2] Parental authority (& responsibility)

a] Definition

What is “parental power” (or, as it’s usually called today, “parental authority,” but might still better be called “parental authority-responsibility”)? Read the following doctrinal material:

Droit de la Famille nº 1843, at 613 (Jacqueline Rubellin-Devichi dir., Paris, 1999)

Parental authority can be defined as the ensemble of right and powers that the law accords to the father and the mother with respect to the person and the goods of their unemancipated minor children, to the end of their accomplishing the duties of protection, education, and support that are incumbent on them.


The institution of parental power [pátrio-poder] results from a natural necessity. During its infancy, a human being needs someone to rear, to educate, to support, and to defend it and to protect and look out for its interests, in sum, to have control of its person and its goods. The persons naturally indicated for the exercise of this mission are the parents. To them, in principle, the law confers this ministry, organizing it in the institution of “parental power.”

Only recently has it come to be understood that the power attributed to the father ought to be exercised in the interest of the child, relaxing, in the customs and in the legislation, the paternal yoke. It is understood, at present, that the powers granted to the parents have as their measure the fulfillment of the duties of protection of the minor child. The institution lost its despotic organization, which was inspired by the Roman law, stopping it from being a conjunction of rights of the father over the person of the son, full and unlimited, so as to be turned into a complex of duties. At its foundation, the evolution is oriented toward three finalities: a) temporal limitation of the power; b) limitation of the rights of the father and of their use; c) collaboration of the State in the protection of the minor child and its intervention in the exercise of parental power so as to orient and to control it. Parental power currently ceases upon majority or the emancipation of the child. Some of the rights that the father traditionally enjoyed have been suppressed and, for the remainder, a spirit of relativity as to their use has been introduced. Finally, the state intervenes, submitting the exercise of parental power to inspection.

From a technical point of view, the conjunction of rights and duties included in the institutions is qualified as a peculiar juridical situation that is characterized by being, at one and the same time, both a “faculty” and a “necessity.” The exercise of the power is tied to the protection of interest by those to whom it is attributed. It constitutes a munus, a kind of function that corresponds to a “private charge.” Parental power is a right-function, a power-duty, that is in an intermediate position
between a power, properly so called, and a subjective right. It does not consist of simple faculties, as does a generic administrative power, nor does it involve a juridical relation with correlative rights and obligation. The father’s faculty of acting correspond to a duty of the son. But do not deal here with an obligatory relation, like that which exists between creditors and debtors, nor a real right on the person of the child. Parental power today has a particular configuration that does not square with [typical] manifestations of juridical activity.

The institution of parental power includes the legal dispositions that regulate the faculties and duties attributed to the parents so that they may regulate the person and the goods of their minor children. The attributes of parental powers concern a) the person of the child; b) his patrimony.

b) History
Where did the institution of “parental power” come from, historically speaking? Read the following doctrinal material:

4 Jose Luis Lacruz Berdejo & Francisco de Asis Sancho Rebullida, ELEMENTOS DE DERECHO CIVIL: DERECHO DE FAMILIA § 59, nº 393, at 715-17 (Barcelona, 1982)

... [In the archaic Roman law the patria potestas [paternal power] was the axis on which family law rotated. All of the familial institutions were conceived in relation to it. What counted was not the matrimonial or familial relation, but subjectation to the pater familias, whose power, which was quasi-public in nature, was exercised over the children and [their] descendants and over adopted and arrogated persons, with a character that was “absolute” – vitae et necis [(power) of life and death] . . .; “immediate” – such as his right over their things –, and “perpetual” [the power did not end until the father or the child died]. Nevertheless, in the classical epoch, this power did not constitute a private right, but a political and social presupposition of such a right. In the patrimonial order, the pater familias was, again according to pure principle, the sole subject of rights. That does not mean, as d’Ors observes, that the children were inactive elements in juridical commerce, but that if they, having maturity and sane judgment, acquired something, then they were thought to act as representatives of the pater familias and, as a result, for his benefit. On the other hand, the father was in the habit of letting them have some goods for their greater patrimonial development – peculium –, but these belonged, with their increases [fruits], to the father, who, at any moment whatsoever, could recover them.

In the later evolution, . . . the patria potestas had to be used more maiorum [literally, “by the custom of the ancients,” i.e., according to tradition]. Notably limited was the power to slay, to expose, to sell (by mancipation), and even to punish the children. New forces provided the impetus for this evolution:
a) Economic and social causes (proceeding from military and administrative activity, on the one hand, and from commercial activity, on the other). Alongside the peculium profecticum ["source peculium," the new name for what had formerly been the only peculium], the children, from the time of Augustine on, were permitted to set up another with the acquisitions [salary and booty] that they made while on campaign (castrensis). Though this, too, belonged to the father, the children could dispose of it by testament. In its turn, the influence of the customs of Greece and Egypt helped the children to acquire some measure of patrimonial capacity. In the year 326, Constantine extended the privilege [of the castrensis] from the military to the personnel of the [Imperial] Court, the successive emperors to all state employees, and Justinian to donations made by the emperor (quasi-castrensis). In 319, Constantine reserved the bona materna [maternal goods] to the children. Afterwards this reservation was extended . . . to lucrative engagement gifts and by Justinian to all things acquired by liberalities made to the children by outsiders and by their own labor. This was equivalent to according the children a patrimony, given that, besides, the father had on these goods ([called] the peculium adventicium . . .) only a kind of usufruct. Also suppressed was the father’s peculium-return right over the castrensis and the quasi-castrensis. Of the ancient regime, all that subsisted for the father was [his rights over] things acquired by the children ex re patris [for the good of the father] and ex iussu patris [on the order of the father].

b) Political causes. As Bonfante points out, while the authority of the state was increasing, the family was losing its character as an institution of the public law, retreating into the ambit of the private law. In particular, beginning in the epoch of Valentinian, it appears probable that the ius patrium [rights of the pater familias] had to cede to the ius publicum [rights of the public] in the matter of delicts . . . .

c) Religious and moral causes. Christianity, with its new conception of the family – which, early on, was centered not on the power of the father but on marriage as a sacrament – understood the potestas as an officium [service] – as a duty of assistance (Kaser) – and understood subjection to it as an act of piety. In the imperial epoch, little remained, in fact, of the ancient patria potestas, save for its perpetuation and consequent attribution to the oldest ascendant. Its content was completely weakened by legal limitations, even that part of it that concerned the power to marry the daughters against their will.

The patria potestas was extinguished by the death of the title-holder or of the subjected person. In the former case, the children became sui juris [an autonomous legal actor] and the other descendants remained subjected to the patria potestas of the oldest surviving ascendant. This power was also extinguished by emancipatio, which converted the child into a sui juris . . . .

In the ancient Germanic laws, all the children of a wife who was herself subject to mundium remained under the authority of her husband, which, for its part, proceeded from the same mundium (Muntgewalt). Planitz observes that, on some occasions, the children, upon being received into the domestic community of the husband, were subjected, along with him, to the power of the grandfather [i.e., the
husband’s father]. Later on, this power of Sippe [the grandfather’s power over his sons and their children], which is a sign of protection, was diminished in favor of the power of the father. And this power of the father was converted, as it had been in primitive Rome, into a true power of disposition over the marriage, education, and fruits of the labor of the child, whom the father could expose immediately upon its birth, punish arbitrarily, and, in case of necessity or great hardship, sell or even kill. But, differently from the classical Roman system, the Germanic system, from the earliest days up until the reception of Roman law, accorded the children patrimonial capacity. That which the child acquired by inheritance of attribution was his own property. Those is property was included in the father’s Gewere, so that the father could administer and develop and, correspondingly, could dispose of the movables, for the immovables he required the consent of the child. Another distinctive characteristic of the German system was that the paternal power terminated upon the separation of the child from the domestic community, be it by virtue of his emancipation, his reception into the communal assembly, his entry into a clientele or patronage system, his adoption, and, for a daughter, her marriage.

The historical Spanish law did not, says Otero, know the classic [Roman] patria potestas in its genuine form, notwithstanding that the Lex visigothorum, by a purely terminological coincidence, uses that term. Even so, as Merea affirms, the Visigothic legislation continued the legislative tradition of the Late Empire, accentuating certain aspects of the post-classical law. The innovations, which coincided more or less with Germanic institutions, can be attributed to this German law itself or can explained perfectly by the vulgar Roman law. The paternal power of the Visigothic legislation already appeared as an officium for the benefit of the child, in a manner even more accentuated than in the law of Justinian; its patrimonial content and the modes of its extinction coincided with those of that law.

The vicissitudes of the institution of paternal power between the fall of the Visigothic monarchy and the end of the 12th Century, the epoch of the first extensive Fueros [compilations of customary law], are not known. Otero supposes that the Visigothic conception continued in place, without any interruption in the process of its evolution. The social and political circumstances of the Christian kinds of the Reconquista, which greatly favored the law’s abandoning its interest in the institution, and the change that was taking place in the patrimonial structure of the family, which created a certain familial community of property, explain why this evolution culminated in this epoch with the law’s abstention from the intimate familial field, which caused the paternal power to lose the rest of its character as a juridical power and to become merely an institution of the natural law. This situation did not change in the Fueros.

The reception of Roman law, however, [then] took place. It occurred, for the most part, by means of Las [Siete] Partidas, which reproduced Justinian’s patria potestas without any modifications that might indicate any traditional, autochthonic contributions. On the other hand, as Otero also says, the reception did not involve a violent change from a system of conjunctive power [conjunctive between father and
son] to a new system of exclusive paternal power, but only the re-establishment of the
dominion of an institution that had been in desuetude. The Partidas utilize the classical
terminology, but, while accepting the content [of paternal power] as fixed by Justinian,
dedicate a law to explaining the significance of the term potestas. Paternal power, in
conformity with the Roman system, endures over the direct descendants in perpetuity.
And it keeps its perpetual character until the Laws of the Toro excluded from it those
children who contract marriage. The power proceeds from marriage and, eventually,
from adoption or a judgment in a filiation proceeding. Save for one picturesque
allusion, the ius vitae and necis [power of life and death] is denied. And the ius vendenti [right of sale] encounters, in even more accentuated form, the limitations of
Justinian’s law: the sale is permitted only in a case of extreme poverty. The power of
correction is correlative to the duty to educate and this is blended with “piety.” In the
patrimonial sphere, the point of departure – also conformed to Justinian’s system – is
that the acquisitions by the child increase the patrimony of the father, with important
limitations based on the peculia. Paternal power ceases upon the death, natural or
civil, of the pater familias and by his being “outlawed” and other similar actions, by the
election of the child to an office of honor, and by emancipation.

Jean-Philippe Lévy, Cours d’Histoire du Droit Privé (La Famille) 86-90 (1966)

In French Law

[I. Frankish Epoch. – ] We will pass rapidly over the Frankish epoch. The paternal
mundium seems to be rather close in many ways to the Roman paternal power. At first
glance, the powers of the father seem to be quite extended. However, when one
consults the acts of practice, one notes that the children, at least those who were
majors, intervened in the acts passed by the father and, further, that it happened rather
often that, during his lifetime, a father would partition his goods among them. . . .

[II.] Middle Ages. – It is appropriate to recall that this power during the Middle
Ages was at once paternal and maternal and that the mother, with powers that were
perhaps more limited, could exercise it when the father had died or was absent or sick.
But, on her side, the death of the mother generally transformed the paternal power into
a kind of tutelage with reduced powers, in particular, for the alienation of immovables.
With this reservation, and on the supposition that both parents were living, the regime
was for the most part as follows:

1° – On the person of the child, the father exercised a right of correction. This
is the moment to recall the text of the summa de legibus of Normandy from the middle
of the 13th Century, which says that the courts do not have to occupy themselves with
the blows administered by a family father to his wife, to his domestic servants, or to his
children, provided that the wounds, if any, are not too grave. Alongside this right of
summary correction, the father could equally put his child into prison, either a public
one or more often a private one, on the decision of a secular judge or official. The
father could also disinherit him. It happened, in fact, that some family fathers married
their children or forced them to enter the religious life without really consulting them, despite the prescriptions of the canon law [to the contrary].

2° – In the domain of the patrimony, the principle was that a child had nothing and that everything belonged to his father. There is no question here of the influence of Roman law, but rather of the confusion of goods (and especially of movable goods) resulting from life in common. In addition, the principle admitted of exceptions. First of all, the exceptions of the Roman law: goods inherited from the mother or maternal ascendants, as well as from collaterals, were not the property of the father. It was the same with goods acquired by the family sons, and on this score one finds, in some texts such as the very ancient Custom of Brittany (the beginning of the 14th Century), passages that seem to make an allusion to the peculium castrensi. In addition, there are some new exceptions, concerning, in particular, donations made with a condition, for example, that a some or a daughter marry or that an older son undertake certain studies. All these goods escaped the paternal power.

Capacity to contract was accorded to the child to some extent. Nevertheless certain Customs, such as that of Brittany, made a “living father exception,” which permitted a child who still had his father to escape from the majority of debts. As for delictual capacity, it seems to have been complete: the father responded for the delicts committed by his child, at least on the pecuniary plane.

Supposing that a child had goods, did he have the right to dispose of them if he [still] had parents? The Customs were extremely diverse, some permitting him to make his testament freely, others forbidding it altogether, and certain others permitting him to make it only with paternal authorization. In brief, on the patrimonial plane, one can say that the customary law had a tendency, in a spontaneous fashion, to reproduce and sometimes even to surpass the solutions that the Roman law arrived at in its last stage.

3° – Duties of the parents. As a counterpart to the important rights of the paternal power, Christianity constantly proclaimed that the parents had certain duties toward their children, in particular, those of supporting them, instructing them – at least in the Christian religion, for general education was not very widespread –, and “establishing” them (setting them up in some trade or business). Saint Thomas Aquinas, in the 13th Century, justified all these duties by stating that, properly speaking, the child belongs not to his parents but to God: non est parentis sed ipsius Dei (“he is not of the parent but of God Himself”).

[III.] Modern Epoch. – The law became clearer in the modern epoch, and its evolution can be characterized by two propositions: the powers of the father over the person of his children was reinforced, but his powers over their goods had a tendency to diminish.

1° – The reinforcement of the [parents'] powers over the person must be seen as a consequence of the political regime, an influence of monarchical absolutism. As the Preamble to the royal Declaration of 1639 on marriage of family daughters put it with particular force: “The natural reverence of children toward their parents is the line of legitimate obedience of the subjects toward their sovereign.” The declaration made
a particular application of this principle by requiring parental consent for the marriages of their children.

The sanctions of the paternal power were very diverse: especially correction, incarceration, disinherison. There was always a right of correction. Henry IV [as a child] had often been beaten with a whip and he likewise prescribed that it be given to the young Louis XIII, despite the protestations that Montaigne had expressed sometime earlier against these methods of violence in education.

The father likewise had the right to cause his son to be incarcerated in public prison. He could do it on his own authority and in his discretion, without demanding judicial authorization. One cites a family father from the province of Dauphine who, in 1663, condemned his son to twenty (20) years in jail for his attempt to commit parricide . . . . But in Paris the Parlement regulated the right to incarcerate. In 1673, some majors who had surpassed thirty (30) years, among them even some priests, were found in prison on the order of their father. Regulatory judgments rendered in 1673 and in 1695 limited to twenty-five (25) years the right of forcing incarceration. If the father had remarried [after the children’s mother had died], judicial authorization [for incarceration of the children] was indispensable, for the [unfavorable] influence of the step-mother [on the father] could not be ignored ![1] . . .

Finally, another sanction consisted of the father’s right to disinherit his children. In addition to the causes [for disinherison] that Roman law had given the father, an edict of 1556 also authorized disinherison when a child had married without the consent of his parents.

The result of all these draconian procedures was to introduce in a good many families, between the parents and the children, relations of extreme politeness, but of complete coldness; the comedies of Molière bore witness to it again and again.

