Louisiana Law Review

Volume 9 | Number 3
March 1949

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Repository Citation
Mary Bird Perkins, *Custody of Legitimate Children*, 9 La. L. Rev. (1949)
Available at: https://digitalcommons.law.lsu.edu/lalrev/vol9/iss3/5

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CUSTODY OF LEGITIMATE CHILDREN

According to the Civil Code of Louisiana the question of custody of legitimate children during the existence of the parents' marriage and common life is a simple one: custody belongs to the parents.[1] The question of custody after the dissolution of the marriage or upon separation from bed and board presents no difficulties when determined solely according to the articles of the code. In such cases the minor is placed under tutorship[2] and custody of the minor belongs to the tutor.[3] The only exception to this rule is found in Article 253, which provides that the mother who exercises her privilege of refusing the tutorship retains custody of her children.[4] Since the passage of the Women's Emancipation Act of 1921[5] it is probable that the mother can no longer refuse the tutorship; therefore it is safe to say that the law does not provide for custody apart from tutorship except in the special instances hereinafter referred to.

Originally our jurisprudence followed the provisions of the code awarding custody to the tutor or tutrix. It was said in *Percy, Tutor v. Provan, Executor*,[6] an 1840 case, that "the duties, powers and privileges of the tutor, under our laws, cannot be divided; he is to have the care of the person of the minor, and it cannot be taken from him."[7] The code provides that the tutor can be deprived of custody only by removal from tutorship.[8] The causes for exclusion and removal are based entirely on business considerations[9] except in the case of "notoriously bad conduct."[10] Consequently, under the code, a tutor may retain custody when the actual welfare of the child is endangered because none of the enumerated causes for removal from the tutorship exist. Our earlier jurisprudence not only adhered to the rule of *Percy v. Provan*, but, at least in the case of natural tutors, construed the causes for exclusion and removal with great strictness and in the parent's favor.

In *Ozanne v. Delile* (1826)[11] in answer to charges of "no-

1. Art. 216, La. Civil Code of 1870.
2. Art. 250, La. Civil Code of 1870.
3. Art. 337, La. Civil Code of 1870.
4. La. Civil Code of 1870.
5. La. Act 34 of 1921(E.S.), §§ 1, 2 [Dart's Stats. (1939) §§ 2167-2168].
6. 15 La. 69 (1840).
7. 15 La. 69, 74-75.
8. Art. 337, La. Civil Code of 1870.
9. Arts. 302, 303, 304, 305, 365, La. Civil Code of 1870.
10. Arts. 303(1), 305, La. Civil Code of 1870.
11. 5 Mart.(N.S.) 21 (La. 1826).

toriously bad conduct"[12] the supreme court made the oft-quoted statement that "the law presumes much on the strength of natural affection; and knows that in general it cannot trust to any surer pledge, than that which is furnished by parental attachment. The evidence therefore should be strong and conclusive that would destroy that presumption."[13]

In *Segura, Under-Tutor v. Prados, Tutor* (1847),[14] another case in which it was sought to remove the father from the tutorship, we find an instance of the court's refusal to deny custody to the natural tutor unless the case is, beyond any possibility of doubt, covered by the codal articles on exclusion and removal from the tutorship. Although the father was found "improvident, careless in his pecuniary affairs, and perhaps wanting in habits of industry,"[15] he was allowed to retain the tutorship and consequently the custody of the child since it did not appear that he was "addicted to any such vices or immoralities of conduct, as should deprive a father of the care and protection of the persons and property of his children."[16]

Several legislative acts contain provisions contrary to the principle that custody is inseparable from tutorship. The laws concerning juvenile courts, such as Act 83 of 1921,[17] have created in the courts a quasi-criminal jurisdiction over children under the age of seventeen designated as "delinquent" or "neglected." This jurisdiction cannot be exercised in civil cases and therefore does not directly affect the decisions in civil custody cases. But, because the court is authorized in cases falling under the act to remove children from the custody of their parents, tutors or other persons, it is an indication of the latest legislative policy upon the right of custody, and, as an expression of policy, might influence the course of the jurisprudence.

