age of majority the child was subject to a less

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5. See LAS SIETE PARTIDAS 4.17, 18. On *patria potestas* at Roman law, see INSTITUTES 1.9, 12; BUCKLAND, A TEXTBOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN 102 (2d ed. 1950); JOLOWICZ, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 118-20, 248-49, 522-23 (2d ed. 1952).

6. INSTITUTES 1.9.3; see note 5 *supra*.

7. See INSTITUTES 1.9, 12; note 5 *supra*.

8. *Ibid.*

9. *Ibid.*

10. *Ibid.*

11. INSTITUTES 1.13.1. See note 3 *supra*.

12. Curatorship was a later development in the Roman law than tutorship. The *lex plaetoria* of the second century B.C. took the first step away from the concept that a youth was legally capable of handling his own affairs as soon as he had reached the age of puberty. This statute, which permitted an action against anyone taking advantage of the inexperience of a man under 25, had the effect of making people wary of dealing with minors. When the praetors began to grant *restitutio in integrum* to minors who had acted unwisely, dealing with a minor became even more perilous. However, if the minor obtained the advice of an experienced adult, he could not bring the actions based upon his own inexperience. Thus persons wishing to transact business with minors began to require that they obtain the advice of an adult and experienced man. Later the law allowed permanent curators, as these advisors were called, to be appointed by the minor.

For a thorough discussion of the institution of curatorship in Roman law, see BUCKLAND, A TEXTBOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN 168 (2d ed. 1950); JOLOWICZ, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 251 (2d ed. 1952).

stringent form of guardianship — curatorship.<sup>13</sup> This continued to be the law of Louisiana until 1830 when the curatorship of minors was abolished and the régime of tutorship was deemed to continue until the child attained majority.<sup>14</sup>

Under the *Partidas* the tutor had to be sound of mind and body, of good morals, a major, and a male.<sup>15</sup> However, the mother or grandmother of the child could become tutrix if she would promise not to remarry and would relinquish the special legal protections that the law granted to women.<sup>16</sup> The promise not to remarry as a requisite was based on the fear that if the mother or grandmother remarried, her love for her new husband might exceed that for her children or grandchildren.<sup>17</sup> The relinquishment of her protective privileges was required of course so that men might contract safely with her.<sup>18</sup>

The section of the *Partidas* on tutorship<sup>19</sup> contemplated testate succession and encouraged testamentary appointment of the tutor. The testamentary tutor was the first provided for in the chapter on tutorship<sup>20</sup> and as a matter of law had priority in the call to tutorship.<sup>21</sup> Another indication of the preference of the *Partidas* for the testamentary disposition of the tutorship was the concession made to women by allowing the widow who made her children her heirs the right to appoint a tutor in her will.<sup>22</sup> This preference for testamentary disposition of the tutorship seems most sensible, for certainly the parent would have the interest of the child at heart in selecting the tutor and should be in a position to pick the best qualified individual from the aggregate of his friends and relatives.<sup>23</sup> If no testamentary tutor was thus appointed, the law called forth the nearest relative of the

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13. LAS SIETE PARTIDAS 6.16.13.

14. La. Acts 1830, p. 48, § 9.

15. LAS SIETE PARTIDAS 6.16.4.

16. *Ibid.*

17. *Ibid.*

18. *Ibid.*

19. *Id.* 6.16.

20. *Id.* 6.16.2.

21. *Ibid.*

22. *Id.* 6.16.6. The father could appoint a tutor in his will in any case. *Id.* 3.16.2, 3.

23. In Roman law the testamentary tutor was not required to give security for a faithful administration. The reason was that "the testator has satisfied himself as to [the testamentary tutor's] fidelity and capacity." INSTITUTES 1.24. (Lee's translation.) The same result may have obtained under the *Partidas*, but there was no express provision as in Roman law. No attempt is made in this comment to treat in any detail matters of security devices in tutorship.

minor to be the legal tutor,<sup>24</sup> unless no relative was available, in which case a dative tutor was selected and appointed by the judge.<sup>25</sup>

The disposition of the custody of the pupil was not necessarily coincidental with the disposition of the tutorship.<sup>26</sup> The law apparently recognized that while those who succeeded to the pupil's estate on his death might have the greatest reason to care for his patrimony, they might have little reason to care for his person. Thus it was provided that in the absence of testamentary disposition the nearest relative would have the guardianship but not necessarily the custody of the child.<sup>27</sup> It was also provided that the child should be "reared up" in the place and with the persons that the father indicated in his will.<sup>28</sup> If the father had made no provision in this respect, the judge was "to take great care to select some good man for that purpose [rearing the child] attached to the person and interest of the minor, and who would *not* have a right to inherit his estate, after his death."<sup>29</sup> (Emphasis added.) As an alternative the law provided that "if he should have a mother of good reputation, her son may be given to her, to rear up, and she may retain him, while she remains a widow."

The *Partidas* did not provide for family meetings or under-tutors. It provided a system of tutorship in which the tutor was to be the sole agent of action in the interest of the minor and the judge was to act as the agent of control by approving or disapproving the tutor's actions.<sup>30</sup> The power of the judge in appointing the tutor was probably greater than it has been until fairly recent times.<sup>31</sup> Although the judge probably had to confirm all appointments of tutors, it is likely he exercised his discretion rather perfunctorily where testamentary and legal appointments were concerned.<sup>32</sup> The selection of the dative tutor was, however, entirely the duty of the judge.<sup>33</sup> Also, if the judge found the

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24. LAS SIETE PARTIDAS 6.16.2, 9.