2° – By contrast, the [parents’] powers over goods had a tendency to diminish. The authors often said that the paternal power was nothing other than a kind of tutorship. In the 16th Century, it was admitted that the child had a patrimony of his own and that he acquired for himself. The father had only the right to administer these goods, at the charge of rendering an accounting. Did he have the right to keep the revenues of these goods? Certain Customs, especially those of the regions next to the pays de droit écrit [southern France], such as Auvergne and Bourbonnais, recognized this right of paternal power. In the rest of France there existed a similar right of enjoyment in the limited case of the nobility and the bourgeoisie. But it was, at bottom, rare. For the rest, this right of enjoyment did not exist and, as Bourjeon wrote in the 18th Century, the father could take from the child’s revenues the expenses of support and education, but he did not have the right to keep the surplus. As for the contractual capacity of the family sons, it was uncontested. For delicts [of the children], the father remained bound to repair them.

The differences in regime between the pays de droit écrit and the pays de droit coutumier were rather minimal. The greatest difference consisted of the right of enjoyment of revenues (or usufruct) on the adventitious goods [of the children].

At the end of the ancien régime, especially in the pays de droit coutumier where
emancipation by attaining majority was admitted, the tendency was above all to effect a rapprochement between the paternal power and tutorship, notwithstanding some differences of detail.

c) Subjects

1) Active
To whom is parental authority-responsibility accorded? Who can exercise it?

a] Ordinarily, residually, & indefinitely
Read CC art. 216. Then read Spaht, § 15.2, p. 608.

b] Extraordinarily, specially, & temporarily
Read CC art. 220. Then read Spaht, § 15.3, pp. 608.

2) Passive
Who is subject to parental authority? Read the heading of “Section 1,” of “Chapter 5,” of “Title 7,” of “Book III,” of the Civil Code; then read CC art. 238.

Does this mean that the parent(s) of an illegitimate has (have) no authority over the illegitimate – that the illegitimate is free to “run wild”? Read CC art. 256.

d) Content
Of what does parental authority-responsibility consist? What are its benefits? What are the correlative burdens?

1] Powers, rights & duties of a “personal” nature

a] Obedience
Read CC art. 217. What are the limits on a child’s duty of obedience? Is there any sort of “sanction” that can be imposed on a child who disobeys? If so, what is it? Read, first, CC art. 218, the latter half, and, then, CC arts. 1617 & 1621.A.

b] Custody
Read CC art. 218, first half; then read the following doctrinal material:

1-3 Henri & Léon Mazeaud et al., LEÇONS DE DROIT CIVIL: LA FAMILLE
n° 1145, at 561 (Laurent Leveneur, Paris, 7th ed. 1995)

The right of custody permits [the parent] to retain the child before him. It is thus that “[t]he child cannot quit the family house without the permission of his father and mother . . . .” CODE CIVIL art. 371-3. The right of custody entails the right for him who holds its to fix the residence [of the child]. It is with the holder of custody that the child has his domicile; and it is only when his father and mother have distinct domiciles that he is domiciled with that parent with whom he resides. The parents, then, have the right to oblige the child to reside with them, and to make him return manu militari [literally, “by the hand of the military,” i.e., by force], if he has escaped. And a third person who would remove the child, even with the child’s consent, from the hands of his parents would incur penalties under . . . the Penal Code. The child . . . can be withdrawn from the family house that has been chosen by his parents only in cases
necessitated by law . . . [W]henever it is possible, the minor must be maintained in his
current milieu . . .

609.

c) Correction
Re-read CC art. 218, latter half; then read the following doctrinal material:


By the right of “correction,” the legislation does not intend to speak of those light
punishments that the father and mother can inflict on their children, by virtue of their
domestic authority and in the interior of the house. On this point, the legislation remits
itself to the usages and affection of the parents. It intervenes in such matters only when
the chastisements inflicted by the parents constitute violence or other mistreatment that
falls under the blow of the Penal Code or yet to pronounce or to authorize the
termination of paternal power in the cases for which the legislation provides.

The right of correction of which it is a question in this title is an altogether different
thing from the right of domestic punishment. Under this name, the legislator attributes
to the father and mother an extremely rigorous right that consists of causing the child
to be imprisoned or, rather (for it is not a matter of true imprisonment), to cause him
to be confined outside of the parental house. This means of correction, which one can
regret to see figuring in our legislation, is reserved for cases of extreme gravity.


The right of education necessary implies a certain right of correction. It has never
been regulated by the legislator in its entirety. In what measure can the parents
employ corporeal chastisements, blows, sequestration? Everything here is a matter of
degree and, save in extreme cases, social mores alone govern the mode of its
legitimate exercise. The tendency is continually to soften the chastisements inflicted on
the child. The father falls under the blow of [certain] articles . . . of the Penal Code if
there are “wounds or acts of violence . . . . Finally, [a certain law enacted in 1889]
punishes, by means of the termination of parental power, “mistreatments” from which
the child might suffer, among which one must certainly include not only blows, but also
privation of nourishment and sequestration.

Only, that does not stop a father from being able to use appropriate sanctions for
the education of the child. The range of these sanctions is all that much larger
because, given that the child generally has no personal resources, it depends on his parents, at once, to deprive him or to compensate him.

Besides, the [Civil] Code accords to the parents a right that is more specifically designated under the name of “parental correction”: it is the right of causing the child to be placed, by a judicial decision, in an establishment or with a person who is qualified to reform his character and his habits.

In earlier times this right consisted of the imprisonment of the child. The Civil Code permitted the father, on certain conditions, to require it. In the law of the ancien régime, it was even exercised against major children.

Today, as a result of a series of reformed, completed by [an ordinance enacted in 1945], this imprisonment has been replaced by a placement that no longer has anything of a punishment in it and that consists only of extreme means of education for difficult children.

Finally, read Spaht, § 15.6, p. 609. To what does “correction” refer? What would be an “unreasonable manner” of correction?

d] Protection

Read CC art. 235 & CC art. 236. What does the parent’s duty of “protection” entail? What kind of “protection” is the parent supposed to afford his child? Is it just legal? Or is it also physical and, perhaps, even emotional, psychological, and spiritual as well? How far may the parent go in providing this protection?

e] Education

Read CC art. 227. What does a parent’s duty to “educate” his child entail? What kind(s) of education is(are) involved? How “good” must the education be? Read the following doctrinal material:

DROIT DE LA FAMILLE n° 1864-1872, at 620-23
(Jacqueline Rubellin-Devichi dir., Paris, 1999)

1864. Definitions. – The protection and education of the child are the raisons d’être of parental authority.

By education, one must understand not only school education, but also professional, religious, moral, civic, and political education, without speaking of that “everyday” education that should permit the child to prepare himself for life in society.

1865. Obligations. – The parents dispose of a certain number of rights that are “prior” to those of society, but must also respect a certain number of obligations. A failure [to meet these obligations] on their part should lead to the putting into operation of measures of educative assistance. They must equally take account of the opinions expressed by the child. The difficulty of realizing an equilibrium between parental responsibility, societal control in the interest of the child, and taking into account the will of the child is manifested, in particular, in the matter of school,
professional, and religious education.

A. – School & Professional Education

1866. Education. – The right to education . . . is put into operation by the father and the mother of the child. It is up to them to choose the genre of education of the child, to determine the public or private establishment in which he will be placed (at least if the parents do not prefer to instruct the child themselves), to decide on his orientation, the choice of his languages, the channels and types of instruction, and eventually to opt for the end of his studies. This power is, however, exercised within a framework that is fixed by legislation and regulations . . . . Beyond that, the father and mother remain bound to the assure the child’s education. The obligation of assuming the expenses of the child’s studies forms part of the parental obligation of support.

1867. Professional formation. – Professional education prolongs the school obligation. More so than for early education, [with respect to professional education] the power of initiative and decision of the parents must be combined with the embryonic capacity of the older minor.

B. – Religious Education

1868. Difficulties. – Religious education constitutes one of the most sensitive problems of the right of parental authority, one into which the legislation and the jurisprudence venture only with extreme prudence, notably when it’s a question of arbitrating conflicts between the parents or between the parents and the child. The question has given rise to an abundant literature.

1869. Prerogatives of parental authority. – The religious education of the child belongs to the father and mother. It is, therefore, up to them to “chose the religion” [of the child] – to stand watch to see that its teaching and practices are followed or to decide not to bring up the child in any religion. The liberty of the parents in the matter is guaranteed by various texts of internal [French] law and by the international convention regarding the rights of the child . . . .

1870. Disagreement between the parents. – In cases in which the parents exercise parental authority in common, the choice of religious education must be made in common by the father and mother. . . . [If they cannot agree, they have no real alternative but to separate or divorce, which will terminate their joint parental authority. After that, the parent awarded sole custody or, where joint custody is awarded, the domiciliary parent will, in principle, have the power to make the choice. The other parent can, however, object, at which point the matter will have to be resolved by the court on the basis of the “best interest of the child.”] To make of the judge an arbiter in the matter of religion satisfies no one and questions can be raised regarding both the desirability and the permissible modalities of this intervention. But in a legal system that is founded on liberty of conscience and that is secular, it does not seem opportune to submit this kind of question to a particular regime.

In practice it seems that the judges have shown themselves to be concerned, above all, to seek for an accord between the parents and, in the event of an
irreconcilable conflict, to maintain the status quo ante. It does happen, however, that the judges will resolve such disputes, notably when the choice of one of the parents would put the child’s equilibrium in danger. The problem is posed in particular when one of the parents is an adherent of a “cult” [secte]. See [a judgment of the court of appeal of] Dijon, [rendered] June 4, 1991, [reported in] 1992 RTD civ. 75 . . . . The court emphasized that
the liberty of the mother to adhere to a cult wherein she believes she finds her personal fulfillment cannot result in her children, aged eight years and five years, being constrained to share a mode of life that is hardly compatible with commonly-recognized educative norms. It is not conformed to the interests of the children – the only factor that the court make take into consideration – to have them suffer the influence of the leader of the sect, who appears to have subjugated the mother.

1871. Third persons. – The choice of the parents is imposed on third persons. In the event of the death of the father and mother, their will must be respected by the persons who assume the charge of the children.

Nevertheless, if this choice puts the child in danger, certain measures of educative assistance can be taken. But even there, the judge must demonstrate the greatest prudence, notably when he finds himself confronted with the phenomenon of “minority religious groups.”

Finally, respect for religious convictions and the liberty of their manifestation at school must be exercise “with respect for pluralism and the liberty of the other, and without threat to the activities of instruction, the content of [educational] programs, and the obligation of assiduousness.

1872. Rights of the child. – The problem of taking into account the sentiments of the minor is posed here [in relation to religious education] in a particularly delicate fashion, notably in a case of opposition between the child and his parents. The international convention regarding the rights of the child proclaims the right of the child to liberty of thought, of conscience, and of religion, while according to the parents the right to guide the child “in a manner that corresponds to the development of his capacities.”

Certain authors have drawn from this [provision of the convention] a novel argument in favor of a special “premajority” [capacity] in the matter of religion, on the model of German law (ten or fourteen years), Swiss law (seventeen years), or English law (twelve years). The idea may appear seductive, but one should not again, that in a legal system that is secular, it does not seems opportune to give to religion an particular status: here it’s a question of just one aspect of a more general problem – that of respect for the minor’s liberty of conscience.

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Representation

Re-read CC art. 235, latter half; then read Spaht, § 15.14, pp. 627. For what purposes and in what senses are the parents the “representatives” of their legitimate child?
1) Judicial representation

Read the following articles of the Code of Civil Procedure:

Art. 683. Unemancipated minor

B. The father as the administrator of the estate of his minor child, is the proper plaintiff to sue to enforce a right of an unemancipated minor who is the legitimate issue of living parents who are not divorced or judicially separated. The mother, as the administratrix of the estate of her minor child, is the proper plaintiff in such an action, when the father is mentally incompetent, committed, interdicted, imprisoned, or an absentee. Moreover, with permission of the judge the mother may represent the minor whenever the father fails or refuses to do so; and in any event she may represent the minor under the conditions of the laws on the voluntary management of another’s affairs [negotiorum gestio].

Art. 732. Unemancipated minor

B. The father as the administrator of the estate of his minor child, is the proper defendant in an action to enforce an obligation against an unemancipated minor who is the legitimate issue of living parents who are not divorced or judicially separated. The mother, as the administratrix of the estate of her minor child, is the proper defendant in such an action, when the father is mentally incompetent, committed, interdicted, imprisoned, or an absentee. Moreover, with permission of the judge the mother may represent the minor whenever the father fails or refuses to do so.

2) Representation in juridical acts

I consider the reference in CC art. 235 to the parents’ power to accept donations for their children to be a synecdoche. What do I mean by that? See Orlando Gomes, Direito de Família n° 231, at 373 (7th ed., Rio de Janeiro, 1988) (“It is incumbent on him [the parent] to represent his child who is absolutely incapable [of juridical acts], acting in his name and for his interest. This representation is legal . . . .”); 4 Jose Luis Lacruz Berdejo & Francisco de Asis Sancho Rebullida, Elementos de Derecho Civil: Derecho de Familia n° 410, at 747 (Barcelona, 1982) (“After the reform of 1981, the Code dedicated Chapter 2 of the Title on ‘parental power’ to the legal representation of the children. In it the first paragraph of Article 162 provides that ‘the parents who hold parental power have the legal representation of their unemancipated minor children.’”); 4 Ludwig Enneccerus, Theodor Kipp & Martín Wolff, Tratado de Derecho Civil: Derecho de Familia § 79, n° 1.3, at 50, & § 80, n° II, at 65 (6th rev. 1928; Blas Pérez Gonzalez et al. trs. [German to Spanish] 1947)(“The care of the person of the child includes the representation of him in his personal dealings. ** * The administration of the patrimony includes the representation of the child in his patrimonial dealings.”)

g) Surveillance (?)
In several other civil-law jurisdictions, parental authority-responsibility, either by legislation or by custom (as reflected in the doctrine and / or the jurisprudence), entails a so-called right-duty of “parental surveillance over the child.” This right-duty is described in the following doctrinal material:

_Droit de la Famille_ n°s 1853-1854, at 617-18
(Jacqueline Rubellin-Devichi dir., Paris, 1999)

1853. Definition. – The right of surveillance is closely tied to the right of custody, for it assures control of the life of the child in the family house and outside of it. In the strict sense, the right of surveillance is defined as the right (and the duty) to watch over the child, by managing and controlling his “comings and goings,” his relations with members of the family and with third persons, as well as his correspondence and, today, his communications in general.

The right of surveillance is not, however, absolute. It should, in fact, be exercised in the interest of the child. Its force varies with the age of the child and with social mores. It is also necessary to take into account certain rights that are accorded to the child by international [legal] texts . . . . Finally, it is limited by the rights that are accorded to grandparents and, in exceptional circumstances, to certain third persons . . . .

1854. Sanctions. – The right of surveillance is also a duty. An absence of surveillance that puts the child in danger, indifference, failure of care, and absence of direction can lead to [the imposition of] measures of educative assistance or to a [forced] delegation or withdrawal of parental authority. A lack of surveillance engages the liability of the father and the mother for damages caused by their minor children.

1-3 Henri & Léon Mazeaud et al., _Leçons de Droit Civil: la Famille_

The father and mother, as long as they exercise parental authority, likewise have a “right of surveillance,” which pertains, in particular, to the correspondence, relation, and activities of the child, which the parents thus have the power to control, to forbid, or to authorize within certain limits. In the same way it is up to them to prevent or to permit the divulgence of the child’s private life and to control the diffusion of his image. It also is up to them to authorize all medical treatments and surgical interventions. . . .

. . .

Custody and surveillance represent not only rights but also duties. The parents who do not assume these charges expose themselves to the implementation of measures of educative assistance or even a partial withdrawal or a total termination of their parental authority. . . .
Guarda is simultaneously a right and a duty of the parents. As a right, it includes the power to keep the child in the house, to have him nearby, and to regulate his conduct in his relations with third persons. The parent can demand that the child, if he has been illegally detained, be returned; can prohibit him from living with certain persons; can stop him from frequenting certain places or performing certain acts; and can even stop him from maintaining relationships that the parent thinks are inconvenient for his interests. And if the child is in the power of another, the parent can recover guarda of him by searching him out and seizing him.

The right of guarda necessarily entails that of vigilance, through which the parent, by constant action, effectuates his power to direct the minor’s upbringing in the sense of moral formation.

Does Louisiana recognize this right-duty? If so, what’s the basis for it? Is it implicit in one of the other enumerated “right-duty” sets that are constitutive of parental authority-responsibility? Or is it a matter of custom?