Act 45 of 1902[18] provides that a minor may have two tutors, one an individual having custody and the other a bank having only the management of the property of the minor.[19] The act is of no importance in a discussion of the legislative and judicial separation of custody from tutorship since it recognizes the right of the individual tutor to custody. Although there is a division

12. Art. 305, La. Civil Code of 1870.
13. Ozanne v. Delile, 5 Mart.(N.S.) 21, 32 (La. 1826).
14. 2 La. Ann. 751 (1847).
15. 2 La. Ann. 751, 752.
16. Ibid.
17. Dart's Stats. (1939) §§ 1679-1685.
18. Dart's Stats. (1939) §§ 582-591.
19. La. Act 45 of 1902, § 1 [Dart's Stats. (1939) § 582].

in the exercise of the tutorial functions, administration of property and care of the person, there is no complete separation of tutorship and custody.

Act 79 of 1894[20] is of great importance in examining the trend of the Louisiana jurisprudence on the question of custody. It expresses a radical departure from the concept that custody is a function of the parental or tutorial power. This act gives to judges of the district courts authority to remove a child from the custody of its parents, tutors or other persons when the physical or moral welfare of the child is "seriously endangered by the neglect, or abuse, or the vicious, or immoral habits, or associations"[21] of the persons having custody or by their "inability, refusal or neglect"[22] properly to care for the child. The Louisiana Society for the Prevention of Cruelty to Children is authorized to bring suit.[23] The district judges are authorized to restore custody on a proper showing.[24]

The courts have not only used Act 79 of 1894 in the case of really serious threats to the welfare of children, but have also applied it broadly as the law in custody disputes involving no great danger to the child's welfare. Thus in *State ex rel. Taylor v. Jones* (1904)[25] the father was denied custody of his two and a half year old child because the child was extremely delicate and the maternal grandmother was better able to care for it. It was admitted that under a strict interpretation of the law perhaps the father should have custody, but under the spirit of the law and in view of Act 79 of 1894, which was regarded as controlling, the grandmother should keep the child for the length of time necessary to assure its continued good health. The court held that the child's "physical welfare" was endangered by the father's "inability" to care for it.

Not only has the court applied Act 79 broadly, but in some cases it has decided the question of custody without reference or regard to the principles of tutorship and without specific reference to Act 79.

In 1901, in *State ex rel. Lasserre v. Michel*,[26] a father brought a habeas corpus suit against his wife, from whom he was not judicially separated, to compel her to restore custody of their

20. Dart's Stats. (1939) §§ 4887-4890.
21. La. Act 79 of 1894, § 1 [Dart's Stats. (1939) § 4887].
22. Ibid.
23. Id. at § 4 [Dart's Stats. (1939) § 4890].
24. Id. at § 3 [Dart's Stats. (1939) § 4889].
25. 113 La. 298, 36 So. 973 (1904).
26. 105 La. 741, 30 So. 122, 34 L.R.A. 927 (1901).

child. The sole question in the case was the right of the husband to sue his wife on a cause of action not within one of the exceptions of Article 105[27] of the Code of Practice. The district court dismissed the suit on an exception of no cause of action. The supreme court reversed the decision and allowed the father's suit, saying "the courts in the United States while adopting the legal principle that the father is usually entitled to the custody of his children, have been inclined to modify it by adopting the equitable principle that this right must yield in some instances to considerations affecting the welfare of the children. . . ."[28] Since the merits of the case were not at issue, this language must be regarded as dictum. However, the dictum became the rule in later cases.