25. *Id.* 6.16.2, 12.

26. See *id.* 6.16.19.

27. *Ibid.*

28. *Ibid.*

29. *Ibid.*

30. For an excellent analysis of the institutions of tutorship and for a comparative study of the laws of tutorship in various countries, see RODIÈRE, *LA TUTELLE DES MINEURS, ETUDE DE DROIT COMPARÉ EN VUE D'UNE RÉFORME DU DROIT FRANÇAIS* (1950).

31. See page 429 *infra*.

32. See LAS SIETE PARTIDAS 6.16.2, 9.

33. *Id.* 6.16.2, 12.

testamentary tutor appointed by the mother or grandmother to be unfit, he could refuse to confirm the appointment.<sup>34</sup> When such occurred the tutorship reverted to the legal tutor, and if none could be found a dative tutor would then have to be appointed.

As the agent of action the tutor was required to file an inventory of the goods of the minor<sup>35</sup> and then "repair the houses of the minor, . . . cause his land to be cultivated, and the cattle to be reared up."<sup>36</sup> Having provided for those acts of administration that in a farming economy were most urgent, the law next outlined the duties of the tutor in the care of the person of the minor.<sup>37</sup> The tutor was entrusted with teaching the pupil good morals, to read and write, and to earn a living befitting his social position.<sup>38</sup> The tutor was to care for the wants of the child according to the pupil's means, but the judge was to determine in advance exactly how much of the produce of the estate should be expended for this purpose.<sup>39</sup> If the tutor thought it best that the pupil should not know the status of his estate, then he could support him from his private funds and be reimbursed by the pupil at the end of the tutorship for all reasonable expenditures.<sup>40</sup>

Under the *Partidas*, the minor was required to accept the tutor confirmed by the judge.<sup>41</sup> The person called upon to act as tutor for the minor, however, could be absolved of this responsibility for any one of the several enumerated excuses.<sup>42</sup> It is not clear whether or not the relative called upon as legal tutor could be required to accept the tutorship if he were unable to provide one of the permitted excuses.<sup>43</sup> However, it was the duty of the

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34. LAS SIETE PARTIDAS 6.16.6. This article also provided that the judge *should* confirm the appointment where the mother made the child the heir unless the person appointed was legally incapable of becoming a tutor. However, the judge *could* confirm any appointment by the mother.

35. *Id.* 6.16.15. If the tutor failed to file the inventory he became a "suspect person" and the judge was required to deprive him of his commission of tutorship.

36. *Ibid.*

37. *Id.* 6.16.16.

38. *Ibid.*

39. *Id.* 6.16.20: "The judge of the place ought, in his discretion to fix upon a certain quantity of bread, wine, and money, according to the fortune of the minor, for his maintenance . . . always taking care that his expenses shall not exceed the rents and fruits of his estate, which ought to remain entire, if possible."

40. *Ibid.*

41. *Id.* 6.16.13.

42. *Id.* 6.17. Some of the excuses were: having five children, being a soldier on active duty, being tutor of three persons at the time, being physically afflicted, etc.

43. *Id.* 6.16.12: "[N]or having any relation who is *willing* to be his guardian . . . ." (Emphasis added.)

family, when no tutor had been appointed by will, either to find a tutor among its ranks or to petition the judge to appoint a dative tutor.<sup>44</sup>

The régime of tutorship under *Las Siete Partidas* did not totally incapacitate the pupil. The tutor could administer the estate either in his own name or in the name of the pupil. In the first instance he acted for the pupil, in the second he only aided the pupil in his actions.<sup>45</sup> The pupil capable of understanding a transaction could act for himself without the aid of the tutor "if another person should make a contract with him, by selling him anything, or obligating himself towards him for something advantageous to the minor."<sup>46</sup> But neither pupil nor tutor could alienate the movable or immovable property<sup>47</sup> of the estate except in certain special cases and then only with the consent of the judge.<sup>48</sup>

#### *Changes Under the Influence of French Law*

The Digest or "Code" of 1808<sup>49</sup> was intended merely to restate the civil laws in force in Louisiana.<sup>50</sup> However, many of the provisions of the *Code Civil* were incorporated in the Code of 1808.<sup>51</sup> With regard to tutorship, three of these provisions greatly altered the law then in force. Under the *Code Civil* nat-

44. *Ibid.* Under penalty of losing the right to inherit the patrimony of the minor.

45. Only *id.* 6.16.17 refers to the tutor aiding the minor. *Id.* 6.16.4, 18 lead the writer to believe that the tutor usually acted in his own name.

46. *Id.* 6.16.17.

47. *Id.* 5.5.4; *Id.* 6.16.18; see note 48 *infra*.

48. AZO & MANUEL, INSTITUTES OF THE CIVIL LAW OF SPAIN 1.3.2, Johnson's translation found in 1 WHITE, RECOPIACION 15-16 (1839): "[T]he guardian cannot alienate or dispose of any of the moveable goods or chattels of the wards without the permission of the judge of his domicile, which shall not be granted without cognisance of the cause of such alienation or sale, and of its utility to the minor [LAS SIETE PARTIDAS 5.5.4]; however he may make such sale without the knowledge of the judge, when it is done for the purpose of providing a marriage portion for a female ward [LAS SIETE PARTIDAS 4.11.14]. Much less can he dispose of the real property of the minor, unless it be to enable him to pay debts due by the father, or to marry the brother of the minor; but then he must obtain the approbation of the judge for the purpose [LAS SIETE PARTIDAS 6.6.18; 4.11.14]. And even in these cases, which furnish just causes for the alienation of the real property, the judge shall not consent to the sale of the house of the father or grandfather of the minor in which it appears he was born, unless it cannot be possibly avoided [LAS SIETE PARTIDAS 6.16.18]." The provisions as to the house were not translated by Moreau-Lislet & Carleton as being in effect in Louisiana.