FH 62. Once Ti-Boy turned fifteen, he went a little wild. First, he stopped going to Mass with his parents, Pascal and Julie. Then he started visiting “adult” sites (what a misnomer!) on the internet. Finally, he started “hangin’” with some known drug pushers. Pascal and Julie have now decided they must “crack down.” And so, they’ve demanded that he resume going with them to Mass, on pain of his being “grounded”; they’ve installed some internet filters on Ti-Boy’s computer that they obtained from AFA (American Family Association); and they’ve forbidden him from “hangin’” with the druggies, on pain of his being shipped off to “military school.” Ti-Boy responded by filing suit against his parents, seeking an injunction ordering them to cease and desist their interference with his “rights” to “religious liberty,” “freedom of speech,” and “freedom of association.” What result would you predict? Why?

2] Powers, rights & duties of a “patrimonial” nature
a] Administration of property
Read CC art. 221; then read the following articles of the Code of Civil Procedure:

Art. 4501. Father as administrator of minor’s property
When both parents are alive and not divorced or judicially separated, property belonging to a minor may be sold or mortgaged, a claim of a minor may be compromised, and any other step may be taken affecting his interest, in the same
manner and by pursuing the same forms as in case of a minor represented by a tutor, the father occupying the place of and having the powers of a tutor.

Whenever the action of an undertutor would be necessary, an undertutor ad hoc shall be appointed by the court, who shall occupy the place of and have the powers of an undertutor.

Art. 4502. Right of mother to represent minor

The mother shall have the authority of the father during such time as the father is mentally incompetent, committed, interdicted, imprisoned, or an absentee. Moreover, with permission of the judge, the mother may represent the minor whenever the father fails or refuses to do so; and in any event she may represent the minor under the conditions of the laws on the voluntary management of another's affairs.

Finally, read Spaht, §15.13, pp. 623-27 (including Snowden).

b] Usufruct

Read CC arts. 223-26; then read Spaht, §15.9, p. 621.

1} Scope

To what property does the parental usufruct extend? What’s excluded? Review CC arts. 223 & 226; then read Spaht, §15.11, pp. 622-23.

2} Unusual characteristics

The parental usufruct has certain characteristics that distinguish it from most other usufructs. What are they? What is the reason for these distinctions?

   a} Inalienability
   b} Exemption from seizure

3} Security (?)

Read Spaht, §15.10, p. 622.

FH 63. During the last few years, Ti-Boy, the sixteen-year-old legitimate son of Pascal and Julie (husband and wife still married), has come into a considerable bit of property. First, he inherited a farm from his grandfather, Papère. Then, his uncle Basile gave him 100 shares of IBM common stock. Finally, in the past year, he’s earned $20,000 in a pirogue-making business that he started up himself. The farm is generating rents from several farms leases; the IBM stock is yielding dividends; and the $20,000, which Ti-Boy placed into a savings account, is bearing interest. Pascal and Julie, to Ti-Boy’s chagrin, have been keeping all of these revenues for themselves. When Ti-Boy turns eighteen, will Pascal and Julie have to account to Ti-Boy for any of these revenues. If so, which ones?

c] Alimentary support

Read CC arts. 227, 224, 230-232, & 234; then read the following doctrinal material:
Article 203 provides: “The spouse contract together, by the sole act of marriage, the obligation to nourish, support, and educate their children.” This obligation also weighs on parents of illegitimates. To the obligation of support are attached, in particular, all the medical or surgical care, treatment, and interventions that the child’s state of health requires.

The obligation to support is penally sanctioned. . . .

The essential element of this obligation of support resides in preparing the child for employment. From this it follows that the parents must, at least for a limited time, assure the support of their children after they’ve attained majority. This proves well that the “civil age” [18] is, in a rather large measure, a fiction.

2180. Duty of support. – The obligation to nourish, support and educate the children is a unilateral alimentary obligation put at the charge of the parents and protected by international conventions. . . . It is a question of a parental duty whose precise foundation is found in the law of parental authority, which is itself founded on the line of filiation, and which is nothing other than the counterpart of that very general, non-juridical obligation of filial “piety” that children owe in regard to their parents . . . .

2182. Content. – The obligation includes nourishment, support – which is extended to the ensemble of care given to a sick child – and the education of the child, that is to say, the expenses of his studies and of his intellectual formation. The child should, in this way, be able to accede to a vocational qualification that will permit him to establish himself and to assume responsibility for himself financially. The obligation of support, however, does not entail the duty of establishing the child and it is not submitted to any condition of need.

2183. End of education. – The obligation of support of children concerns, first of all, minor children, but aims also at major children. Distinct from the alimentary obligation for educative finality [i.e., the obligation to pay for elementary & secondary education], the obligation of support can, in fact, be pursued beyond the majority of the child, particularly when he pursues studies.

Finally, read Spaht, § 15.17, pp. 628-29 (ignore, for now, the information about CC art. 229, which concerns a kind of alimony that is not a function of parental authority-responsibility).
FH 64. Two of Gueydan’s luminaries, Olide and Clodice, who’ve been married for 20 years, have two children: Ti-O, aged 19, who’s now a sophomore at Baton Rouge Community College, where he’s pursuing a degree in computer programming, and Desirée, aged 16, who’s now a junior at Our Lady of the Bayou Catholic Boarding School in LaRose. Up until recently, Olide has been paying for both the direct (tuition, books, school supplies, etc.) and the indirect (room, board, clothing, transportation, etc.) educational expenses of both children. But not long ago, Clodice ran off to Zurich with her gym instructor, Hans. In response, Olide cut himself from everything that might remind him of Clodice, including his two children. The children are now wondering how they’ll meet their expenses. Can they compel Olide, who you may assume is “loaded,” to pay any of these expenses? If so, all of the expenses or just some of them? Explain.

e) Vicissitudes

Orlando Gomes, *Direito de Família* n° 234, at 376 (7th ed., Rio de Janeiro, 1988)

Because the parental power is a *munus* [office or service] that must be exercised, in essence, in the interest of the child, the state controls it, establishing in the legislation the cases in which the title-holder should be deprived of its exercise, either temporarily or definitively. In the former case, there is a suspension; in the other, a deprivation [i.e., extinction].

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1) Suspension

May parental authority-responsibility be suspended, i.e., temporally cut off? If so, under what circumstances? Read the following doctrinal material:


The parental power . . . is suspended in the following cases: 1. When the parent is incapable of celebrating juridical acts. 2. When the parent is limited in this capacity or a curator has been appointed for him, on account of infirmity, with respect to his person and his patrimony [full interdiction]. 3. When . . . the court has noted that the parent is impeded in fact from exercising the parental power for an extended time period.³

³ For example, by the imposition of a penalty of an extended deprivation of liberty [imprisonment]; at times, extended absence from the country.

Orlando Gomes, *Direito de Família* n° 234, at 376 (7th ed., Rio de Janeiro, 1988)
A suspension takes place by virtue of the misconduct of the parent or by involuntary facts. Punitive suspension happens in the cases provided for in the Civil Code and the Code of Minors [suspension for child abuse, neglect, etc.] Suspension for involuntary acts occurs: a) when the title-holder of the parental power is judicially interdicted; b) when he is declared absent.

4 Jose Luis Lacruz Berdejo & Francisco de Asis Sancho Rebullida, ELEMENTOS DE DERECHO CIVIL: DERECHO DE FAMILIA n° 418, at 763-64 (Barcelona, 1982)

Suspension is the temporary loss or privation (depending on whether it has a punitive character) of parental power. A temporary loss exists in the cases of absence, incapacity, and impossibility [of acting] of one of the parents, and a temporary privation when the courts so impose it.

Then re-read CC art. 221, par. 1, & CCP arts. 683, 732, & 4502 (reproduced above). Next, read La. Rev. Stat. 9:361-362. Finally, re-read CC arts. 132 & 133.

a] Causes
1) Incapacity to make juridical acts
   a) Mental infirmity
   b) Interdiction
2) Unavailability of parent
   a) Absent
   b) Lengthy imprisonment
3) Injunction prohibiting contact by an abusive parent
4) Award of custody pendente lite to the other parent or to a non-parent

b] Effects

What are the effects of a suspension of parental power? As a matter of definition (analytical judgement), most of the effects could not help but lapse. But would all of them have to? What about the parental usufruct? To whom do the fruits produced by the child’s property that’s subject to that usufruct belong? On this point the foreign doctrine is in disarray. Compare 4 Ludwig Enneccerus, Theodor Kipp & Martin Wolff, TRATADO DE DERECHO CIVIL: DERECHO DE FAMILIA § 82, n° III.3, at 96 (6th rev. 1928; Blas Pérez Gonzalez et al. trs. [German to Spanish] 1947) (“The parent conserves the right of usufruct on the child’s patrimony. The usufruct takes the same character it always has when it does not go together with the right of administration . . . .”) with Orlando Gomes, DIREITO DE FAMÍLIA nº 234, at 377 (7th ed., Rio de Janeiro, 1988) (“While the suspension endures, the rights of the parent, including that of the usufruct, are interrupted.”) Or, what about the parental obligation to support the child? If the parent still has capital and / or income, as will almost always be the case, shouldn’t this obligation subsist?

2] Extinction
Parental authority-responsibility may certainly be extinguished. But for what causes and in what circumstances? Read the following doctrinal material:


The parental power of the parent terminates in its entirety:
1. When the child attains major status or is declared to be such [emancipation].
2. When the child dies. If he is declared dead, the parental power terminates only presumptively . . .
3. When the parent dies . . .
   . . . If the parent is declared dead, his parental power is extinguished effective upon the moment that, by virtue of the declaration of death, is considered to be the moment at which the parent died.

   . . .
4. The parent can be deprived of his parental power. It is so when the parent, by virtue of a crime committed against the child . . ., is condemned to correctional prison . . .

   . . .
5. The parent loses parental power if the child is adopted by a third person.

Orlando Gomes, DEREITO DE FAMÍLIA n° 234, at 376 (7th ed., Rio de Janeiro, 1988)

The parental power is extinguished by: a) the death of the parents or of the child; b) majority; c) emancipation; d) adoption.

. . .
Alongside the causes of “cessation” of the parental power, the legislation enumerates causes of “loss.” One is distinguished from the other by the nature of the determinative facts. The loss of the parental power takes place as a result of the culpable conduct of the parent; thus, the loss is configured as a true sanction.

The parental power is lost in the cases provided for in the Civil Code and in the Code of Minors. The judicial authority can decree the loss of the parental power of a parent who has caused an “irregular situation” for the minor or who, without just cause, has failed to fulfill the obligations that he had assumed in relation to the minor’s treatment; among the other causes for loss of the parental power that are enunciated in the legislation, I will single out these: the manifest impossibility of providing for the subsistence of the child, the application of immoderate punishments, and the exploitation of activities contra bonos mores.
Then read or re-read, as the case might be, CC arts. 214, 216, & 250.

**a] Causes**

1. Death of parent or child
2. Child’s attaining majority
3. Emancipation of child
4. Voluntary or involuntary surrender of parental rights
5. Adoption of child
6. Legal separation or divorce of parents

**b] Effects**

What are the effects of the extinction of parental authority-responsibility? Is it possible for the authority to be terminated but not the responsibility (or, at least, not all of it)? Consider, for example, a parent who has lost his parental authority thanks to an involuntary surrender of parental rights. To be sure, he’s now lost all the “perks” of parental authority. But doesn’t he – or, at least, shouldn’t he – still be “responsible” for supporting the child financially? Or what about a divorced parent? Surely he retains his special alimentary obligation notwithstanding that his parental authority has ended, yes?

**b Relations between parents and their illegitimate children**

Read CC arts. 238-240 carefully. Then skim over CC arts. 241-245. The read the following jurisprudence:

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*Succession of Brown*, 388 So.2d 1151 (La. 1980)

Sidney Brown, Jr. died intestate on January 1, 1978 in Shreveport, Louisiana. He is survived by four acknowledged illegitimate children, respondents, and one adopted child, relator. Relator had also been an illegitimate until her adoption in 1965, which gave her the status of a legitimate child. The decedent was married two times. His first wife died in 1955 and there were no progeny of this marriage. His second marriage ended in divorce in 1963 and, likewise, there were no progeny of this marriage.

Respondents, Ruby Atkins, Betty Jean Lee, Nathaniel Brown and Eugene Brown, sued to annul a judgment of possession recognizing the relator, Effie Brown, as the sole heir of the decedent.

At issue is the constitutionality of article 919 of the Louisiana Civil Code. . . . We declare C.C. art. 919 to be unconstitutional on the basis of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, and art. 1, s 3 of the 1974 Louisiana Constitution.

Article 919 excludes acknowledged illegitimates from participating in the succession of their father when he is survived by legitimate descendants, ascendants, collateral relatives, or a surviving spouse.

To uphold the constitutionality of art. 919 under an equal protection analysis, it
must be shown that the classification is "substantially related" to permissible state interests, Lalli v. Lalli, 439 U.S. 259, 99 S.Ct. 518, 58 L.Ed.2d 503 (1978). Under this same standard, the United States Supreme Court earlier decided, in Trimble v. Gordon, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 1459 (1977), that an Illinois statute discriminating against an illegitimate in inheriting from his father was unconstitutional.

Previously, the United States Supreme Court held that art. 919 was constitutional, Labine v. Vincent, 401 U.S. 532, 91 S.Ct. 1017, 28 L.Ed.2d 288 (1971). However, at that time, the Court used a test of "minimum rationality" under the old scheme of equal protection analysis, City of New Orleans v. Dukes, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976). The two tier approach of Dukes has been refined to allow for a middle level of analysis for statutes based on such categories as sex, Orr v. Orr, 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979); birth, Matthews v. Lucas, 427 U.S. 495, 96 S.Ct. 2755, 49 L.Ed.2d 651 (1976); and illegitimates, Lalli, supra, and Trimble, supra.

Though Trimble does not expressly overrule Labine, it forecasts the proper analysis on a more critical examination of the statute:

Despite these differences it is apparent that we have examined the Illinois statute more critically than the court examined the Louisiana statute in Labine. To the extent that our analysis in this case differs from that in Labine, the more recent analysis controls." Trimble, 97 S.Ct. 1468, n.17

Under this analysis, the classification set forth in art. 919 must be substantially related to permissible state interests.

The three state interests advocated are the promotion of legitimate family relationships, the possibilities which the father could have exercised to insure the illegitimates a part of the succession, and the orderly disposition of property at death. The first two interests were specifically rejected in Trimble. The third was the major reason for the upholding of the New York statute's constitutionality in Lalli and will be discussed in greater detail here.

Trimble rejected as proper justification for a statute which discriminates against illegitimates the promotion of legitimate family relationships accepted in Labine by "only the most perfunctory analysis", Trimble, p. 1464. This "family harmony" state interest is even weaker in this case. The decedent had five illegitimate children, none of them the progeny of his two marriages. Four were openly acknowledged and one was adopted, so that the existence of all five was equally known and no threat to any family harmony even existed. Even if it had, the Trimble Court expressly rejected the argument that a state may attempt to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships, Trimble, pp. 1464-5. We agree that the innocent children should not suffer from the promiscuous adventures of their parents.

Trimble, pp. 1466-7, also made clear that the Labine possibilities as to how the father could have insured the illegitimates a part of the succession are mere hypotheses which will not clear the statute of its underlying invalidity. The idea that the
father could have left a will, or legitimated, or even adopted the illegitimates does not
serve as a sufficient state interest so as to constitutionally clothe art. 919. The
acknowledged illegitimate has no recourse to force his father to leave a will, to
legitimate, or to adopt him. The point is, the father did not pursue any of the above
possibilities, and the acknowledged illegitimates' rights should not hinge on mere
hypotheses of what the father might have done.

The only remaining rationale from Labine left valid after Trimble is the state's
interest in the orderly disposition of property at death. Lalli, 99 S.Ct. pp. 524-5, re-
emphasized this valid state interest; however, Trimble recognized this important interest
is not unquestionable, but must yield in the fact of constitutional mandates.