In a 1908 decision, *State ex rel. Kearney v. Steel*,[29] the judgment of the district court refusing to remove a child from the custody of the paternal grandmother was reversed and custody was restored to the mother. There was no allegation that the mother was not a suitable person or could not care for the child. The question was what weight should be given the child's preference in determining custody. In holding that the district court should not have considered the child's preference, the court stated "the judge has unquestionably some discretion in dealing with the custody of children; but that discretion has to be based on more solid and substantial grounds than those on which the district judge acted."[30]

Considering the mildness of the language used in both the *Michel* and *Steel* cases in delineating the limits of the trial judge's discretion in custody cases it is startling to find in *Ex parte Ryan* (1910)[31] (a suit by the father to obtain custody from relatives of the mother) a hearty endorsement of the *Michel* case. It is startling because in the *Ryan* case the supreme court went exhaustively into the question of the preference of the child. It said "We are satisfied that out of the troubles and dissentions between the parents the child has grown up to have no affection towards her father; that she has reached an age when to be forced to live with him and his family and to separate from those to whom she has become attached would be productive of future unhappiness to her, resulting in anything but good."[32]

27. La. Code of Practice of 1870.
28. 105 La. 741, 746, 30 So. 122, 124 (1901).
29. 121 La. 215, 46 So. 215 (1908).
30. 121 La. 215, 219, 46 So. 215, 216.
31. 126 La. 449, 52 So. 573 (1910).
32. Ibid.

Because of the subsequent confusion of the *Michel* dictum with the broad language in the decision of the *Ryan* case, the *Michel* case was later regarded as expressing the view that the courts have extremely broad discretion in dealing with problems of custody and that the preference of the child is an important element in custody determination. However, the *Ryan* case is the true origin of what may be termed the "broad discretion" rule in custody disputes. Thus a new line of jurisprudence was created opposed to the "narrow discretion" rule of the *Steel* case. Subsequent decisions have followed first one then the other of these lines.

In *Ex parte Lincoln* (1911)[33] a father, despite evidence that he had been living in concubinage during his marriage and afterward, gained custody of his two children from the father and sister of the mother. The supreme court expressed the view that a father is entitled to possession of his children unless the court is satisfied that he will neglect or expose them to improper influences. The *Delile* and *Prados* cases were cited in support of the decision, indicating that the concept of the inseparability of tutorship and custody had not yet been completely discarded. But after deciding the case on the basis of the "narrow discretion" rule with reference to principles of tutorship, the court proceeded to distinguish the *Ryan* case on the grounds that there the "welfare and happiness" of the child would have been endangered by giving the father custody. This indicates that the court had not lost sight of the "broad discretion" rule but only considered its application unnecessary.

The principle of the *Ryan* case was denied, however, in *State ex rel. Sevier v. Sevier* (1917).[34] The mother was restored to the custody lost while she was in a Georgia insane asylum. The court said, "the question is not whether they will be as happy or as well provided for with their mother as they are now with their foster parents."[35] "The tutorship and authority over minor children whose father is dead belongs of right to the surviving mother."[36]

In the same year, the court held in *Heitkamp v. Ragan*[37] that the allegations of the father's unworthiness were insufficient to deprive him of custody in the light of the rule laid down in *Kearney v. Steel.*

33. 128 La. 278, 54 So. 818 (1911).
34. 141 La. 60, 74 So. 630 (1917).
35. 141 La. 60, 67, 74 So. 630, 632.
36. Ibid.
37. 142 La. 81, 76 So. 247 (1917).

Until 1922, the *Michel* dictum and the rule of the *Ryan* case, although recognized by the courts, were not used as the basis for decision. But in that year, in *State ex rel. Harner v. Karpe*[38] the court cited the *Michel* and *Ryan* cases as justification for the proposition that the welfare of the child is the predominant consideration in determining custody.

The *Karpe* case cannot be said to reaffirm the proposition in the *Ryan* case that the court must give weight to the preference of the child but is more in line with the *Michel* dictum concerning the child's welfare aside from mere preference. There was a greater showing here on the part of respondents of their ability to care properly for the child than that made by petitioners and there was no problem of interference with the rights of a parent.