49. The official title of the 1808 Civil Code is "A Digest of the Civil Laws now in force in the Territory of Orleans, with alterations and amendments adapted to its present system of government." It was adopted in La. Acts 1808, No. 29, pp. 120, 122.

50. *Ibid.*

51. *Dainow, Introductory Commentary to the Louisiana Civil Code*, 1 L.S.A. CIVIL CODE OF 1870, at 7 (1952).

ural tutorship started at the death of either parent;<sup>52</sup> an undertutor was required;<sup>53</sup> and the family council was the *haute tutelle*, or highest agency of control.<sup>54</sup> The first two provisions have gradually become more important in Louisiana law since their inception in 1808, while the last, after a period of importance, fell into disuse and has been eliminated from the law.

Under the *Partidas*, the death of the mother had had no effect upon the power of the father over the child.<sup>55</sup> With the inception of the French law in Louisiana, however, upon the death of the mother the father could only exercise authority over the child as a natural tutor and subject to the regulations governing tutors.<sup>56</sup> This was obviously a recognition of *parental* authority rather than *paternal* authority, and is probably attributable to the general rise of the position of women in society that occurred with the French Revolution.<sup>57</sup> Under the new system in Louisiana, the father continued to be the head of the family,<sup>58</sup> but the natural unit of familial control was considered that of the man and wife.<sup>59</sup> Since each parent was considered as an adviser for the other and as a restraining influence as well, the death of either parent destroyed the natural unit of authority and made it necessary for the régime of tutorship to be substituted.<sup>60</sup> While retaining the surviving parent as the agent of action, the régime of tutorship supplied the agency of control for the property and person of the minor, deemed to be missing when one parent alone survived.<sup>61</sup> Tutorship supplied a new agent of action as well as of control when neither parent survived.<sup>62</sup> Requiring the father to qualify as tutor after the death of his wife was a great deviation from the prior absolutism of paternal authority. It meant that the father had no greater rights than the mother in this respect, since under the Spanish law she had never been able to

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52. CODE CIVIL art. 390.

53. *Id.* arts. 420-26.

54. *Id.* arts. 405-19, 452-68.

55. See page 412 *supra*.

56. LA. CIVIL CODE 1.8.5-10, p. 58 (1808).

57. On the position of the woman in society, see 15 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 439-51 (especially 445 for the French Revolution) (1935).

58. The father during the marriage was the administrator of the estate of his minor children. LA. CIVIL CODE 1.8.5, p. 58 (1808). He was also head of the community of acquets and gains. *Id.* 3.5.66, p. 336.

59. *Id.* 1.7.37, p. 52.

60. Another reason for applying the rules of tutorship was that the minor probably had separate property inherited from the deceased parent. See 1 PLANIOL ET RIPERT, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL 756, art. 2201 (student ed. 1950).

61. *Id.* art. 1982.

62. *Ibid.*



exercise authority over the child and its estate after the death of her spouse without qualifying as tutrix or custodian.<sup>63</sup> The provision for four types of tutors, testamentary, legal, dative, and natural, has continued to this day.<sup>64</sup>

Perhaps the greatest change in the system of tutorship in Louisiana brought about by the Code of 1808 was the provision for the family meeting.<sup>65</sup> Although peculiarly French in its later development,<sup>66</sup> its origin is found in the Roman law.<sup>67</sup> The Roman magistrates had sometimes consulted the family of the deceased *pater familias* about important matters in the education of the pupil and in the care of his property. This, however, never became a universal practice and by no means a part of the codified law.<sup>68</sup> It was simply the natural way for the magistrate to get information and opinions that would be helpful in deciding what was best for the pupil. The provinces of the *droit écrit* in France largely followed the Roman written law and had no family meeting.<sup>69</sup> The provinces of the *droit coutumier* used the family meeting, but never as an organized institution of law and only at the discretion of the judge.<sup>70</sup> Thus the family meeting, as it has been known in France and Louisiana, was largely the product of the redactors of the *Code Civil*.<sup>71</sup> The office of tutor, while traditionally referred to as a public office or duty,<sup>72</sup> has always been primarily a family matter in the civil law.<sup>73</sup> The redactors of the *Code Civil* made the agency of control as well as the agency of action a family matter by giving to the family meeting many of the powers formerly held by the judge. In France the family meeting became so strong that it was referred to as the legislative branch of tutorship, the tutor being the executive.<sup>74</sup> On the other

63. See page 414 *supra*.

64. LA. CIVIL CODE art. 247 (1870); LA. CIVIL CODE art. 264 (1825).

65. LA. CIVIL CODE art. 281 (1870); LA. CIVIL CODE art. 305 (1825); LA. CIVIL CODE 8.1.20, § 5, p. 62 (1808).

66. RODIÈRE, LA TUTELLE DES MINEURS 18 (1950).

67. DOMAT, CIVIL LAW §§ 1297-98 (Strahan transl., Cushing ed., 1850).

68. *Ibid.*

69. RODIÈRE, LA TUTELLE DES MINEURS 17 (1950).

70. *Ibid.*

71. *Ibid.*

72. "[T]hey may be excused from tutorship or curatorship as from other public duties, for tutorship and curatorship are regarded as public duties." INSTITUTES 1.25. Translation by Lee.