The state interest of stable land titles and orderly disposition of property will
withstand an equal protection analysis, if the state statute provides the illegitimate
some way to obtain equal protection, Lalli. In Lalli, the Court upheld a New York
statute which required the illegitimate to have his parental filiation declared by a
competent court before his father's death in order to share in the inheritance.

The requirement of a filiation order during the lifetime of the father was held to
be substantially related to the important state interests and, therefore, the statute
passed constitutional equal protection muster. Problems such as proof of paternity,
service of process, finality of decrees in estate distribution, and spurious claims were
all recognized in Lalli, pp. 525-6, and the New York statute requiring proof of filiation
before death cured them. Louisiana could, likewise, anticipate and solve these
problems with a statute that allows the acknowledged illegitimate to relieve his
predicament rather than relying upon present art. 919, which flatly denies him
succession rights if other relatives exist.

The distinction drawn by art. 919 between these acknowledged illegitimates and
all other relations of the decedent is arbitrary, capricious, and unreasonable. This
conclusion is not a recent development, for it is but a further extension of a line of
judicial determinations striking down Louisiana laws which discriminate
unconstitutionally against illegitimates.

Three times the United States Supreme Court has invalidated Louisiana statutes
because of their denial of equal protection rights to illegitimates. Levy v. La., 391 U.S.
68, 88 S.Ct. 1509, 20 L.Ed.2d 436 (1968); Weber v. Aetna Casualty & Surety Co.,
406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed.2d 768 (1972); and Glona v. American
Using art. 1, s 3 of the 1974 Louisiana Constitution, this Court has found
unconstitutional certain testate codal provisions which discriminate against
illegitimates, Succession of Thompson, supra and Succession of Robins, 349 So.2d
276 (La.1977).

Thus, both the United States and Louisiana Constitutions prohibit the total denial
of inheritance rights of acknowledged illegitimates in the succession of the father who
is survived by other relations. From our examination of art. 919, it is apparent that the
respondents are being discriminated against because of their birth status, for had they
been born legitimate, or made legitimate as the relator was, they would have succeeded with the relator to their father's succession. Absent any legislative authority to remedy their loss of succession rights as the children of their father, we find the statute denies them the equal protection of the law.


The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual as well as an unjust way of deterring the parent.

The parents have the ability to conform their conduct to societal norms, but their illegitimate children can affect neither their parents' conduct nor their own status.

After Trimble and Brown, what remains of the rules set forth in CC arts. 238-245, i.e., which are constitutional? Are all of these rules unconstitutional or just some of them? Explain.

You will recall that a number of special prerogatives are reserved to the parents of legitimates, among them (i) the right to “honor and respect” and (ii) the parental usufruct. Is the denial of these rights to the parents of illegitimates constitutional? Why or why not? If it is, might the state not take still other “punitive” actions against the parents of illegitimates, e.g., depriving those parents of the right to demand support or even the right to inherit from their children?

1) Custody
How is the custody of an illegitimate child determined? Read CC art. 256.

2) Support
Does an illegitimate have the right to demand alimony from his parents? If so, what showing must he make? And on what basis will the amount of the award be fixed? Re-read CC art. 240; then read La. Rev. Stat. 9:399.

C Tutorship
1 Definition
What is tutorship? Here’s a sampling of definitions from around the world:


Tutorship, in the broad sense, is the care that is exercised, under state inspection, by a person of confidence (the tutor) over the person and the patrimony of him who
is not in a position to care for his affairs himself or, at least, is treated juridically as if he were not in this position. Tutorship in the broad sense concerns [either] all the affairs of the child or a limited part of them. As a general rule, tutorship takes place only when the child is not subject to parental power, though there are some exceptions.


Tutorship, as its name indicates (from tueri: to defend or to protect), has as its end the defense of the interest of an incapable person (minor . . .). In our current law, and in foreign legislation, tutorship is organized in the interest of the person of whose protection it is a question. . . .

. . .

One can give to tutorship the following definition: a mission given by the law or by the will of man to a capable person to take care of an unemancipated minor . . ., to administer his goods, and to represent him in civil acts.

2-1 Francesco Messineo, MANUALE DI DIRITTO CIVILE E COMMERCIALE § 71, n° 1 (8th ed., Milan, 1952)

The institution of tutorship, in its essence, involves replacing the parental power [where this power is unavailable] because the progenitors of the unemancipated minor have both died (the minor is an orphan) or because it is impossible for them to exercise the parental power. . . . (The person who is submitted to tutorship is generally called the pupil.) For this reason, tutorship, just like the parental power, is a conjunction of powers: it is the “tutelar” potestas. Nevertheless, the powers of the tutor are more restrained that are those conferred on a progenitor who exercises parental power . . . in such a manner that major safeguards and more rigorous controls are necessary.


According to [Argentine Civil Code] article 377, tutorship is the right that the law confers for governing the person and the goods of a minor who is not subject to paternal power and to represent him in all the acts of civil life. In its essence, tutorship is an institution of protection: it provides, as far as this is humanly possible, for someone to fill the void that has been left by the absence of the parents – that this someone [i] care for the minor, watching out for his moral health, attending to his education, and administering his goods, and [ii] supply the minor’s incapacity, carrying
out the [juridical, judicial, etc.] acts that the minor cannot realize [by himself] for lack of natural aptitude.

Orlando Gomes, Direito de Família n° 236, at 377-78 (7th ed., Rio de Janeiro, 1988)

For the assistance and representation of minors who are not subject to the authority of a parent, the law organizes tutorship. Through this means someone is invested with the powers necessary for the minors’ protection where the family itself cannot provide this protection, be it because the parents have been lost, because they are not known, or because they have been deprived of parental power. Inasmuch as the end of tutorship is to substitute for parental power, the institution receives a structure that is juridico-familial, a structure that is situated, in the [Civil] Codes, in the Book dedicated to family law.

Organized in the image and likeness of the parental power, tutorship requires that the protection of the minor be confided to a person who, by virtue of his kinship with the orphan, will [willingly] (so one would presume) dispense parental care to him. This accounts for the preference established for the naming of tutors. There has long been a concept of tutorship that is strictly familial. But modern life has modified the traditional concept, even though the broad outlines of the current organization [of tutorship] retain this familial inspiration. Still, the burdens and responsibilities of tutorship demand a spirit of sacrifice that the tenor of life in our times makes rare...

Tutorship is the responsibility conferred on someone to protect the person and to administer the goods of minors who do not find themselves subject to the parental power. The person to whom this responsibility is confided is called the “tutor.” The minor under tutorship is denominated the “pupil” or “tutellee.” It is incumbent on the tutor, under the inspection of the judge, to a) govern the person of the minor, b) represent him, c) look out for his interest, and d) administer his goods. In the governance of the person of the minor, it is necessary for the tutor to direct his education, to defend him, and to provide him with his necessities. Moreover, it is necessary for him, as to the goods, to perform acts of administration, some of them in dependency on the authorization of the judge. The tutor if, finally, the legal representative of his pupil. To the extent that the pupil is absolutely incapable, the tutor represents him in the acts of civil life; if the pupil is relatively incapable, the tutor assists him in the acts in which the pupil is a party.

The tutor exercises a munus publicum [public office or service]. Defining the nature of his burden in this manner signifies that [tutorship] constitutes a delegation from the state. He who exercises the function does not acquire the position of a public functionary, but is invested in a position to which a high social mission corresponds, in the exercise of which the duty of the state to guard and defend orphans is turned over to his action for effectuation. For this reason, in the structuring of tutorship,
juridical precepts of the public law and the private law cross each other; the protection of minors under tutorship is realized through means and instruments that are, in part, proper to the public law and to the private law. It is sufficient to consider that the tutor acts under the inspection of the judge. Nevertheless, its attributes are contained, for the most part, within the lines of the private law.

2 History


Historic modification of the characteristics of tutorship. – In Rome tutorship appears to have been, at first, a potestas, established in the interest of the family [as a whole] rather than in that of the pre-pubescent sui juris that it concerned. But it became, sooner than did the paternal power, a simple institution of protection. Also, our old law [con]founded it with another institution of protection that the Roman law organized for minors who had reached puberty – curatorship. Pursuing its extension, according to the spirit of the customary law, it has, in the Civil Code, conquered a place at the expense and on the side of the paternal power.

Our tutorship is essentially different from the tutorship and the curatorship of Rome: in lieu of authorizing the incapable [i.e., giving him permission to act for himself], the tutor, today, represents him.

3 Dramatis personae tutelae

Who are the “players” in the tutorship drama (what Planiol calls the “organs of tutorship”; Baudry-Lacantinerie, the “cogs” of the “mechanism” of tutorship; Spaht, the “agencies of tutorship”)? Read CC arts. 246 & 273 & former CC art. 281 (repealed in 1960) (“Family meetings, in all cases in which they are required by law, for the interest of minors . . . , must be composed of at least five relations or, in default of relations, friend of him whose interests they are called upon to deliberate.”) Then read the following doctrinal material:

4 Gabriel Baudry-Lacantinerie et al., Traité Théorique et Pratique de Droit Civil: des Personnes n° 308, at 361-63 (2d ed., Paris, 1905)

The mechanism of tutorship includes three principal cogs: the tutor, the family counsel, and the undertutor. It is necessary to add to this the trial court, which is called to play (in the normal [judicial] manner) a rather important role.

α. – The tutor, the principal actor of tutorship. He represents the minor . . . in all civil acts, that it so say, he accomplishes these acts for the minor, in the quality of a
legal mandatory. The minor, then, does not need to intervene in the acts that concern him. . . . The French system hardly differs at all, except only theoretically, from the system consecrated by the Roman legislation. We have seen that in the last stage of the Roman law, the gestio [management for another] had become the normal mode of action for the tutor and that, in fact, the personal intervention was no longer necessary except in some exceptional cases. . . .

β. – The family counsel. This term designates an assembly composed, in principle, of the relatives by consanguinity or affinity of the person under tutorship . . . . The family counsel is charged with the control of the tutorship: To this effect, it can oblige the tutor to furnish an accounting of the situation of his management annually. Moreover, it is called in numerous cases to give its advice regarding the important acts of the tutorship to which the tutor must conform himself.

γ. – The undertutor, who is invested with a three-fold mission: to stand watch over the management of the tutor, to represent the minor . . . in those cases in which his interests are in opposition with those of the tutor, and finally to provoke the nomination of a new tutor when the tutorship becomes vacant.

Finally, read Spaht, § 16.4, pp. 647-48.

4 Characteristics


a Obligatory

Orlando Gomes, Direito de Família nº 239, at 383 (7th ed., Rio de Janeiro, 1988)

The “obligatoriness” [of tutorship] results in: a) the impossibility of recusing oneself from the nomination [to be tutor]; b) the impossibility of renouncing the function of tutor. Clearly, the prohibition of recusation is not absolute. There are cases in which the nominee can be “excused” from the tutorship. But these cases are exhaustively enumerated in the legislation. Only when a legal cause for excuse is presented is there justification for an exception to the principle of obligatoriness. . . . [And] the tutor [must] . . . ask for the dispensation. . . .


Tutorship . . . is a public charge: no one can be excused to get out of it without sufficient cause. This characteristic is explained by the very nature of the institution.
Human beings have certain debts of solidarity toward others of their kind, all the more so if they are related by consanguinity or affinity. To succor and to aid the orphan, the helpless minor, is a moral obligation, the fulfillment of which no one can refuse without just cause.

b  Personal


Tutorship . . . is, before all, a “personalistic” responsibility and, as such, it cannot be transferred by *inter vivos* acts or by an act of last will, nor can it be the object of a cession or a substitution. This [is said] without prejudice to the faculty of the tutor to delegate power for the celebration of certain particular acts, in the same fashion as the family father can do it, provided that these acts be carried out under his directives and dependency.

c  Gratuitous

Orlando Gomes, *Direito de Família* n° 239, at 383 (7th ed., Rio de Janeiro, 1988)

The dignity of the office [of tutorship] does not permit the exercise of the responsibility to be remunerated. Gratuitousness is of the essence of tutorship in its current form. Even so, it is permissible for the tutor to receive a “gratification” for his work, so that the tutorship will not collapse on the abandoned minor. The gratification, which is to be arbitrated by a judicial authority, is not a compensation for services, but a kind of indemnification.

d  Indivisible

1)  General rule

Orlando Gomes, *Direito de Família* n° 239, at 383 (7th ed., Rio de Janeiro, 1988)

The power that the legislation confers on the tutor is one and indivisible. It is so in the sense the power ought to be regarded as a synthesis of faculties and not as the sum of powers of a personal nature and a patrimonial nature or of administration and representation.
2) Exception

In Louisiana, tutorship can, in certain extraordinary circumstances, be “divided,” in particular, all or part of the “patrimonial” power can be given to one person and the rest of the power, to another person. What are those circumstances?

a) Division by law

Read the following provision of the Code of Civil Procedure:

Art. 4069. Separate tutor of property
A. In exceptional cases and for good cause shown, the court may appoint a bank or another person as administrator or tutor of the property of the minor. This appointment may be made upon the court’s own motion or upon the motion of the tutor or other person entitled to the tutorship if no tutor has been previously appointed, or upon motion of any interested person after a contradictory hearing with the tutor, administrator, or person entitled to the tutorship or the administration.


b) Division by will

In the case of a “volitional” tutorship, which, as we’ll see below, is one in which the parent, by juridical act, appoints someone to serve as tutor for his child after his death, can the parent “divide” the tutorship power between two or more persons? Read, first, CC art. 262, and then, the following doctrinal material:


Nomination of several tutors. – In general, a single tutor assures the entire functioning of the tutelar institution. The legislation speaks of him in the singular. But the texts themselves provide for some exceptions to the unity of the tutorship and they nowhere render this unity obligatory.

In addition, the testator . . ., when the legislation confides to him the choice of tutor [volitional tutor], can, if he believes it useful, name two or more tutors. Ordinarily, they will divide the functions between themselves. For example, one will mange certain elements of the pupils’ patrimony, such as a business or far-off properties, and the other will assume the rest of the tutorship. Or still, one is named [by the creator of the volitional tutorship] to manage the goods [a tutor “as to the goods” or an “onerous” tutor] and the other is charge with the custody and education
of the child (tutor “as to the person” or “Honorary” tutor). The custody can even be
confided to a person on whom the title of title is not conferred.

5 Determination of the dramatis personae tutelae
a Who is eligible
1) To be tutor

What are the different types of tutorship? Read CC art. 247; then read Spaht, § 16.5, p. 648.

a) The possibilities: types of tutors

There are four different varieties of “permanent” (i.e., non-provisional) tutorship: natural,
volitional, legal, and dative.

a) Natural

What is a “natural” tutor? Who can be one? When? Read CC arts. 250-256; then read Spaht,

When natural tutorship arises thanks to the divorce of the parents, how are “custody” and
“tutorship” inter-related? In particular, if the parents are awarded “joint custody” and one of them
is designated as the “domiciliary” parent, is that parent alone entitled to the “tutorship”? Read the
following doctrinal material:

Kenneth Rigby, Forum Juridicum: 1993 Custody and Child Support Legislation,
55 La. L. Rev. 103, n. 60 (1994)

La. R.S. 9:335(B)(3) (Supp.1994) provides: "The domiciliary parent shall have
authority to make all decisions affecting the child unless an implementation order
provides otherwise." This grant of authority to make all decisions affecting the child
unless an implementation order provides otherwise presents a dichotomy between La.
Civ. Code art. 250 and La. R.S. 9:335(B)(3). Article 250 provides that, if the parents
are awarded joint custody of a child, the cotutorship of the minor child shall belong
to both parents with equal authority, privileges, and responsibilities, unless modified
by order of the court or by an agreement of the parents, approved by the court
awarding joint custody. Article 250 was not amended by 1993 La. Acts No. 261.

