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# Tutorship - Right of Surviving Parent to Custody of Child

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is danger that in these cases labor unions, because of the weakness of their foe, may do more harm than good if they are sufficiently encouraged. Experience in the building trades and associated industries has proved that labor organizations, when given absolute control, are not above extortion and similar practices.<sup>16</sup> To deny the small businessman the use of the injunction may put him completely at the mercy of the labor racketeer. Also, the possibility that labor's cause may be hurt by going further than the public believes justified should not be overlooked.

L. W. R.

#### TUTORSHIP—RIGHT OF SURVIVING PARENT TO CUSTODY OF CHILD—

A habeas corpus proceeding was instituted by the father to obtain the tutorship of his minor child. The trial judge dismissed the writ on the grounds that: (1) the child was being cared for properly by its grandparents; and (2) the custody of a child of such a tender age should not be changed merely because the father came into court to ask for it. *Held*, affirmed. *State ex rel. Landry v. Robin*, 192 So. 349 (La. 1939).<sup>1</sup>

As a general rule, upon the death of either parent, the other is entitled to the tutorship of minor children as of right.<sup>2</sup> Only in the event of "unfaithfulness of his administration, notoriously bad conduct, and abandonment of his children and failure to support and maintain them for more than one year" can the father be excluded from the tutorship.<sup>3</sup> In the earlier cases this right was regarded as absolute unless the specific causes of exclusion were proven.<sup>4</sup> Later, however, the welfare of the child became the determining factor in awarding letters of tutorship<sup>5</sup> and it is now

16. For a discussion of "labor racketeering," see (1937) 37 Col. L. Rev. 993.

1. Three justices dissented from the holding of the majority. On rehearing, the case was remanded for further finding of facts with two justices dissenting.

2. Art. 250, La. Civil Code of 1870.

3. Art. 305, La. Civil Code of 1870.

4. Tutorship of Kershaw, 5 Rob. 488 (La. 1843). See also *In re Tutorship of Upton*, 16 La. Ann. 175 (1861).

5. La. Act 79 of 1894 [Dart's Stats. (1939) § 4887] provides: "Whenever an affidavit shall be made before any district judge that the physical or moral welfare of any child in the state is seriously endangered by the neglect, or abuse, or the vicious, or immoral habits, or associations, of its parents, or parent, tutor, or other person having the custody of such child, or that the physical or moral welfare of any such child is seriously endangered by the inability, refusal or neglect of such parents, parent or tutor or custodian to properly care for such child, it shall be the duty of such district judge to summon witnesses, as to the facts set forth in such affidavit, and also such parents, or parent, tutor or custodian of such child, and if the proofs be

regarded as of more importance than the technical right of the parent.<sup>6</sup> This progressive attitude toward the welfare of the child is analogous to that taken by the legislature in awarding the custody of children in divorce cases.<sup>7</sup>

Although the judge is vested with considerable discretion in determining upon whom the tutorship is to be conferred, this discretion must be exercised upon solid and substantial grounds.<sup>8</sup> In *Heitkamp v. Ragan*,<sup>9</sup> the court stated that the discretion of the judge is not an arbitrary one because "in the absence of any positive disqualification of the father for the proper discharge of his parental duties, he has, as it seems to us, a paramount right to the custody of his infant child, which no court is at liberty to disregard."

The burden of proof to show disqualification is on those resisting the claim of the parent;<sup>10</sup> and in order to deprive a parent of the custody of his or her child a strong case must be made out.<sup>11</sup> In the instant case, as was pointed out by Justice Fournet in the dissenting opinion, there was no evidence that the father was un-

sufficient to establish the facts set forth in such affidavit, it shall be the duty of such judge to cause such child to be removed from the custody of such parents, or parent, tutor or custodian, and provided with a home or such place for safekeeping and provision of such child as may be available and in his best judgment most suitable."

It has been pointed out that "The primary object of the statute is the protection of the child. The public policy of the state is to place the welfare of the child above any right of parental custody, when such welfare becomes endangered, morally or physically, by the misconduct of the parents, or by his or her neglect of duty to the child." *State ex rel. Dartez v. Dartez*, 154 La. 722, 724, 98 So. 164, 165 (1923).

6. Whenever the evidence is such as to render it inadvisable to award the custody of a child to the parent, the claim will be denied. *State ex rel. Peter v. Stanga*, 161 La. 978, 109 So. 783 (1926) (child not given proper attention by father); *State ex rel. Castille v. Cooke*, 183 La. 404, 164 So. 153 (1935) (mental incapacity of parent); *State ex rel. Castillian v. Jeunesse*, 185 La. 845, 171 So. 51 (1936) (financial incapacity of parent to care properly for the child).

7. Art. 157, La. Civil Code of 1870, as last amended by La. Act 74 of 1924: "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 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."

8. *State ex rel. Kearney v. Steel*, 121 La. 215, 46 So. 215 (1908).

9. 142 La. 81, 83, 76 So. 247, 248 (1917).

10. *Heitkamp v. Ragan*, 142 La. 81, 76 So. 247 (1917); *State ex rel. Burleigh v. Savoie*, 185 La. 985, 171 So. 98 (1936).

11. *Ozanne v. Delille*, 5 Mart. (N.S.) 21 (La. 1826); *In re Alexander*, 127 La. 853, 54 So. 125 (1911); *Ex parte Lincoln*, 128 La. 278, 54 So. 818 (1911).

qualified.<sup>12</sup> The holding of the majority of the court, contrary to the clear intent of Articles 250 and 305,<sup>13</sup> shifts the burden upon the parent to prove that he is able to properly care for the child before he will be awarded its custody. This view, in its zeal to protect the child, disregards the positive provisions of the Civil Code and what seems to have been the established jurisprudence of this state.

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12. See note 6, *supra*. The evidence showed that the father was a successful tenant farmer while the grandfather was without employment at the time the suit was filed, and, when employed, earned his living as a waiter.

13. La. Civil Code of 1870.