Although the *Ryan* case was not specifically mentioned, its principle was refuted in *State ex rel. Martin v. Talbot* in 1926.[39] The court refused to interfere with the authority of a natural tutrix (a mother suing for the return of her child whom she had left with her sister because of her inability to support it) since it was not a case for the application of Act 79 of 1894. There was no allegation that the mother was unworthy, but only a showing that the child preferred to remain with the sister. The court said, "the child's preference to live with someone else cannot prevail over the parent's authority to compel the child to live with him or her."[40] *Sevier v. Sevier* was cited as one of the authorities for this proposition.

In the *Talbot* case, the supreme court, for the first time, gave voice to the fact that the decision in *Lasserre v. Michel* was not authority for any proposition concerning the equities of custody disputes. "In *State ex rel. Lasserre v. Michel* the ruling was merely that the marital relation did not prevent the husband's suing his wife for possession of their child, on allegations of unworthiness on the defendant's part."[41]

In view of the recognition in *Martin v. Talbot* of the limitation of the *Michel* case, coupled with the court's criticism of the *Ryan* rule, it is surprising to find another 1926 decision in which the "broad discretion" rule of those cases was given a liberal application—*State ex rel. Peter v. Stanga.*[42] The father sought to regain custody from the maternal grandmother. There was

38. 151 La. 585, 92 So. 124 (1922).
39. 161 La. 192, 108 So. 411 (1926).
40. 161 La. 192, 196, 108 So. 411, 413.
41. State ex rel. Martin v. Talbot, 161 La. 192, 197, 108 So. 411, 413 (1926).
42. 161 La. 978, 109 So. 783 (1921).

nothing really to be said against the father except that he was re-married and had another small child who, the court decided, prevented his wife from being "in position to properly look after her step-daughter."[43] Nowhere is the judicial severance of tutorship and custody more strikingly evidenced than in the court's statement that, "the fact that the relator has been confirmed as natural tutor of his daughter has not added any strength to his case. No property rights are involved, and, so far as the control of the person of the child is concerned, relator's right as natural tutor is no greater than his parental right."[44] Apparently, the parental right was found to be remarkably slight since the court called it a "cold, technical right" and allowed respondent to retain the child.

In *State ex rel. Stockstill v. Spiers* (1930)[45] the court cited the *Michel* and *Ryan cases* as justification for refusing the father custody against the maternal grandmother. They enthusiastically repeated the language of the *Stanga* case concerning the "cold, technical right" of the father. The facts of this case, however, keep it from being quite as liberal an application of the *Ryan* rule as was found in the *Stanga* case. The father had no property, no money and no job and was "a very young man with an unsettled nature, and with no experience with caring for and raising children."[46] Furthermore, there was evidence that he had not wanted the child and had tried to induce his wife to submit to an abortion. Therefore, considering that the absolute welfare of the child was in question, the court's language is broader than the facts necessitate when they discuss "the interest and happiness of the child which alone is to be consdered."[47]

As if exhausted by so much liberality, the court in *State ex rel. Bethany v. Corley*[48] (a case in which only the child's preference was in contest) ignored the *Stanga* case and affirmed the expression in the *Talbot* case that the parent's authority should not be interfered with except under conditions presenting a real danger to the physical or moral welfare of the child. The "cold, technical right" of the father was allowed to triumph and custody was taken from the maternal aunt and uncle.