A custody award and tutorship create different legal relationships. A custody
award does not include appointment of a tutor, nor does it institute a regime of


If one parent has been named the domiciliary parent without any limitations on
his decision making authority, and it becomes necessary to institute tutorship
proceedings in order to judicially assert a claim on behalf of the minor, or for other
reasons, the parents would be appointed cotutors with equal authority, privileges, and
responsibilities, unless modified by one of the specified methods, presumably either at
the time of the awarding of joint custody or at the time of appointment of a tutor.
Tutors have the custody of and care for the person of the minor. La. Code Civ. P. art. 4261. Therefore, a domiciliary parent with unrestricted decision making authority might seek restrictions on the other parent's authority or seek to be appointed the sole tutor, if the occasion for tutorship arises.

b] Volitional

What is a “volitional” tutor (tutor “by will”)? Who can be one? When? Read CC arts. 257-262; then read Spaht, § 16.9, p. 650.

c] Legal

What is a “legal” tutor? Who can be one? When? Read CC art. 263; then read Spaht, § 16.10, p. 651.

d] Dative

What is a “dative” tutor? Who can be one? When? Read CC art. 270; then read Spaht, § 16.11, p. 651.

2] Provisional tutor

What is a “provisional” tutor? In what sense is he different from a “permanent” tutor? Under what circumstances may a provisional tutor be appointed? Read the following articles of the Code of Civil Procedure:

Art. 4070. Provisional tutor
On the application of an interested person or on its own motion, pending the appointment of a tutor, the court may appoint a qualified person as provisional tutor of a minor, if such appointment is necessary for the welfare of the minor or for the preservation of his property.

Art. 4073. Functions, duties, and authority of provisional tutor
The functions of a provisional tutor are limited to the care of the person of the minor and the preservation of his rights and property. In the performance of his functions, a provisional tutor has the same authority, and is subject to the same duties and obligations, as a tutor.
Under specific authority of the court which appointed him, a provisional tutor may:
(1) Institute and prosecute an action to enforce judicially a right of the minor; and
(2) Operate a business belonging to the minor.
A provisional tutor shall file an account upon the termination of his authority.

Now, read Spaht, § 16.12, p. 652.

2) Prioritization: the “order of call” of (permanent) tutors

What is the order or priority among possible tutors? In other words, if there’s a need for a tutor and there’s an eligible and willing natural tutor, a designated and willing volitional tutor, an eligible
and willing legal tutor, and an eligible and willing dative tutor, which one “gets” it? Read Spaht, § 16.6, pp. 648-49.

2) **To be undertutor**

Who can be the undertutor? Scan CC arts. 273-280; then read Spaht, § 16.20, p. 657.

b **Who is (or may be) dispensed (of incapacities, other disqualifications, excuses, etc.)**

1) **Incapacity to be tutor & other disqualifying conditions**

Is any particular kind of capacity required of him who would be tutor? Are there any other conditions, aside from “incapacity” properly so called, that might disqualify an otherwise eligible would-be tutor? Read the following article of the Code of Civil Procedure:

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Art. 4231. Disqualification of tutor

No person may be appointed tutor who is:

1) Under eighteen years of age;

2) Interdicted, or who, on contradictory hearing, is proved to be mentally incompetent;

3) A convicted felon . . . .

4) Indebted to the minor, unless he discharges the debt prior to the appointment.

5) An adverse party in a suit to which the minor is a party; or

6) A person who, on contradictory hearing, is proved to be incapable or performing the duties of the office, or to be otherwise unfit for appointment because of his physical or mental condition or bac moral character.

The provisions of paragraphs (1), (4), and (5) do not apply to the parent of the minor.

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It is important to note that the otherwise eligible would-be tutor must possess these capacities and qualifications not only as a prerequisite to his being judicially recognized as tutor, but also as a prerequisite to his *remaining tutor* once he has been so recognized. According to CCP art. 4234, “[t]he court may remove any tutor who is or has become disqualified.”

2) **Excuses from tutorship**

Can a person who is eligible to serve as tutor be “excused” from this responsibility? Does it depend on when the excuse arises? Or on who the person is, in particular, on his relationship to the pupil?

a) **Enumeration of the excuses**

1] **Office or function**

Read CC arts. 292-294.

2] **Remote relation**

Read CC art. 295.

3] **Age**

Read CC art. 296.

4] **Infirmity**
5] Prior tutelar service

c) Identification of persons entitled to claim excuses

Which eligible would-be tutors are entitled to avail themselves of an excuse? Which are not?

FH 65α. Not long ago, Olide was killed in a tragic crawfishing accident. He was survived by, among others, his wife, Clodice (who’s been under an order of full interdiction and under the curatorship of her sister, Felice, for several years) and his daughter of ten (10) years, Desirée. In his testament, Olide provided that if anything should happen to him and to Clodice, then his buddy, Pascal, was to serve as Desirée’s tutor. But Pascal doesn’t want the job. Desirée’s closest relatives, aside from Clodice, are (i) her paternal grandfather, Gaston, who is now seventy years old (ii) her maternal aunt, Felice, who is a state district court judge, and (iii) her maternal first cousin, once removed, Dana, none of whom wants to take Desirée under his or her wing. In fact, the only one willing to do take responsibility for Desirée is Clodice’s best friend, Maria. Whom should / must the court appoint as Desirée’s tutor? Why?

FH 65β. The same as before, except that, this time, Olide, not Felice, was Clodice’s curator. What result now? Why?

3) Resignation from tutorship

Once he has assumed his responsibilities as tutor, a person can, at least under some circumstances, resign or at least ask for permission to do so. The matter is addressed in the following article of the Code of Civil Procedure:

Art. 4233. Resignation of tutor

A tutor other than a parent of the minor may resign when authorized by the court under Article 4271:

(1) If subsequent to his appointment as tutor he has been invested with an office or engaged in a service or occupation which excuses him from the obligation of serving as tutor;

(2) If he has reached the age of seventy years;

(3) If because of infirmity he has become incapable of discharging the duties of his office; or

(4) For any other reason which the court in its discretion may deem sufficient.

The resignation by a tutor shall become effective when a successor is appointed, as provided in Article 4237, and when his final account has been filed and homologated.

Official Revision Comments
(a) Civil Code Arts. 294, 296, and 297 specify the only grounds for resignation of a tutor. These grounds are covered by paragraphs (1), (2), and (3) of the above article. Under Civil Code Art. 301 these reasons do not apply to the father, who may not resign at all. See Succession of Watt, 111 La. 937, 36 So. 31 (1903). See, also, In re Minors Long, 118 La. 689, 43 So. 279 (1907), holding that the mother cannot resign once she is appointed, although apparently she did not allege one of the grounds specified in the Code.

(b) The fourth paragraph gives the court discretion to accept any excuse deemed sufficient. A tutor who is unwilling to continue in office is not likely to afford the best care to the minor or his property. Cf. Model Probate Code, § 217.

4) Removal from tutorship

Once he has assumed his responsibilities as tutor, a person can, at least under some circumstances, be removed from office against his will. The matter is addressed in the following article of the Code of Civil Procedure:

Art. 4234. Removal of tutor
The court may remove any tutor who is or has become disqualified; is a nonresident who has not appointed, or has left the state permanently without appointing, an agent to represent him as required by Article 4273; has become incapable of discharging the duties of his office; has mismanaged the minor's property; has failed to perform any duty imposed by law or by order of court; or if such removal would be in the best interests of the minor.

The court on its own motion may order, and on motion of any interested party shall order the tutor to show cause why he should not be removed from office. If service of this order cannot be made on the tutor for any reason, the court shall appoint an attorney at law to represent him, on whom service shall be made and against whom the proceeding shall be conducted contradictorily.

The removal of a tutor from office does not invalidate any of his official acts performed prior to his removal.

Official Revision Comments
(a) This article effects two important procedural changes which are beneficial to a minor. Under Art. 1017 of the Code of Practice a tutor could be removed only in an ordinary action commenced by a petition and citation. Castille v. Gallagher, 206 La. 904, 20 So. 2d 175 (1944). This article permits more expeditious action by contradictory motion. It also permits the proceeding to be instituted by the court on its own motion or by any interested person. Code of Practice Art. 1016 provided that the judge, if he considered that probable cause existed, should direct the undertutor to commence an action for removal or appoint a curator ad hoc to do so. Pursuant to these provisions, the supreme court has held that an undertutor cannot commence a suit for removal without permission from the court, Lillard v. Kemp, 9 Rob. 113 (La. 1844); and that a grandparent
cannot sue for removal under any circumstances, Succession of Desina, 135 La. 402, 65 So. 556 (1914).

(c) Unlike Art. 304 of the Civil Code, this article does not include insolvency per se as a ground for removal, although the tutor may be removed if, because of his insolvency, the court considers him unfit to serve. See Ozanne v. Delile, 5 Mart. (N.S.) 21 (La. 1826).

(d) Art. 305 of the Civil Code provides that no cause of exclusion or removal is applicable to the father except: (1) unfaithfulness of his administration; (2) notoriously bad conduct; (3) abandonment of his children and failure to support and maintain them for more than one year. There are three situations to be considered: (1) disqualification under Art. 4231, supra; (2) revocation under Art. 4232, supra; and (3) removal under the above article. In so far as disqualification is concerned, all of the grounds in Art. 4231 necessarily apply to the father, except those where specific exception is made. As to revocation, the court would be compelled to revoke the appointment of a father as tutor if he refused to take the proper steps to qualify. Finally, the various grounds for removal in the above article are also applicable to the father, particularly since the existence of such a ground does not make it mandatory for the court to remove the tutor.

6 Commencement of tutorship

When does tutorship “begin”? When can an eligible and qualified would-be tutor be considered tutor? When can an eligible and qualified would-be tutor begin to exercise tutorship prerogatives? Are these last two questions essentially identical, i.e., different ways of stating what is, in essence, the same inquiry, or are they altogether different questions?

Read, first, the following Code of Civil Procedure articles:

Art. 4061. Natural tutor; general obligations

Before a natural tutor enters upon the performance of his official duties, he must take an oath to discharge faithfully the duties of his office, cause an inventory to be taken or a detailed descriptive list to be prepared, and cause a legal mortgage in favor of the minor to be inscribed, or furnish security, in the manner provided by law.

Official Revision Comments

(a) Although the surviving parent has an absolute right to be appointed natural tutor, he must qualify as such before he can exercise the authority conferred on tutors. This principle was first decided over a hundred years ago and has been followed consistently. See Mitchell v. Cooley, 12 Rob. 636 (La. 1846).

(b) Although all of the obligations enumerated above are set forth in detail in other articles, it was considered advisable to specify them as is done in Art. 251 of the Civil Code.

Art. 4062. Tutorship by will
The court shall appoint as tutor the person nominated as such in a testament or an authentic act, upon his furnishing security and taking an oath, as provided in Articles 4131 and 4171, unless he is disqualified or unless for some other reason the court determines that the appointment would not be for the best interest of the minor.

Art. 4063. Legal tutor
The court shall appoint a legal tutor under the circumstances and according to the rules for priority provided by law, and in the manner provided in Articles 4065 through 4068.

Official Revision Comment
The rules of priority are found in Arts. 263 et seq. of the Civil Code, which provide for the order of preference in the appointment of the tutor. This article regulates only the procedure governing the application and the appointment of the tutor.

Art. 4064. Dative tutor
The court shall appoint a dative tutor under the circumstances provided by law and in the manner provided in Articles 4065 through 4068.

Art. 4065. Legal or dative tutor; petition for appointment; publication of notice
When a petition for appointment as legal or dative tutor is filed, the applicant shall annex an affidavit listing to the best of his knowledge the minor's ascendants and collaterals by blood within the third degree and the surviving spouse of the minor's mother or father dying last who reside in the state. A copy of the petition for appointment shall be mailed by registered or certified mail to each person listed in the affidavit.

Notice of the application shall be published once in the parish where the petition was filed, in the manner provided by law.

Art. 4171. Oath
Before the person appointed as tutor enters upon the performance of his official duties, he must take an oath to discharge faithfully the duties of his office. A natural tutor shall include in his oath a list of the parishes in which he owns immovable property.

Art. 4172. Issuance of letters
After the person appointed as tutor has qualified by furnishing the security required of him by law, and by taking his oath of office, the clerk shall issue to him letters of tutorship.

These letters, issued in the name and under the seal of the court, evidence the appointment of the tutor, his qualification, and his compliance with all requirements of law relating thereto.
Then, read La. Rev. Stat. 9:196. Finally, read Spaht, § 16.18-16.19, pp. 653-57 (including Justice Barham’s opinion in *Griffith*), & § 16.13, p. 652. Confused yet? If not, then you’ve missed something. In that event, please read this material again and again until the confusion sets in. If, after repeatedly reading these materials, you’re still not confused, then contact me and I’ll confuse you myself.

7 Powers, rights & duties of tutorship

a Duties the fulfillment of which is a prerequisite to qualification

1) Inventory or descriptive list

a) General rule

Read the following article of the Code of Civil Procedure:

Art. 4101. Inventory and appraisement or descriptive list

A. When any person applies to be appointed as tutor, the court shall order either the taking of an inventory and an appraisal of the minor's property or the preparation of a detailed descriptive list of his property in accordance with Article 4462.

B. If an inventory is ordered, it shall be begun not later than ten days after the order is signed. The court shall appoint a notary of each parish in which property of the minor has a situs to take the inventory of such property in that parish.

b) Exception (small tutorships)

Read the following article of the Code of Civil Procedure:

Art. 4461. Small tutorship defined

For the purposes of this Chapter, a small tutorship is the tutorship of a minor whose property in Louisiana has gross value of twenty thousand dollars or less.

Art. 4462. Inventory dispensed with

In a proceeding under this Chapter, the applicant for the tutorship may file a detailed descriptive list of the property instead of an inventory. The list shall be sworn to and subscribed by the applicant, and shall set forth the location and fair market value of each item of property.

The list has the same effect as an inventory, and an abstract thereof recorded in the mortgage records preserves the legal mortgage of the minor.

2) Security

a) General rule

Read the following articles of the Code of Civil Procedure:
Art. 4131. Amount
A. The person appointed tutor, except the natural tutor, shall furnish security for the faithful performance of his duties in an amount equal to the total value of the minor's movable property as shown by the inventory or detailed descriptive list, plus such additional sum as the court may consider sufficient to cover any loss or damage which may be caused by the bad administration of the tutor.
B. Upon proper showing that the security required is substantially in excess of that needed for the protection of the minor, the court may fix the security at any amount which it considers sufficient for the protection of the minor.

Art. 4132. Nature of security
A. The security required by Article 4131 shall be in the form of a bond, to be approved by the court, and secured by:
(1) A surety company authorized to do business in this state;
(2) Bonds of this state or of any political subdivision or any municipality thereof, or of the United States, or certificates of deposit in any bank, savings bank, or trust company chartered under the laws of Louisiana or National Banking Association domiciled in this state and insured by the Federal Deposit Insurance Corporation, or shares of any building or loan or homestead association domiciled in this state and insured by an agency of the United States, in an amount at par value equal at least to the amount of the security required; or
(3) No less than two personal sureties signing in solido who are residents of this state and who each have unencumbered property located in this state in an amount amply sufficient to secure the amount of the bonds notwithstanding the provisions of Civil Code Article 3042 or any other law to the contrary.

Art. 4133. Special mortgage instead of bond
Instead of the security required by Articles 4131 and 4132, the tutor may furnish a special mortgage in favor of the minor on immovable property otherwise unencumbered. The mortgage shall be for the same amount as the security required by Article 4131 and shall be approved by the court as provided in Article 4271. The costs occasioned by the furnishing of a special mortgage shall be borne by the tutor.

b) Exceptions
1] For natural tutors
Read the following articles of the Code of Civil Procedure:
Art. 4134. Natural tutor; bond; recordation of certificate of inventory or detailed descriptive list

A. Except as provided in Article 4135, a natural tutor shall not be required to furnish bond, but shall record in the mortgage records of the parish of his domicile a certificate of the clerk setting forth the total value of the minor’s property according to the inventory or detailed descriptive list filed in the tutorship proceeding. A certificate of the recorder of mortgages setting forth the recordation of the clerk’s certificate shall be filed in the tutorship proceedings before the tutor is appointed or letters of tutorship are issued.

B. Within thirty days after his appointment, the natural tutor shall cause the clerk’s certificate to be recorded in the mortgage records of every other parish in the state in which he owns immovable property.

C. The recordation operates as a legal mortgage in favor of the minor on all the immovable property of the tutor situated within any parish where recorded.

Then read CC arts. 322 & 333.

2] For small tutorships

Read the following articles of the Code of Civil Procedure:

Art. 4461. Small tutorship defined

For the purposes of this Chapter, a small tutorship is the tutorship of a minor whose property in Louisiana has gross value of twenty thousand dollars or less.