73. 1 TOULLIER, LE DROIT CIVIL FRANÇAIS 308, § 1078 (1833): "*On peut définir la tutelle une charge de famille fondée sur la nature, et confirmée par le droit civil.*" ("One can define tutorship as a family responsibility founded on nature and confirmed by the civil law.")

74. See 1 COLIN ET CAPITANT, COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANÇAIS 585, no 761 (1947).

hand, in Louisiana, while permission of the family meeting was needed by the tutor in performing many acts,<sup>75</sup> and by the judge in appointing the dative tutor,<sup>76</sup> the family meeting never became a directive body. Its function was to approve or disapprove the acts of the tutor, not to direct them. The Code of 1808, while introducing the family meeting in Louisiana, did not provide for its use as extensively as did the *Code Civil* or indeed the subsequent Louisiana Codes. Although there were chapter headings "Of Tutorship by Nature,"<sup>77</sup> and "Of the Undertutor,"<sup>78</sup> there was no chapter entitled "Of the Family Meeting." Under the Code of 1808 the only apparent use of the family meeting was in appointing the dative tutor<sup>79</sup> and accepting an inheritance.<sup>80</sup> In borrowing money, compromising rights,<sup>81</sup> making partitions,<sup>82</sup> and disposing of the property,<sup>83</sup> the tutor needed only the consent of the judge.

Another significant change brought about in the Code of 1808 was the adoption of the requirement of the *Code Civil* that an undertutor be appointed.<sup>84</sup> The appointment of an undertutor was unknown in Roman law and was never a strong custom in France.<sup>85</sup> Perhaps even more than the family meeting, it was the original effort of the redactors of the *Code Civil*.<sup>86</sup> As with the family meeting the Code of 1808 provided only the most rudimentary elements of the institution.<sup>87</sup> Little more was provided than that the judge should appoint for every tutorship an undertutor who should act for the pupil when the pupil's and the tutor's interests became in conflict.<sup>88</sup> Not until the later codes<sup>89</sup> were more specific duties of the undertutor and especially the relationship of the undertutor and the family meeting provided for. Actually, the great rise in the importance of this institution came

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75. See LA. CIVIL CODE arts. 339, 343, 350, 353 (1870).

76. LA. CIVIL CODE art. 271 (1870).

77. LA. CIVIL CODE 1.8, § 2, p. 58 (1808).

78. *Id.* 1.8, § 6, p. 64.

79. *Id.* 1.8.20, p. 62.

80. *Id.* 1.8.62, p. 70.

81. *Id.* 1.8.65, p. 70.

82. *Id.* 1.8.67, p. 70.

83. *Id.* 1.8.57, p. 68.

84. *Id.* 1.8, § 6, p. 64.

85. 1 COLIN ET CAPITANT, COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANÇAIS 582, n<sup>o</sup> 758 (1947).

86. *Ibid.*

87. LA. CIVIL CODE 1.8.32-35, p. 64 (1808).

88. *Id.* 1.8.32-33, p. 64.

89. LA. CIVIL CODE arts. 273-280 (1870) ; LA. CIVIL CODE arts. 300-304 (1825).

only with the abolition of the family meeting and the substitution of the present judicial procedure in tutorship.<sup>90</sup>

Two other major features of the régime of tutorship under the *Code Civil* were later accepted in Louisiana. These were the system of disposing of the pupil's property<sup>91</sup> and the abolition of curatorship of minors. Again the Legislature did not immediately adopt all of the French provisions. Only after unsuccessful intermediate provisions, perhaps peculiar to Louisiana, were these concepts of the *Code Civil* fully incorporated in the state's legislation.

The transition from the Spanish system for the disposition of the property of the pupil to that of the *Code Civil* seems to have been unnecessarily difficult. The Code of 1808 provided a simple procedure for the tutor to follow in the administration of the property of his pupil.<sup>92</sup> He was to see that two appointed appraisers and a parish official, in the presence of the undertutor, made an inventory of all the property of the pupil.<sup>93</sup> Then, unless the tutor were a surviving spouse, he was required to provide security for his faithful administration equivalent to the amount of the inventory.<sup>94</sup> This is basically similar to the system of *Las Siete Partidas*, to the *Code Civil*, and indeed to the law today.<sup>95</sup> However, the Code of 1808 went further by providing for the compulsory sale of all the goods of the pupil, movable and immovable.<sup>96</sup> While the *Code Civil* provided for the compulsory sale of the movable property,<sup>97</sup> neither the *Partidas* nor the *Code Civil* provided for the mandatory sale of the immovable property of the pupil. On the contrary, the basic rule of the *Partidas* was that all his property had to be conserved.<sup>98</sup> The reason given in the Code of 1808 for this drastic departure from accepted procedure was to relieve the tutor of the burden of administering active plantations and caring for movable property.<sup>99</sup>

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90. See page 429 *infra*.

91. CODE CIVIL arts. 450-475.

92. LA. CIVIL CODE 1.8, § 9, p. 68 (1808).

93. *Id.* 1.8.54, p. 68.

94. *Id.* 1.8.55, p. 68.

95. LAS SIETE PARTIDAS 6.16.15; CODE CIVIL art. 451; LA. CIVIL CODE arts. 316, 317 (1870).

96. LA. CIVIL CODE 1.8.56, p. 68 (1808). The sale was to be at no less than the appraised value of the goods. *Id.* 1.8.59, p. 70.