In a 1932 decision, *State ex rel. Burleigh v. Savoie*,[49] a father

43. 161 La. 978, 980, 109 So. 783, 784.
44. Ibid.
45. 170 La. 454, 128 So. 275 (1930).
46. 170 La. 454, 457, 128 So. 275.
47. 170 La. 454, 456, 128 So. 275.
48. 172 La. 266, 134 So. 87 (1931).
49. 176 La. 115, 145 So. 285 (1932).

was allowed to recover his child from the maternal grandparents despite their charges of negligent and immoral conduct, such conduct consisting chiefly of bootlegging. Although the court talked grandly of the rights of the father, it distinguished the *Stanga* case on the grounds that there the child had lived with his grandparents all his life and become attached to them while here the child's attachment was to his father with whom he had lived. Three justices dissented, Justice Odom insisting that the child's welfare was endangered by the "immoral habits" of the father and that Act 79 of 1894 would justify denying him custody since "the welfare of a child is paramount to the parent's natural and legal right of custody."[50]

The majority as well as the dissent showed influences of the "broad discretion" jurisprudence. It was indicated that had they thought the situation demanded it, custody would have been granted the grandmother. However, on rehearing the former decision was reinstated with Justices Land, Rogers and Odom again dissenting.

The two lines of cases continue, but more and more it becomes evident that, although there is no requirement that the parent be financially better able to care for the child than the other party seeking custody, there is a requirement imposed by the courts that the parents be able to provide the child with a certain minimum standard of living, and that there be no special conditions (such as the extreme youth of the child or a lack of time to devote to the child's care) which would be detrimental to the best interests of the child.

In cases like *State ex rel. Pitre v. Lefort* (1934),[51] when on a showing that relator had seduced the child's mother and married her only upon the institution of criminal proceedings, custody was left with the maternal grandparents, the *Michel, Ryan, Stanga* and *Spiers* cases ("broad discretion" cases) being cited. On the other hand, in cases such as *State ex rel. Perdue v. Carkuff*,[52] involving only the child's preference, the *Lincoln, Talbot* and *Ragan* cases ("narrow discretion" cases) were cited.

The most recent trend seems to be toward an extremely liberal use of discretion in custody cases and the use of the language of the *Michel* and following cases to justify depriving the parent of custody even when there is no real question of en-

50. 176 La. 115, 135, 145 So. 285, 291.
51. 179 La. 919, 155 So. 435 (1934).
52. 182 La. 920, 162 So. 629 (1935).

dangering the child, but merely a question of who can give the best care.

In 1939, in *State ex rel. Landry v. Robin*[53] the maternal grandmother was allowed to retain custody of a six-months old child solely on the ground of the child's tender age with no averment of positive disqualification on the part of the father. Justices Higgins and Fournet dissented. Justice Fournet declared the necessity for having solid and substantial reasons for depriving the father of custody and cited the *Lincoln, Talbot, Ragan* and *Carkuff* cases.

In *State ex rel. Conerly v. Sonier*[54] allegations of the father's cruelty to the mother and his non-support of both mother and child were sufficient basis for the court's decision in which custody was granted the maternal grandparents. The *Michel, Ryan, Lefort* and *Robin* cases were cited. There was no dissent because the facts of the case were such that, under the modern liberal tendency, there could be no argument against the court's exercising discretion.

So it seems settled to date in view of the *Sonier* case that the court will continue to use its discretion when the parent is really unfit. Despite the dissent in *Landry v. Robin* it is probable that the court will also continue to exercise discretion in cases not involving the fitness of the parent to have custody but solely the question of who is best able to care for the child.

It also seems that the child's preference will be considered, among other factors, but will be of persuasive value only in making a determination and that if, as in *Perdue v. Carkuff*, a parent is of impeccable character and is able to care for the child, the fact that the child does not wish to live with the parent will not be considered.

The prevailing tendency toward liberality in custody cases and the long line of jurisprudence justifying such liberality rather obscures the fact that the supreme court, in refusing custody to a tutor without first depriving him of tutorship or without applying Act 79 of 1894, is acting without legislative sanction. However, in view of the necessity for such action and the unfairness in certain cases of following the strict codal principles of tutorship and custody, perhaps this action on the part of the court is justified. Nonetheless, this judicial legislation creates a certain amount of confusion and a codal revision that is consistent with the judicial trend should be made.

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53. 193 La. 789, 192 So. 349 (1939).
54. 209 La. 138, 24 So.(2d) 290 (1945).