Art. 4463. Tutor without bond

A. The court may dispense with the furnishing of security by a legal tutor appointed in a proceeding under this Chapter [small tutorships].

B. If the court is satisfied that no one will accept the dative tutorship of a minor in a proceeding under this Chapter and furnish the usual security, if required, it shall appoint a dative tutor, who shall comply with all requirements except that of furnishing security.

FH 66α. Recall FH 65α. Suppose that Pascal, Olide’s “choice” as tutor, is appointed as the tutor. Further, suppose that the gross value of Desirée’s estate is $30,000, $10,000 worth of which consists of movables. Must Pascal perform a full-fledged inventory? Why or why not? Must he post security? Why or why not? If so, of what kind and in what amount?

FH 66β. The same as before, except that, this time, Clodice, who’s order of interdiction has been lifted, is appointed tutor. Must she perform a full-fledged inventory? Why or why not? Must she post security? Why or why not? If so, of what kind and in what amount?

FH 66γ. The same as FH 66α, except that, this time, Maria is appointed tutor. Must she perform a full-fledged inventory? Why or why not? Must she post security? Why or why not? If
so, of what kind and in what amount?

FH 66δ. The same as FH 66γ (Maria is tutor), but now the gross value of Desirée’s estate is only $10,000, all of which consists of movables. Must she perform a full-fledged inventory? Why or why not? Must she post security? Why or why not? If so, of what kind and in what amount?

FH 66ε. The same as FH 66δ (the estate is worth only $10,000), but now Felice (Desirée’s aunt) is appointed tutor. Must she perform a full-fledged inventory? Why or why not? Must she post security? Why or why not? If so, of what kind and in what amount?

b Powers, right & duties consequent (?) upon qualification

1) Powers, rights & duties over the person of the minor

Read the following article of the Code of Civil Procedure:

Art. 4261. Care of person of minor; expenses

The tutor shall have custody of and shall care for the person of the minor. He shall see that the minor is properly reared and educated in accordance with his station in life.

The expenses for the support and education of the minor should not exceed the revenue from the minor's property. However, if the revenue is insufficient to support the minor properly or to procure him an education, with the approval of the court as provided in Article 4271, the tutor may expend the minor's capital for these purposes.

2) Powers, rights & duties over the patrimony of the minor


a) Authorized acts

1] Powers, rights & duties that the tutor can exercise / fulfill on his own (i.e., without court approval): “acts of administration”

Read the following articles of the Code of Civil Procedure:

Art. 4262. Administration of minor's property

The tutor shall take possession of, preserve, and administer the minor's property. He shall enforce all obligations in favor of the minor and shall represent him in all civil matters. He shall act at all times as a prudent administrator, and shall be personally responsible for all damages resulting from his failure so to act.

Natural cotutors shall be bound in solido except as to damages arising from the administration of all or a part of the minor's property by one of the cotutors individually pursuant to an order of the court or an agreement between the cotutors approved by the court.

Official Revision Comments
(b) The term "obligations" means those which are enforceable. The tutor, for example, has no duty to enforce a debt against a bankrupt debtor. See Art. 3211, supra.

Art. 4264. Tutor's administration in his own name; procedural rights
The tutor acts in his own name as tutor, and without the concurrence of the minor. The tutor may act through a mandatory or attorney in fact outside of the parish of his residence or as provided in Article 4273.
In the performance of his duties, the tutor may exercise all procedural rights available to a litigant.

2) Powers, rights & duties the exercise / fulfillment of which require court approval
a) Enumeration of the powers, rights & duties
   1} Powers, rights & duties with respect to acts short of disposition

Read the following articles of the Code of Civil Procedure:

Art. 4265. Compromise and modification of obligations
With the approval of the court as provided in Article 4271, a tutor may compromise an action or right of action by or against the minor, or extend, renew, or in any manner modify the terms of an obligation owed by or to the minor.

Art. 4266. Continuation of business
The court may authorize a tutor to continue any business in which the minor has an interest, when it appears to the best interest of the minor, and after compliance with Article 4271. The order of court may contain such conditions, restrictions, regulations and requirements as the court may direct.

Art. 4267. Loans to tutor for specific purposes; authority to mortgage and pledge minor's property
When it appears to the best interest of the minor, and after compliance with Article 4271, the court may authorize a tutor to borrow money for the purpose of preserving or administering the property, of paying debts, for expenditures in the regular course of a business conducted in accordance with Article 4266, or for the care, maintenance, training, or education of the minor. As security for such a loan, the court may authorize the tutor to mortgage or pledge property of the minor upon such terms and conditions as it may direct. Before authorizing a loan, the court may require the tutor to furnish additional security in an amount fixed by the court.
Official Revision Comments

(a) Some of the purposes for which the court has authorized the sale or mortgage of a minor's property are as follows: (1) To pay debts or claims against the minor's property—Succession of Hickman, 13 La.Ann. 364 (1858); Lalanne's Heirs v. Moreau, 13 La. 431 (1839); (2) To operate a plantation owned by a minor—Leisey v. Tanner & Helm, 28 La.Ann. 299 (1876); (3) To pay taxes, to repair and to improve the minor's property—Spence & Goldstein v. Clay, 169 La. 1030, 126 So. 516 (1930).

(b) The last sentence, giving the court the right to increase the tutor's bond, is new. A similar provision is included in Art. 4304, infra, relative to sale of a minor's property. Since the proceeds of a loan will sometimes be expended almost immediately, in this instance the increased bond should be discretionary with the court.

Art. 4268. Lease of minor's property; mineral contracts

When it appears to the best interest of the minor, and after compliance with Article 4271, the court may authorize a tutor to grant a lease upon property of the minor. The term of the lease may extend beyond the anticipated duration of the tutorship.

In addition to the requirements of Article 4271, the petition of the tutor shall set forth the terms and conditions of the proposed lease.

This article applies to mineral leases.

A tutor may execute such other contracts as are authorized by law affecting the whole or any part of the share of his ward in oil, gas, or other minerals, either discovered or undiscovered in the manner provided herein.

Art. 4269. Investment and management of minor's property

In acquiring, investing, reinvesting, exchanging, retaining, selling, and managing property for the benefit of a minor, a tutor shall exercise the judgment and care, under the circumstances then prevailing, which men of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital. Within the limitations of the foregoing standard, a tutor is authorized to acquire and retain every kind of property and every kind of investment, specifically including but not by way of limitation, bonds, debentures, and other corporate obligations, and stocks, preferred or common, and securities of any open-end or closed-end management type investment company or investment trust registered under 15 U.S.C. §§ 80a-1 through 80a-52, as from time to time amended, which men of prudence, discretion, and intelligence acquire or retain for their own account.

Official Revision Comments

(a) The above article represents a change in the Louisiana law which has always restricted fiduciaries to prescribed lists of approved investments. However,
this is a change which is long overdue and which will be of great benefit to minors. A similar change is recommended for other fiduciaries, particularly curators of interdicts. See, The Development of the Prudent Man Rule for Fiduciary Investment in the United States in the Twentieth Century, 12 Ohio State L.J. 491 (1951); Why the Prudent Man?, 7 Vand.L.Rev. 74 (1953).

Art. 4269.1. Placement of minor’s property in trust
At any time during his administration a tutor may apply to the court for authorization to place some or all of the minor’s property in trust for administration, management and investment in accordance with the Louisiana Trust Code. The trust instrument shall name the minor as sole beneficiary of the trust, shall name a trustee, shall impose maximum spendthrift restraints, and shall be subject to termination at the option of the beneficiary upon attaining the age of majority or, should he fail to attain majority, at the option of his heirs or legatees. The court may, upon application, make such changes in the trust instrument as may be advisable. Upon creation of the trust, the tutor shall be entitled to no further commissions with respect to the trust property.

2) Powers, rights & duties with respect to acts of disposition
Read CC art. 336. Then read the following articles of the Code of Civil Procedure:

Art. 4275. Donations to or by minor
The tutor may accept donations made to the minor, but he cannot make donations of any property of the minor.

Art. 4301. Purpose of sale or exchange
A tutor may sell or exchange any interest of a minor in property, owned either in its entirety or in indivision, for any purpose, when authorized by the court as provided in Article 4271.

Official Revision Comments
(a) The source statute applies only to private sales; however, the above article authorizes both public and private sales. The power to exchange the minor's property has been made specific.

Art. 4302. Terms of sale
A sale of minor's property shall be for cash, unless upon the petition of the tutor the court authorizes a credit sale. When a credit sale is authorized, the order shall specify the terms of the sale and the security.
Art. 4303. Perishable property; crops
Upon the petition of the tutor as provided in Article 4321 or 4341, the court may order the immediate sale of perishable property and growing crops either at public auction or private sale, without appraisal, and without advertisement, or with such advertisement as the court may direct.

Art. 4304. Additional bond prior to sale of immovables
Before authorizing a sale of a minor's immovable property, the court may require the tutor to furnish additional security in an amount fixed by the court.

Art. 4321. Petition; order
In addition to the requirements of Article 4271, a petition for authority to sell property of a minor at public sale shall set forth a description of the property and the reasons which make it advantageous to the minor to sell at public sale.

The court shall render an order authorizing the sale at public auction after publication, when it considers the sale to be to the best interest of the minor. The order shall specify the minimum price to be accepted.

Official Revision Comments

(b) The rule on minimum price is that at the first sale the property must bring "the amount of its appraised value mentioned in the inventory." Civil Code Art. 342. Under the above article, the court order shall specify the minimum price, permitting the court to use any assistance available, including the inventory appraisal.

Art. 4322. Publication; place of sale
Notice of the sale shall be published in the parish in which the tutorship proceeding is pending, at least twice for immovable property and at least once for movable property, in the manner provided by law. The court may order additional advertisements.

When immovable property situated in another parish is to be sold, the notice shall also be published in the parish where the property is situated. When movable property situated in another parish is to be sold, the court may require the notice to be published also in the parish where the property is situated.

The sale shall be conducted in the parish in which the tutorship proceeding is pending, unless the court orders that the sale be conducted in the parish where the property is situated.

Art. 4323. Minimum price; subsequent offering
The property shall not be sold if the price bid by the last and highest bidder is less than the minimum price fixed by the court. In that event, on the petition of the tutor, the court may order another offering, with the same formalities as for an original
offering, at a lower minimum price.

Official Revision Comments
(a) The source article provides that if the court is satisfied that a sale cannot be made at the original appraisal, it can order another appraisement. The above article adopts a more realistic approach and permits the court to authorize a sale at a lower price, without the intervening step of ordering a lower appraisal.

Art. 4341. Petition
In addition to the requirements of Article 4271, a petition for authority to sell property of a minor at private sale shall set forth a description of the property, the price and conditions of the proposed sale, and the reasons which make it advantageous to the minor to sell at private sale.

Art. 4342. Bonds and stocks
A tutor may sell bonds and stocks of the minor at rates prevailing in the open market, after compliance with Article 4271, by obtaining a court order authorizing the sale.

The endorsement of the tutor and a certified copy of the court order authorizing the sale shall be sufficient warrant for the transfer.

Art. 4274. Compensation of tutor
The court shall allow the tutor reasonable compensation for his services annually, which shall not exceed ten percent of the annual revenues of the minor's property, unless increased by the court upon proper showing that this would be inadequate.

Official Revision Comments
In order to retain the benefit of the jurisprudence interpreting Civil Code Art. 349, almost identical language is used in the above article. It has been held that the tutor's commission applies to the net and not the gross proceeds from the sale of crops. Succession of Hargrove, 9 La.Ann. 505 (1854). The tutor is not entitled to a commission on the proceeds of the sale of personal property of the minor, nor on the principal collected on notes inherited by the minor. In re Hollingsworth, 45 La.Ann. 134, 12 So. 12 (1893). Neither is the tutor entitled to a commission on rents due before the property was "committed to his charge," even though collected during the tutorship. Sims v. Billington, 50 La.Ann. 968, 24 So. 637 (1898).

Provision is made giving the court the right to fix the compensation at less than ten percent because in some cases the flat ten percent is excessive.

b) Procedures required for the exercise / fulfillment
1} Basic procedure
Read the following articles of the Code of Civil Procedure:
Art. 4271. Court approval of action affecting minor's interest
The tutor shall file a petition setting forth the subject matter to be determined affecting the minor's interest, with his recommendations and the reasons therefor, and with a written concurrence by the undertutor. If the court approves the recommendations, it shall render a judgment of homologation. The court may require evidence prior to approving the recommendations.

If the undertutor fails to concur in the tutor's recommendations, the tutor shall proceed by contradictory motion against him. After such hearing and evidence as the court may require, the court shall decide the issues summarily and render judgment.

2) Heightened procedural requirements for acts of disposition

For certain acts of disposition, in particular, public and private sales, certain additional procedural requirements are imposed on the tutor. What are they? Review CCP arts. 4321-4323 & 4341, which are reproduced above.

b) Prohibited acts
There are some acts into which a tutor is just flat out prohibited from entering – no “if”s, “and”s, or “but”s. What are they? Read the following article of the Code of Civil Procedure:

Art. 4263. Contracts between tutor and minor
A tutor cannot in his personal capacity or as representative for any other person make any contracts with the minor. He cannot acquire any property of the minor, or interest therein, personally or by means of a third person, except as otherwise provided by law.

Contracts prohibited by this article shall be null, and the tutor shall be liable to the minor for damages resulting therefrom.

Official Revision Comments
(a) Civil Code Art. 337 provides that the tutor cannot purchase or lease the minor's property, or accept the assignment of any claim against the ward. The above article has been expanded to apply generally to all types of contracts. See Art. 3194, supra.

FH 67. Olide has just been appointed tutor for Ti-Boy, the fifteen-year-old son of the recently-departed Pascal and Julie. Among the acts that Olide wants to take with respect to Ti-Boy are these: (i) place Ti-Boy in a military boarding school in Houma for the rest of his minority; (ii) hire Jean Sot to look after a farm that Ti-Boy had inherited from his grandfather, Papère; (iii) collect rent owed by Gaston, a farmer who had leased that farm from Ti-Boy (through Pascal and Julie); (iii) hire a
new broker to manage Ti-Boy’s stock portfolio, which he had inherited from Pascal; (iv) direct the broker to sell the existing stock and re-invest the proceeds of the sale in “safer” stocks and bonds; (v) sell Pascal’s and Julie’s Gueydan homestead, which Ti-Boy inherited from them, in a private sale; (vi) donate $10,000 of Ti-Boy’s cash to Ti-Boy’s sister, Lil-Fille; and (v) pay himself $2,000 in compensation for his expenses. You may assume that the annual revenues generated by Ti-Boy’s properties come to $10,000. Which of these actions can Olide not take at all? Which of them can Olide take on his own? Which can he take only with court approval? What must he show to get that approval?

8 Termination of tutorship
a Causes of termination
What events bring about the termination of tutorship? Read Spaht, § 16.30, p. 662.

1) Majority
2) Emancipation
3) Remarriage of the pupils’ parents (?)
Suppose that the “cause” of the tutorship was that the pupil’s parents divorced. If these parents then marry each other again (stranger things have happened), would the child be removed from tutorship and re-subjected to parental authority?

b Effects of termination
What are the consequences, juridically speaking, of the termination of tutorship?

1) Accounting of the tutor to the pupil
a) Duty
Read the following article of the Code of Civil Procedure:

Art. 4391. Duty to account; annual accounts
A tutor shall file an account annually, reckoning from the day of his appointment, and at any other time when ordered by the court on its own motion or on the application of any interested person.

b) Timing
Read the following article of the Code of Civil Procedure:

Art. 4392. Final account
A tutor may file a final account at any time after expiration of the tutorship. The court shall order the filing of a final account upon the application of the former minor after the expiration of the tutorship, or upon the rendition of a judgment ordering the removal of a tutor or authorizing his resignation.

Official Revision Comments
(a) Art. 357 of the Civil Code requires the tutor to file a final account on the expiration of his tutorship. The above article makes a change in the law. It is similar to Art. 3332, supra, which gives the succession representative the right to
file a final account, but imposes no absolute duty upon him to do so except after an order of court on the application of any party in interest. In many instances, the minor who has just attained majority may be completely satisfied with an extrajudicial settlement.  