97. CODE CIVIL art. 452. If the family meeting authorized the preservation of any of the movables they became exempt from compulsory sale.

98. See page 417, n. 48. *supra*.

99. LA. CIVIL CODE 1.8.72, p. 72 (1808).

The harshness of the rule requiring sale of the pupil's homesite to relieve the tutor of its care must have become readily apparent, for the modification of the rule began immediately after its enactment. Two provisions of a statute enacted in 1809<sup>100</sup> were aimed at relieving the harshness engendered by the rule. The statute first provided that the natural tutor could be relieved of the necessity of selling the immovable property of the minor if he obtained the approval of the judge and the undertutor that it would benefit the pupil to keep the land (a procedure strikingly similar to the present judicial procedure in all major acts of tutorship). It next provided that uncultivated land could not be sold without the permission of the judge and the family meeting. The first dispensation probably was in recognition of the parent's desire to preserve the homesite for the child; the second was based on the fact that the administration of uncultivated land required little effort.<sup>101</sup> In 1811 these provisions were repealed and a provision incorporating some of the features of both French and Spanish law was adopted. Act 9 of that year provided that no property of the pupil, movable or immovable, could be sold without the consent of the undertutor and the five nearest relatives of the pupil, or if none could be found, his five nearest friends.<sup>102</sup> The act also provided that if the will of the deceased parent forbade sale of the property, the property could not be sold, unless there were unsatisfied debts of the estate.<sup>103</sup> This was true even if the undertutor and the relatives believed that it was in the best interest of the minor that the property should be sold. By the adoption of the Code of 1825, however, the provisions for the disposition of the pupil's estate were brought entirely in line with the provisions of the *Code Civil*. Immovable property could only be sold with the permission of the judge and family meeting and at public sale.<sup>104</sup> Movable property, on the other hand, had to be sold unless the judge and family meeting gave the tutor permission to retain it.<sup>105</sup> In France this compulsory sale of movables has been limited to the sale of corporeal

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100. La. Acts 1809, No. 21, p. 48.

101. Another provision of the same act prevented a possible impasse under the provisions of the Code by allowing the property to be sold partly on credit when there were no cash buyers. *Id.* at 52.

102. La. Acts 1811, No. 9, p. 30. The term "family meeting" was not used.

103. *Id.* at 30.

104. LA. CIVIL CODE arts. 334, 336 (1825).

105. *Id.* art. 333.

movables.<sup>106</sup> Whether or not this important result has obtained in Louisiana is not clear.<sup>107</sup>

The last great change towards the system of tutorship in the *Code Civil* was the abolition of curatorship in 1830. The division of guardianship into tutorship and curatorship found in the Roman law, the *Partidas*, and the Louisiana Code of 1808 was retained in the Code of 1825.<sup>108</sup> Curatorship has always been described by differentiating it from tutorship.<sup>109</sup> The abolition of curatorship therefore took away some of the provisions of the Code which illuminated the régime of tutorship. This illumination was chiefly obtained in the articles describing the curator *ad bona*, the permanent curator in charge of the minor's estate.<sup>110</sup> One difference between the curator and tutor to be noted in the Code of 1808, but which was not continued in the Code of 1825, was that "the tutor is appointed principally to the person of the minor, and secondarily, to his estate; and the curator *ad bona* is appointed principally to the estate of the minor, and secondarily,

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106. 1 PLANIOL ET RIPERT, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL 767, no 2236 (3d ed. 1949): "*L'obligation de vendre n'existe que pour les meubles corporels . . . le sens de l'art. 452 est fixé par l'histoire: il a pour origine l'art. 102 de l'Ordonnance d'Orléans, de 1560 dont la portée avait été exactement précisée depuis longtemps par l'usage: il ne s'appliquait pas aux meubles incorporels. La pratique était, à cet égard, tout à fait stable et c'est évidemment à elle que les auteurs du Code se sont référés. Enfin la loi de 1880 a tranché toute sorte de doute: non seulement le tuteur n'est pas obligé de vendre ces sortes de meubles, mais il n'en a même pas le pouvoir; il lui faut une autorisation spéciale.*"

("The obligation to sell exists only for corporeal movables . . . the meaning of art. 452 [LA. CIVIL CODE art. 338 (1870)] is fixed by history. It has for its origin art. 102 of the Ordinance of Orleans of 1560 of which the import had been established precisely for a long time by usage; it did not apply to incorporeal immovables. The practice had been in that regard quite stable and it is evidently to that that the authors of the Code Civil had reference. Nevertheless, the law of 1880 has put down any possible doubt; not only is the tutor not *obliged* to sell this sort of movable, but he does not have the *power* to do so; he must have a special authorization.")

107. The Louisiana Supreme Court in *Schiller v. New Orleans City R.R.*, 36 La. Ann. 77 (1884) stated, in reference to some shares of stock, that LA. CIVIL CODE art. 341 (1870) must be read with article 338 and thus that judicial authorization of the sale of movables is required. However, no mention of the peculiarity of this holding to incorporeal movables was made. The court in *Diaz v. Companie Comercial Mexicana*, 168 La. 27, 121 So. 180 (1929) held in regard to a ship that the tutor must receive judicial authorization *not* to sell. No mention of the *Schiller* case was made nor was a distinction between corporeal and incorporeal movables made. No other cases in point have been found by the writer.