(b) It is contemplated that included in every judgment of removal or resignation will be an order by the court compelling a final account.

c) Contents

Read the following article of the Code of Civil Procedure:

Art. 4393. Contents of account
The account of a tutor shall contain the same matters required by Article 3333 for an account of a succession representative.

Art. 3333. Contents of the account
An account shall show the money and other property received by and in the possession of the [tutor] at the beginning of the period covered by the account, the revenue, other receipts, disbursement, and disposition of property during the period, and the remainder in his possession at the end of the period.

d) Interest

Read CC art. 338.

e) Prescription

Read CC art. 340.

2) Capacity of the pupil
a) In general: full capacity
b) Exception: limitation on post-tutorship contracts with former tutor

Read CC art. 339.

D Emancipation

1 Definition
What is “emancipation”? For reasons that will be explained later, emancipation in Louisiana differs a bit from emancipation in Louisiana’s “mother” civil-law jurisdictions, France and Spain, with the result that the definitions of emancipation current in French and Spanish doctrine are not entirely appropriate here. And so, we Louisianans must, in this case at least, develop our own definition. Here’s mine: “Emancipation is some juridical event – either a juridical act or a court judgment – as a result of which a minor is released, either in full or in part, from the parental or tutelar power to which he had theretofore been subjected and, as a result, acquires capacity, either in full or in part, to act on his own juridically.”

2 History
a In the civil-law tradition in general
In Roman law, emancipation put an end to the paternal power. But, far from being a cause of extinction of tutorship, emancipation was a cause for opening it, [at least] when the emancipated child had not yet attained the age of puberty. Emancipation, then, was applied to children who were under [paternal] power, and it had as its end and its effect to cause them to exit the family and to break the civil lines that united them to their paterfamilias and to the other members of the agnatic family.

It is probably that, at the beginning, emancipation had a penal character. The child was, under the name of “punishment,” excluded from the family, which led to the loss of his rights of agnation. It was a chastisement graver than disinherison, which took away from the child only his succession rights, without causing him to exit the family.

The character of the institution was transformed with time. The tendency was to envision it more and more as a benefit for the child who was the object of it. Not that the emancipation gave the child a greater capacity (. . . if the child was prepubescent, he was, following emancipation, placed under tutorship; if he had reached puberty – a minor of twenty-five years –, he was given a curator; if he was already a “family son,” [he remained capable]12; but it rendered him “independent” by conferring on him the quality of paterfamilias and by permitting him, thereafter, to have a

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1 In Roman law, . . .

2 In this respect, emancipation, properly so called, was rather different from the Roman law institution known as venia ætatis [literally, “permission of age”], with which emancipation would, in the Middle Ages, end up being confounded in some jurisdictions, in particular, Spain, and for which there was a close parallel in Germanic customary law. See 4 Jose Luis Lacruz Berdejo & Francisco de Asis Sancho Rebullida, Elementos de Derecho Civil: Derecho de Familia § 62, n° 421, at 762 n. 2 (1982). Here’s how Baudry-Lacantinerie described that other institution:

The venia ætatis, introduced in the 3rd Century, was designed to end the inconveniences caused by the rule that permitted a minor of 25 years to recover in integrum [in kind] the property he had disposed of by juridical acts, even those he had made with the consensus of his curator. The fear generated by this restitutio in integrum often deterred third persons from contracting with persons of the age of puberty, minors of twenty-five years, and this measure that he been taken to protect the minor’s interest was thus turned against him. Thus, the Emperors permitted minors to ask for the venia ætatis, or dispensation of age, which was accorded to them by imperial rescript. The principal effect of the venia ætatis was to render the in integrum restitutio impossible with respect to the minor’s post-rescript acts.

personal capacity and to conserve the benefit of acquisitions he had made after the emancipation. It is true that these advantages were, in large measure, balanced out by the disadvantages and losses that resulted from emancipation. But attempts were made to try to remedy these inconveniences of emancipation. And when the ancient notion of the agnatic family had nearly disappeared, so as to give way to that of the cognatic family and when the system of civil successions was effaced before that of the pretorian successions, the new idea triumphed and emancipation thereafter procured hardly anything but advantages for the emancipated child.

. . .

. . . As to substance, emancipation was not, at the beginning, subject to any special condition. The paterfamilias, by virtue of his sovereign powers and as the domestic magistrate, emancipated the child when he wanted to and without any possible constraint. But new rules were introduced when emancipation lost its penal character so as to become a benefit conferred on the child. In the first place, it was required that the child consent to the emancipation or, at least, that he not oppose it. Then, in certain cases, the father was required to emancipate his child. Emancipation was then considered to be a means of causing the paternal power to cease in the interest of the child.

Alongside the express emancipation of which we have just spoken, the Roman law also admitted some cases of tacit emancipation that resulted from the acquisition of certain dignities [honoric public offices]. But emancipation by marriage remained foreign to the Roman legislation.

651. In our ancient pays de droit écrit and in the rare pays de coutumes in which the paternal power was recognized, it was the principles of the Roman law that were followed, with the modifications that the jurisprudence of the parlements had introduced into them. Emancipation’s end, as in Roman law, was to free the child from paternal power in his own interest; this was called “emancipation of the family son.”

Altogether different was the character of emancipation in the [vast majority of the] pays de coutumes. In these, the paternal power was unknown, that is to say that it did not have that character of perpetuity that distinguished it in the Roman legislation. Emancipation was simply a means of procuring for the minor a restrained capacity. This [was called] “emancipation of minors.”

652. In the pays de droit écrit, emancipation could be express or tacit.

I. Express emancipation – or emancipation by act – was, in principle, done before a judge, who created an official record of it. In the jurisprudence produced in certain parlements, it was admitted that emancipation could be made before a notary. For emancipation to be possible, the consent of the father was, as a general rule, required, for emancipation deprived him of his rights over his child. The consent of the child was likewise required, for emancipation constituted for him a benefit that he was supposed be free to refuse. Emancipation had to be general and absolute; thus, it could not . . . be conferred on the child quoad unum actum, that is to say, in view of
a particular [single] juridical act.

II. The \textit{pays de droit écrit} knew several cases of tacit emancipation, some of which came from the Roman law and others of which were recognized under the influence of the \textit{coutumes}.

. . . [There follows a discussion of the forms of tacit emancipation that were derived from Roman law, which I omit here.]

Finally, the customary rule of emancipation by marriage was introduced into the \textit{pays de droit écrit} that were subject to the \textit{Parlement de Paris}. But it was not, in general, admitted in the other \textit{pays de droit écrit}.

Whatever may have been the mode of emancipation, the effects of it were always the same. Emancipation, as in Roman law, did not confer on the family son a new capacity: if the child was prepubescent, he was, following emancipation, placed under tutorship; if he had reached puberty — a minor of twenty-five years —, he was given a curator. Emancipation had the effect of putting an end to the paternal power and of rendering the child \textit{sui juris}.

653. The emancipation of minors, in the \textit{pays de coutumes}, was an absolutely different institution. Without doubt, it freed the child from paternal authority. But that was not its objective. The objective of emancipation was to confer on the minor a restrained capacity. The cessation of the paternal power was simply a consequence of that.

There were two different sorts of emancipation [in the \textit{pays de droit coutumier}]: express and tacit.

I. Express emancipation was accorded by letters [issued] from the Prince. It was an institution analogous to the \textit{venia ætatis} of the Roman law, from which it appears to have been derived. . . .

The emancipation by letters of the customary law . . ., however, produced less extended effects [than the \textit{venia ætatis}]. The emancipated minor acquired only a restrained capacity. The minor could thereafter touch his revenues without any assistance; but he remained stricken with a general incapacity, and he required the assistance of a curator both to act judicially and to accomplish acts of disposition.

II. It was a general rule in the \textit{pays de coutumes} that marriage emancipated the minor of right. . . .

. . .

654. The [French] Civil Code, in imitation of our ancient customary law, recognizes two species of emancipation: tacit emancipation, which results of right from marriage, and express emancipation, which results from a declaration or will of the person or persons charged with the protection of the minor [either his parents or his tutor together with the family council].

\footnote{1 Marcel Planiol & George Ripert, \textit{Traité Pratique de Droit Civil Français: Les Personnes} \textsuperscript{n°} 476, at 539 (Réné Savatier rev., 2d ed., Paris, 1952)}
[In the French Civil Code] emancipation is an act that confers on the minor: 1° the government of his person; 2° the enjoyment and administration of his goods with a limited capacity. . . .

Despite its name, this act does not resemble the ancient emancipation [of Rome], which simply extinguished the patria potestas. Our emancipation proceeds from the fusion, which had already been made in the law of our ancien régime, of that Roman emancipation and of the venia ætatis, which gave to Roman minors an anticipated capacity, by terminating their curatorship before age twenty-five.

b In Louisiana in particular

NOTE

When Louisiana first codified its civil law in 1808, the law of emancipation was relatively simple and straightforward. This law was closely patterned on the law of emancipation as it was stated in the French Code civil or, to be more precise, the projet for that code – the so-called Projet du gouvernement –, the provisions of which the drafters of our Digest copied more or less verbatim. Just like French law, this law recognized only two modes of emancipation – express emancipation, by the act of the parents or by the family counsel, and tacit emancipation, by marriage. And, again just like French law, both of these modes of emancipation had the same effect, namely, to confer on the affected minor the capacity to direct his own person and to administer his own goods, a capacity that was, as in French law, more restrained than the “full” capacity enjoyed by majors. To engage in acts as to which the minor still lacked capacity (e.g., (i) acting in justice, i.e., suing or being sued, and (ii) disposing of property), the minor, as in French law, required the assistance of a curator (though, in Louisiana, this curator was a curator ad hoc as opposed to the “standing” curator of French law).

With the enactment of the Civil Code of 1825 came the first complications of the original system. First, the new code recognized yet another mode of emancipation (the third), namely, emancipation by court order, against the will of the parents, for the parents’ mistreatment of or corrupt influence on the minor. Second, the new code altered the effects of tacit emancipation (emancipation by marriage) a bit by providing that a minor emancipated in this fashion could act in justice on his own, without the assistance of a curator.

Still more profound changes to the law of emancipation were made when the Civil Code was re-enacted in 1870. First, the new code recognized yet another mode of emancipation (the fourth), namely, emancipation by court order, with or without the consent of the parent, upon a finding that the minor was, in fact, “capable of managing his own affairs.” This mode of emancipation, unlike the others, conferred full capacity on the affected minor. Second, the new code altered the effects of tacit
emancipation (emancipation by marriage) still further, specifically, provided that a
minor who had been emancipated in this fashion, once he attained the age of
eighteen (which was then three years shy of majority, the age f majority then being
twenty-one), acquired full capacity. Third, the new code established a new schema,
based on a new systematization, for the arrangement of the law of emancipation.
According to this new schema, which divided up the different modes of emancipation
on the basis of their effects on the capacity of the affected minor, there were three
“kinds” of emancipation: (i) emancipation conferring the power of administration; (ii)
emancipation by marriage; and (iii) emancipation by court order upon a finding of the
minor’s de facto managerial capacity.

More recent changes in Louisiana’s law of emancipation are summarized in
Spaht, § 17.1, pp. 665-66, which you should now read. The effect of these more
recent changes, as Professor Spaht implies (but, perhaps out of politeness, does not
state overtly), has been to destroy the re-systematization of the law of emancipation
that was accomplished in 1870. That in itself would not have been so bad had those
who made the changes either re-established the original systematization or established
yet another, new systematization. But, either because they could not or cared not (I
suspect it was the latter), they did neither. And so it is that the present law of
emancipation is a shambles, organizationally speaking, no less disjointed, scrambled,
and chaotic than your typical “common law” legislation. Ecce lex barbarorum!

3 Classifications
a According to manner of accomplishment
Under current Louisiana law, there are, altogether, four different modes of emancipation, that
is, ways in which emancipation may be accomplished. These modes can be grouped under two
headings.

1) Extra-judicial
Two of the modes of emancipation are extra-judicial, that is, can be carried out by the interested
party or parties themselves, without judicial involvement.

a) Emancipation by authentic act of emancipation
1] Explication
The first of the two extra-judicial modes of emancipation is described in CC art. 366, which you
should now read. Then read Spaht, § 17.2, p. 666, the first two paragraphs.

2] Prerequisites
What is required for the accomplishment of this kind of emancipation?
a] Substantive prerequisites
1] Minimum age of minor: 15
2] Consent of the parents or tutor
Which parent(s) must consent? Though the legislation accords the power of emancipation, first,
to the father alone, that is undoubtedly unconstitutional. And so, what’s the rule? That both parents
must concur in the emancipation? Or that either one, acting alone, can emancipate the child? Or,
how about this: though either one can act alone, the child, in such a case, will be emancipated only
The second extra-judicial mode of emancipation is described in CC art. 379, which you should now read. Then read Spaht, § 17.3, p. 670.

2) Prerequisites

What is required for the accomplishment of this kind of emancipation? Is it necessary that the marriage be valid? What about a putative marriage – would it do? What if the marriage ends? Is the minor then un-emancipated, i.e., re-subjected to parental or tutelar power?


657. It must be understood that marriage produces emancipation only when it is valid. A null marriage can produce no juridical effect.

However, so long as the marriage has not been annulled, it is provisionally regarded as valid and it is, as a result, susceptible of producing effect. From this, it follows that, as long as no judgment of annulment has taken place, the minor spouses ought to be regarded as emancipated by marriage.

658. When the marriage is annulled, the minor spouse is thought never to have been emancipated. It is appropriate, however, to except the case in which the marriage has been declared putative. A marriage declared putative produces all civil effects for the benefit of the spouse or spouses in good faith: thus, also, emancipation, if he is a minor. It is not only the acts made by the [putative] minor spouse before the judgment of annulment that will be maintained if he has not exceed the limits of the personal capacity of an emancipated minor. But it has also been decided, though this can appear to be a more delicate question, that the [putative] spouse conserves his capacity for the future, for a putative marriage produces the same effects as a valid marriage dissolved by divorce.

659. The dissolution of the marriage does not lead to the cessation of the emancipation. The legislation does not attach emancipation to the status of being married; [rather,] the legislation makes emancipation a consequence of the celebration of a valid marriage. Thus, the minor spouse remains emancipated if he becomes a widower or a divorcé, and that regardless of his age.

2) Judicial

The other two modes of emancipation are judicial, that is, involve judicial proceedings and require a court judgment.

a) Emancipation upon a showing of parental misconduct

1) Explication
The first of the two modes of judicial emancipation is described in CC art. 368, which you should now read. Then read Spaht, § 17.2, p. 666, the third and fourth paragraphs.

2] **Prerequisites**

   a] **Substantive: excessive ill-treatment, refusal of support, corrupt examples**

   What must the petitioner show in order to obtain this kind of emancipation? The meaning of the expression “refusal of support” is clear enough. But what about “excessive ill-treatment” and “corrupt examples”?

   As to the former, what kind of “ill-treatment” is contemplated? Surely, physical mistreatment is covered. But what about psychological mistreatment? And when does the mistreatment become “excessive”? Is “excessiveness” a function of quantity, of quality, or both?

   As to the latter, what is a “corrupt example”? Would one act be enough to constitute an “example,” or is a “pattern” of misbehavior necessary? Further, in order for the parental behavior in question to constitute an “example,” is it necessary that that behavior take place in front of the child? Or is it sufficient that the conduct somehow come to the child’s attention? Does it depend on the type of “corrupt” conduct? Speaking of “corruption,” what does that mean? Surely, the term would include criminal activity. But is that all? Does a parent set a “corrupt” example if, with the child looking one, the parent (i) tells lies, (ii) uses profanity, (iii) engages in “hate speech,” (iv) engages in sex acts, (v) drinks to excess, (vi) uses tobacco, (vii) tries to commit suicide, (viii) beats the other parent?