108. LA. CIVIL CODE 1.8.78-86, p. 72 (1808); LA. CIVIL CODE arts. 357-366 (1825).

109. See note 108 *supra*.

110. The curator *ad bona* must be distinguished from the curator *ad litem*, a temporary officer appointed to litigate for the minor. LA. CIVIL CODE 1.8.79-80, p. 72 (1808); LA. CIVIL CODE arts. 358, 359 (1825).

only to his person."<sup>111</sup> Article 360 of the Code of 1825 clearly stated the other differences between tutorship and curatorship:

"The curator *ad bona* differs from the tutor in no respect except the following:

"1. The tutor is appointed to the minor, whether he be willing or not; but the curator *ad bona* cannot be appointed to the minor against his will, the judge being bound to appoint the person mentioned to him by the minor, if such person has, in every other respect, the necessary qualifications;

"2. Tutorship is natural, testamentary, legal or dative; curatorship on the contrary is only dative;

"3. The tutor stipulates in every contract, in the name of the minor, and without his presence, and appears for the minor in every case when his own interest is not in opposition to that of the minor; whilst the curator *ad bona* only assists the minor in every contract in which he is concerned, and does not appear for him in courts of justice, this being the particular duty of the curator *ad litem*."

In 1828 the Legislature provided that when the tutorship was natural or testamentary, it did not end at puberty but continued until the minor reached the age of majority or was otherwise emancipated.<sup>112</sup> As previously indicated, in 1830 the institution of curatorship was totally abolished and it was provided that the minor should remain under the régime of tutorship until his emancipation or coming of age.<sup>113</sup> This brought the Louisiana legislation in line with that of the *Code Civil*. Although no reason was given by the Legislature for the abolition of the institution of curatorship of minors, it may have been felt that emancipation for administration served the same purpose. Since the child could be emancipated at the age of fifteen,<sup>114</sup> there was no need to relieve him of some of the disabilities of tutorship, whether he was ready for it or not, simply upon reaching the age of puberty. It is interesting to note that a recent sociological appraisal of the care of orphaned minors in certain states, including Louisiana,

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111. LA. CIVIL CODE 1.8.81, p. 72 (1808).

112. La. Acts 1828 (2d Sess.), No. 36, p. 58.

113. La. Acts 1830, § 9, p. 48.

114. LA. CIVIL CODE art. 369 (1825); LA. CIVIL CODE art. 366 (1870).

has recommended a return in some respects to the principles of curatorship of minors.<sup>115</sup>

### *Modern Changes*

The passage of time has witnessed the lessening of the power of the father and a corresponding increase in the importance of tutorship. Under *Las Siete Partidas*, as in the Roman law, the child still under paternal authority was never a subject of the régime of tutorship. With the adoption of the French concept of natural tutorship in the Code of 1808, it became possible for the child still under paternal authority to be under the régime of tutorship as well.<sup>116</sup> Since 1855, in the administration of the property of the child, the father has been required to pursue "the same forms as in case of minors represented by tutors, the father occupying the place and being clothed with the powers of the tutor."<sup>117</sup> Furthermore, since 1924 the régime of tutorship has begun not only upon the dissolution of the marriage by the death of one of the spouses or by divorce, but also with the judicial separation of the spouses from bed and board.<sup>118</sup> Requiring tutorship after judicial separation broadens the applicability of the rules of tutorship and limits the exercise of the paternal and parental authority. Describing paternal authority in terms of tutorship seems to be a complete reversal of the original concept that paternal authority is supreme and tutorship is only a substitute régime for the aid of the minor when he has been denied

115. FEDERAL SECURITY AGENCY, CHILDREN'S BUREAU PUBLICATION No. 330, SOCIAL SECURITY ADMINISTRATION, CHILDREN'S BUREAU 178 (1949): "There should also be a provision [in all states studied, including Louisiana] to permit a child 14 years of age or older who has no guardian of the person to institute action to establish his legal relationship to some person or agency of his choosing."

116. I PLANIOL ET RIPERT, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL n° 1982 (1950): "*Le tuteur est destiné à remplacer les père et mère qui sont des tuteurs naturels, les premier et les meilleurs de tous. Il semble donc que la tutelle ne devrait pas coïncider avec la puissance paternelle. . . . En droit romain . . . . En droit français, au contraire, le mineur se trouve soumis à la fois à la puissance paternelle et à la tutelle lorsqu'il a encore son père ou sa mère.*"

("The tutor is intended to replace the father and mother who are the natural tutors, the first and best of all. It would thus seem that tutorship could not coincide with paternal authority. [At Roman law it could not.] In French law, to the contrary, the minor finds himself at the same time under paternal authority and tutorship when he still has a father or mother.")

117. La. Acts 1855, No. 324, § 17, p. 447, incorporated in LA. CIVIL CODE art. 222 (1870). But "being clothed with the power of the tutor" does not subject the father to the requirement of furnishing security, taking and subscribing an oath, having an inventory taken, or causing a mortgage to be inscribed against him. Succession of Allen, 48 La. Ann. 1240, 1243, 20 So. 683, 685 (1896).

118. LA. CIVIL CODE art. 246 (1870), *as amended*, La. Acts 1924, No. 72, p. 113.

the authority of his father. The usefulness of tutorship while a parent, or at least while the father, is still living has not been accepted in most European countries.<sup>119</sup> However, in those countries which limit tutorship to the situation where both parents are dead, there have been serious limitations placed on the right of the parents to dispose of the property of the minor under their control.<sup>120</sup> In those countries the ultimate result, it would seem, is not very different from that attained in Louisiana. Perhaps the rules of tutorship should be brought into effect whenever the child possesses a patrimony, whether one, both, or neither parent is dead. Similarly, if there is no patrimony and a parent is living, it might be better not to require the surviving parent to qualify as tutor.<sup>121</sup>

Although the order of calling persons to become the tutor, as provided in the chapter of the Civil Code styled "Of Tutorship," has not changed appreciably since 1808, significant changes have been made through collateral legislation. Act 34 of 1921 provides that "women have the same rights, authority, privileges, and immunities, and shall perform the same obligations and duties

119. See RODIÈRE, *LA TUTELLE DES MINEURS* 40, 41 (1950): "*Sauf le droit anglais, les législations étrangères faisant front unique contre le système napoléonien, n'ouvrent la tutelle qu'après la mort des deux parents.*"

("Except for the English law, the foreign legislations present a solid front against the Napoleonic system, not opening the tutorship until after the death of the two parents.")

120. *Ibid.* "(a) *Du vivant de la mère le père en Allemagne a le droit d'administrer les biens de son enfant mineur. Mais il lui faut pour toute opération un peu grave l'autorisation d'un organe étranger, le Tribunal des tutelles;*

"(b) *Après la mort de la mère, le père demeuré administrateur patrimonial, conserve les mêmes pouvoirs.*"

("(a) During the life of the mother, the father in Germany has the right of the administration of the goods of his minor child. But it is necessary for him, for all important operations, to get the permission of a foreign institution, the Tribunal of Tutors.

"(b) After the death of the mother, the father continues the administration, keeping the same powers.")

121. See 1 PLANIOL ET RIPERT, *TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL* 693, no 1982 (1950): "*L'idée d'une tutelle organisée dès le décès de l'un des parents, et alors que l'autre est encore vivant, paraît être venue d'une confusion entre le titre de tuteur et la fonction de gérant du patrimoine d'autrui. Par sa nature primitive, la puissance paternelle ne comporte pas le pouvoir de gérer les biens de l'enfant, puisque son principe est l'impossibilité de l'existence d'un patrimoine propre à l'enfant, tout ce qui est acquis par le filius devenant la propriété du pater.*"

("The idea of an organized tutorship from the death of one of the parents, and while the other is still living, seems to have come from a confusion between the title of tutor and the function of the gestor of the patrimony of another. In its primitive nature, the paternal authority did not encompass the power to manage the property of the minor, inasmuch as of principle there was an impossibility of the minor having his own patrimony, all that is acquired by the son being the property of the father.")



as men in the holding of office including the civil functions of tutor, undertutor . . . ."<sup>122</sup> The law declares that the woman has the same rights as the man. Thus the mother, like the father, is allowed to remarry without the judge's consent and yet retain the tutorship of her children.<sup>123</sup> Although according to the legislation, women have the duties as well as the rights of men, the court has shown no disposition to require the mother to accept the full tutorship of her orphaned children as it has with the father. The reason behind this attitude of the court probably is that women are often untrained in business affairs and may not wish to assume the responsibility of caring for an estate.

A change in the call to tutorship has also come about by a changed attitude of the court and a broad use of certain articles of the Code. Today it seems likely that even the tutorship by nature may not be looked upon by the court as an absolute right of the parent demanding it. The court's primary consideration at present is in providing the best care for the child.<sup>124</sup> The welfare of the child rather than the right of the parent has been the criterion, especially in cases of tutorship after separation or divorce.<sup>125</sup> The courts have seized upon an interesting technique in divorce cases to permit them to exercise their discretion. Article 157 of the Civil Code of 1870 originally provided that:

"In all cases of separation, the children shall be placed under the care of the party who shall have obtained the separation, unless the judge shall, for the greater advantage of the children, and with the advice of the family meeting, order that some or all of them shall be intrusted to the care of the other party.

"In all cases of divorce the minor children shall be placed under the tutorship of that party who shall have obtained the divorce."

Since tutorship obtained only after dissolution of the marriage

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122. La. Acts 1921 (E.S.), No. 34, § 1, p. 38, incorporated as LA. R.S. 9:51 (1950).

123. *In re Rhymes' Tutorship*, 153 La. 639, 96 So. 501 (1923).

124. See Comment, *Natural Tutorship in Louisiana*, 28 TUL. L. REV. 373 (1954); *State v. Robin*, 193 La. 789, 192 So. 349 (1939), 2 LOUISIANA LAW REVIEW 561 (1940).

125. For a recent case in point, see *Cannon v. Cannon*, 225 La. 874, 875-76, 74 So.2d 147, 148 (1954): "It is well settled in the jurisprudence of this state that in cases involving the custody of children the primary concern of the court is the welfare and best interests of the children."

and not after the separation, the judge obviously had no control in the appointment of the tutor in cases under this article. In 1921, by an amendment to article 157, the judge, in all cases of divorce, as well as separation, was allowed to grant the care of the child to the parent against whom the judgment was obtained if he thought it for the greater advantage of the child.<sup>126</sup> Article 157 as amended in 1921 nevertheless still referred not to tutorship but to the care of the child. But a further amendment to article 157 in 1924 made tutorship begin after separation as well as divorce, and also provided that "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."<sup>127</sup> Thus, in all cases of separation from bed and board today, when the court decides which party is to have the care of the child, it likewise determines the question of tutorship. This movement is away from the theory of tutorship of right, and back to the ancient French theory,<sup>128</sup> and the present theory in Quebec,<sup>129</sup> that all tutors are dative, the judge having the final authority of appointment.

The primary agent of action in the law of tutorship in Louisiana today is still the tutor, but the character of the agent has been changed in some cases. Historically the tutor had been an individual in charge of both the care of the pupil's property and his person. However, since the mother had a right to retain the custody of her child while refusing the care of its estate, it is clear that a division in responsibility was possible.<sup>130</sup> Since 1902 it has been possible for a bank to become tutor of the property of the pupil.<sup>131</sup> Since the bank could not be tutor of the person, the opportunity for "split" tutorship was greatly increased. This provision further changed the nature of the institution of tutorship by allowing a corporation, as well as an individual, to qualify as tutor. There are definite advantages to be gained from permitting a division of tutorship and allowing a corporation to

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126. La. Acts 1921 (E.S.), No. 38, p. 42.

127. LA. CIVIL CODE art. 250 (1870), as amended, La. Acts 1924, No. 196, p. 307.

128. I COLIN ET CAPITANT, DROIT CIVIL FRANÇAIS 571, n° 743 (1947).

129. QUEBEC CIVIL CODE art. 249.

130. *But see* SAUNDERS, LECTURES ON THE CIVIL CODE OF LOUISIANA 62 (1925): "The functions of a tutor cannot be divided. The only exception to this is [the case of the mother who retains only custody]." See also page 415 *supra*.

131. La. Acts 1902, No. 45, p. 59, incorporated as LA. R.S. 6:322(6) (1950).

be tutor for the minor's property. Since there is no need for a solvent corporation to post security,<sup>132</sup> the pupil's estate is saved that expense when tutorship is granted to a bank. Furthermore, the ability and willingness to rear a child do not necessarily coincide with the ability to manage an estate. Although banks as tutors for the property are subject to criticism for being too impersonal, on the whole a division of authority between a relative of the minor and a bank may be beneficial.<sup>133</sup>

The latest great change in the law of tutorship in Louisiana has been the abolition of the requirement of a family meeting. While the value of family counseling with regard to the major questions of tutorship is indisputable, the family meeting did not prove totally successful in Louisiana. The dispersment of family members made it difficult to bring them together for a family meeting. For this and other reasons the family meeting often became a meaningless assemblage of persons unacquainted with the pupil. When relatives and friends of the minor were not readily available, it was not at all unusual for a tutor or his lawyer to draft loiterers in the courthouse to be the members of the family meeting. Their approval of the acts of the tutor was a routine matter. In an act of 1920, re-enacted and amended in 1934 and 1935,<sup>134</sup> the Legislature provided an alternative procedure for the approval of the tutor's acts and the appointment of the dative tutor, which, by an apparently unauthorized rewording in the Louisiana Revised Statutes of 1950, has become mandatory today.<sup>135</sup> Under this procedure, the judge assumes the powers exercised by the family meeting in regard to the appointment and confirmation of tutors. In regard to the administration of the estate of the minor, the tutor must petition the

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132. *Ibid.*

133. FEDERAL SECURITY, AGENCY, CHILDREN'S BUREAU PUBLICATION No. 330, SOCIAL SECURITY ADMINISTRATION, CHILDREN'S BUREAU 181 (1949): "If the guardian of the person of a child meets the test of financial competence, however, he should have preference for appointment as guardian of the child's estate." See note 115 *supra*.

134. La. Acts 1920, No. 110, § 1, p. 159; La. Acts 1934, No. 47, §§ 1, 2, p. 245; La. Acts 1935 (2 E.S.), No. 18, § 1, p. 557; incorporated as LA. R.S. 9:602, 651, 652, 653 (1950).

135. It is highly doubtful that the "alternate procedure" was mandatory before the adoption of the Revised Statutes of 1950. The 1935 act used the imperative "shall" before the alternate procedure, while the 1934 act used the permissive "may." But in context "shall" as used in the 1935 act was permissive also. The act of 1935 provided "Said family meeting *shall* be dispensed with *under the following conditions*, to wit: if the tutor or curator shall present to the judge . . ." (Emphasis added.) Thus it was not until 1950 that the family meeting was finally abolished in matters of tutorship.

judge for permission to perform the acts that previously required the consent of the family meeting. If the undertutor concurs in the petition, the judge may homologate the proceeding and the acts of the tutor may be perfected. If the undertutor dissents, the judge must have a hearing after which he may decide the issue and summarily give his decree. The judge may also require a hearing if he is not satisfied as to the desirability of the act even though the undertutor has concurred. Whether authorized or not, the mandatory effect given in 1950 to the previous alternative procedure would not seem to have made any practical difference. Since the tutor or judge may still ask any member of the family or anyone he pleases for advice, the abolition of the requirement of a family meeting has not deprived either of them of this useful source of guidance.<sup>136</sup> In this respect the present procedure is quite similar to the original Roman practice.

There is always a delicate balance necessary in the control agencies of tutorship. If the procedure for obtaining permission to perform certain acts is too cumbersome, the facility and probably the quality of the administration may be lowered. On the other hand, if the tutor is not controlled, the pupil may suffer from maladministration that the law could have prevented. In removing the mandatory family meeting, the Legislature may have improved the system of tutorship. If, however, the undertutor approves all the acts of the tutor without investigation and the judge signs all the petitions the undertutor approves, there would seem to be no effective agency under the present system for controlling the acts of the tutor.

*Harry R. Sachse*

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<sup>136</sup> For a thorough discussion of the family meeting and the new procedure see Comment, *The Family Meeting and Its Successor*, 25 *TUL. L. REV.* 237 (1950).