   __________


   On the 26th of December, 1842, Jacob Beiller, late of the parish of Concordia, made his last will, by which he disinherited his daughter, the plaintiff. The clause of disinherison is as follows: "Fifth. To my daughter, Elizabeth Beiller, now the wife of Felix Bosworth, I give nothing; but, on the contrary, I expressly and totally disinherit my said child, Elizabeth Beiller, for the reason that, while she was yet a minor, she eloped from my house, my protection, and my authority, and intermarried with the aforesaid Felix Bosworth, without my consent, and in direct opposition to my command and wishes. I therefore, and for that reason, totally, wholly and expressly disinherit her."

   Two objections are urged . . . to the validity of this testamentary disposition. The first is . . . . The second is that, in the relation of parent and child, the obligation of protection and the duty of obedience are reciprocal; that the failure to fulfil the first, forfeits every right which is founded on the non-observance of the last. . . .

   [I]t is contended that the immoral conduct and bearing of the father in his family, deprived him of any right he might have to disinherit the plaintiff. The learned counsel for the plaintiff has urged that the right to disinherit may be forfeited, by misconduct which would justify a decree of destitution of the father from the paternal power. The Code provides (arts. 326, 371) that, no cause of exclusion or removal from the
tutorship is applicable to the father, except that of unfaithfulness of his administration and of notoriously bad conduct; and that the minor may be emancipated against the wish of his father and mother, when they ill treat him excessively, refuse him support, or give him corrupt examples. Admitting, for argument’s sake, this view of the law to be correct, there is only one fact sufficiently well established in the conduct of the father, which requires from us any consideration, the charges of the plaintiff, as to other misconduct, not being proved.

It is stated in the testimony of a witness that, in the summer of 1833, Beiller committed an outrage upon the person of his wife, by giving her blows on the head with a large stick, which caused a profuse bleeding. The account of the origin of the quarrel between them, given by Beiller himself to the witness aggravates the injury rather than extenuates it. With the exception of this act, it does not appear that his conduct in his family was bad, still less notoriously so, nor that it furnished a corrupt example to his child. Beiller was a hardworking, energetic man, of strong impulses and violent passions, far from being amiable in his domestic relations, but it is not pretended that he ever was unkind to his daughter. After the quarrel of 1833, for any thing before us to the contrary, the parties lived in peace up to the denouement of August, 1834. They had been married for nearly thirty years; the husband was advanced in life and very deaf, and we should not be authorized to decree a separation of bed and board after such a reconciliation, great as the outrage is said to have been. Nor would we feel ourselves at liberty to break up this family, by withdrawing from the care and protection of the father, and committing to others, his favorite child. Under all the disadvantages to which, under the paternal roof, she was exposed, as magistrates and fathers we should consider her happiness and future welfare better assured under the protection of the rugged affection of her father, with all his infirmities, than under the mercenary tutelage of strangers, or the custody of her nearest relatives.

The case before us is not one in which, for the interest of the party most concerned and of society itself, we should feel ourselves justified in depriving the father of the just prerogatives of the paternal power. No authority has been cited, nor reason given, which would authorize such an interference, under the very difficult and embarrassing considerations which the facts of this case present. The judicial power which takes from the father the custody of the child, is to be exercised with the greatest delicacy, and only in cases in which its exercise is indispensable for the protection of the rights, interests and future welfare of the minor, or the cause of sound morals and the established order of society, which are almost identical with the former. For those cases the Code has provided. Toullier thus gives his view of the sense of the terms notoriously bad conduct: the expressions commented upon are gens d’une inconduite notoire. Code Nap. act 444.

Expressions qu’il ne faut pas seulement entendre du défaut d’ordre dans les affaires, comme si un homme avait fait faillité, s’il avait été soumis à un conseil judiciaire, mais encore d’un dérèglement de moeurs notoire; comme si un homme avait subi à la police quelque condamnation pour des actions
scandaleuses, s’il vivait dans un libertinage notoire: par exemple s’il, vivant avec sa concubine, il s’était reconnu le père de ses enfants. On ne pourrait laisser des mineurs, et surtout des filles, sous la garde d’un homme ainsi noté.\(^3\)

Article 371, concerning the causes for which minors may be emancipated against the will of their fathers and mothers, does not extend the operation of article 326, nor is it applicable in its terms to the same subject.

In stating our objections to the application of the argument of the learned counsel to the facts of this case, we must not be understood as deciding the principle that the misconduct, on the part of the father, which would authorize his destitution from the tutorship, would necessarily destroy the prerogatives of the paternal power, which are independent of the tutorship. Toullier considers the paternal power as personal, and the rights resulting from it as separate from the tutorship, and unaffected by it. It is a question on which we would not wish to be considered as expressing any opinion. It is of great moment, and can only be decided after the most thorough investigation.

But in conclusion let us suppose that, at the time this marriage was under consideration, a court had been applied to for the purpose of withdrawing the minor from the paternal power, for the causes presented by the counsel. A court would not be satisfied with any thing but the most unquestionable proof of the facts on which its action was to be based. If true, they must be well known, and how does it happen that, in this case, they are left to depend for their establishment on the testimony of a single witness? The notoriety as to certain matters which we have left out of view, because we did not consider them to be proved, this witness alone speaks of. Would not a court, before proceeding to perform one of the highest acts of judicial power, have required the charge of notoriously bad conduct and corrupt example to be supported by other evidence, and not to be dependent on the opinion of a single witness? What reason can be given that this testimony stands alone? Why were not his neighbors, his associates, brought forward to establish the fact of the notoriety of Beiller’s bad conduct, and the corrupting influence of his example? Many witnesses, neighbors, intimate friends, were examined, but not one of them testified in support of these allegations, which, had they been true, some of them must have known. Had the facts been as represented, they would have been proved, and not left to rest on the testimony of a single witness. The neighbors, heads of families, friends of the deceased, whose testimony on the example afforded by the conduct of the father, and whether the paternal dwelling was or not disgraced by the mode of life charged on the deceased, would have been conclusive on the court; but with the evidence before us, we are satisfied that no court would take the responsibility of removing the child from...

\(^3\) Translation: “By these expressions, one must understand not only a lack of order in one’s affairs, as if a man had become bankrupt, but still a notorious disorder of morals, as if a man had received a criminal condemnation for some scandalous acts or if he had lived in a notoriously libertine condition, for example, if while living with his concubine, he had recognized himself to be the father of her children. One could not leave minors, and especially not girls, in the custody of a such a man.”
the protection of the paternal power, and on it we cannot reverse the judgment appealed from as contrary to evidence.

We therefore conclude that the testator by his conduct had not forfeited the right of disinheriting his child, a minor, for marrying without his consent.

We agree with the district judge in dismissing the plaintiff's demand. We have not come to this conclusion without the most mature deliberation; and, in so doing we are acting in the best interests of society, in defense and in vindication of the paternal power, of the right which every man has to the fruits of his labor, and carrying out that fundamental principle upon which not only the welfare and happiness of the child repose, but the power and safety of the State—Honor thy father and mother. . . .

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b] Procedural

1/ Parties plaintiff

Who’s entitled to demand the minor’s emancipation on this basis? Is it the minor himself? Or is it someone else, who purports to act in his interest? Or is it either? Is it relevant that, when the article that established this mode of emancipation was first introduced into our civil law (in the Code of 1825), the article that immediately proceeded that article, which established a mode of emancipation (one granted by the so-called “family council”) that has since been suppressed, ended with this line: “This emancipation can be provoked either by one of the relatives of the minor or by the minor himself.”?

2/ Mode of proceeding

What kind of proceeding is required / allowed?

b) Emancipation upon a showing of “good reason” and “de facto managerial capacity”

1] Explication

The second of the two modes of judicial emancipation, though referred to in CC art. 385, is described not there, but in CCP arts. 3991 - 3994, which are reproduced below:

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Art. 3991. Petition; court where proceeding brought

The petition of a minor for judicial emancipation shall be filed in the district court in the parish of his domicile, and shall set forth the reasons why he desires to be emancipated and the value of his property, if any.

Art. 3992. Consent of parent or tutor

The petition of the minor shall be accompanied by a written consent to the emancipation and a specific declaration that the minor is fully capable of managing his own affairs, by the following:

(1) The father and mother if both are alive, or the survivor if one is dead. If either parent is absent or unable to act, the consent of the other parent alone is necessary. If the parents are judicially separated or divorced, and the custody of the minor has been awarded by judgment to one of the parents, the consent of that parent alone is
necessary. A surviving parent is not required to qualify as natural tutor in order to give such consent, nor is the appointment of a special tutor necessary.

If the petition is filed on the ground of ill treatment, refusal to support, or corrupt examples, parental consent is unnecessary, but the parents or the surviving parent shall be cited to show cause why the minor should not be emancipated.

(2) The tutor of the minor if one has been appointed. If a tutor of his property and a tutor of his person have been appointed for the minor, the consent of both is necessary. If no tutor has been appointed, or if the tutor has died, resigned, or been removed, and there is no surviving parent who is able to act, a special tutor shall be appointed. If the tutor or special tutor refuses to give his consent, he may be cited to show cause why the minor should not be emancipated.

Official Revision Comments to Articles 3991 and 3992--1960
(a) Art. 3991 is a combination of the source articles. The provision requiring a proceeding contradictorily with the parents when the ground for the petition is cruel treatment is new.
(b) If both parents are alive and not judicially separated or divorced, both must consent. State ex rel. Billington v. Sacred Heart Orphan Asylum, 154 La. 883, 98 So. 406 (1923).
(c) A judgment of emancipation rendered without the consent of a tutor or special tutor when both parents are dead is a nullity. Gaston v. Rainach, 141 La. 162, 74 So. 890 (1917). The consent of the tutor is required even when a bank is tutor of the property and the mother is tutrix of the person. In re Webster's Tutorship, 188 La. 623, 177 So. 688 (1937). For the protection of the minor, this article requires the consent of the tutor of the property and of the tutor of the person.

Art. 3993. Hearing; judgment
If the judge is satisfied that there is good reason for emancipation and that the minor is capable of managing his own affairs, he shall render a judgment of emancipation, which shall declare that the minor is fully emancipated and relieved of all the disabilities which attach to minority, with full power to perform all acts as fully as if he had reached the age of majority.

Official Revision Comments--1960
(a) Art. 386 of the Civil Code provides no test for the court, but simply states that the judge, "after hearing the parties, shall render judgment in the premises." The above article provides a standard, and deletes the provision regarding "hearing," leaving it to the judge to determine in whatever manner he wishes whether the minor should be emancipated. This includes the power to emancipate a minor who may be temporarily absent, such as in the armed forces.
(b) The provision in Art. 386 of the Civil Code authorizing the judge to render the judgment in open court or in chambers, in term time or in vacation, has been deleted. But see Arts. 194 through 196, supra.
Art. 3994. Expenses of proceeding
Whether the minor succeeds or fails in obtaining a judgment of emancipation, all expenses which he may have incurred shall be paid out of his estate.

Now, read Spaht, § 17.4, pp. 670-71.

2] Prerequisites
a] Substantive
What are the substantive requirements for this mode of emancipation?

1] Minimum age of minor: 16
2] Either –
   a] Consent of the parents or tutor or
   b] Ill treatment, refusal to support, or corrupt examples
3] Actual managerial capacity on the part of the minor

b] Procedural
1/ Parties plaintiff
Who’s entitled to demand the minor’s emancipation on this basis? Is it the minor himself? Or is it someone else, who purports to act in his interest? Or is it either?

2/ Mode of proceeding
What kind of proceeding is required / allowed?

b) According to effects
Emancipations can also be classified on the basis of their effects, in particular, their effects on the minor’s subjection to parental or tutelar power, as the case might be, and, correlative, upon the capacity of the minor. This, in fact, is the traditional basis for classification of emancipations.

Under current Louisiana law, an emancipation, depending on its mode, may have either of two different sets of effects or, in one case, a complicated combination of the two.

1) Limited emancipation
Two of the modes of emancipation have only a limited (restricted or partial) effect on the minor’s subjection to parental or tutelar power, as the case might be, and, correlative, upon the capacity of the minor.

a) Modes of emancipation that produce this effect
The modes of “limited” effect are (i) emancipation by juridical act, (ii) emancipation by marriage, and (iii) emancipation by court judgment for mistreatment.

b) The content of this effect
What is the extent of the capacity of a minor who has undergone limited emancipation? Read CC arts. 370-376.

1] Acts of which the minor is capable
   a] Acts within the scope of “full administration”
   b] Acts within the scope of “trade”
2] Acts of which the minor is still not capable
a) Acts of disposition
   1) Acts for which the minor must have parental or tutelar approval and judicial authorization
   2) Donations inter vivos

b) Acts incurring obligations: acts unrelated to simple administration in which the minor incurs liability in excess of one year’s revenue

FH 68. Shortly after their legitimate son, Ti-Boy, turned sixteen (16), Pascal and Julie, husband and wife, made out an authentic act in which they “emancipated” him. For the past two years, Ti-Boy has helped to support himself by earning money making pirogues (his annual income from this business is $12,000), an effort he plans to continue making. In short order, Ti-Boy then entered into the following juridical acts: (i) he leased a farm that he’d inherited from his grandfather, Papère, for 12 months at a rent of $200 / month; (ii) he ordered supplies for the next year of operations of his already-established pirogue-construction business, the total cost of which was $5,000; (iii) he mortgaged the farm referred to in (i) to Bayou Bank to secure a loan of $10,000, the proceeds of which he planned to use for a variety of purposes, none of them connected with his business; (iv) he gave one of his pirogues (worth $250) to his girlfriend, Desirée, on the occasion of her birthday; (v) he bought a used Porsche on e-Bay for $30,000; and (vi) he sold his Ovation acoustic guitar for $500.

Before the years is up, Ti-Boy has cause to regret each of these juridical acts. And so, he has come to you for assistance. What he wants to know is which of these juridical acts he can “undo.” What will you say? Why?

2) Plenary emancipation

One mode of emancipation has a plenary (full or complete) effect on the minor’s subjection to parental or tutelar power, as the case might be, and, correlative, upon the capacity of the minor.

a) Mode of emancipation that produce this effect

The mode of “plenary” effect is emancipation by court judgment upon a showing of “good reason” and “de facto managerial capacity.”

b) The content of this effect

What is meant by “plenary” emancipation? How does it differ from “limited” emancipation? As you ponder these questions, re-read CCP art. 3993, which is reproduced above.

FH 69. The same as before (FH 68), except that, this time, Ti-Boy was emancipated (again, just after his 16th birthday) by virtue of a judgment based on “good reason” and a finding of “managerial capacity.” What will you tell Ti-Boy now? Why?

3) Variable emancipation: either (i) temporary limited emancipation, followed by plenary emancipation at a later time or (ii) plenary emancipation from the start

The last remaining mode of emancipation – emancipation by marriage – has different effects depending on the age of the minor at the time of the marriage. If the minor is below age sixteen when the marriage takes place, then the minor, at first, receives only limited emancipation and then,
upon attaining the age of sixteen, receives plenary emancipation. If, on the other hand, the minor is sixteen years old or more when the marriage takes place, then the minor, from the get go, receives plenary emancipation.

FH 70α. The same as FH 68, except that, this time, Ti-Boy was emancipated by virtue of his having married Desirée (again, just after his 16th birthday). What will you tell Ti-Boy now? Why?

FH 70β. The same as before (FH 70α), except that, this time, Ti-Boy was only fifteen (15) when (i) he married Desirée and (ii) he entered into the various juridical acts in question. What will you tell Ti-Boy now? Why?

c According to reversibility of effects
Skipped in the interest of time.

E Curatorship

1 Definition
What is curatorship? Read the following doctrinal material:


The direction of minors under parental power the law grants to parents; for orphans, [the law deems] direction by tutors suitable. Completing the trilogy of assistance for incapables, the law sets up “curatorship” as a responsibility committed to someone to manage the person and to administer the goods of an incapable who is a major. This definition, nevertheless, does not include all the species of curatorship . . . . Curatorship extends beyond the protection of incapable majors to reach, at times, minors and even unborn children. Viewed with technical rigor, curatorship does not constitute a single institution, as does tutorship; to the contrary, it is complex, involving varied situations.

The original of curatorship is rooted in Roman law, where . . . it was admitted that curatorship was granted to majors who were not subject to paternal power – minors of the age of puberty –, protecting them from their own inexperience, and even to the major of twenty-five years who asked for it in his own interest. [But] Roman law did not define curatorship [or specify its] content or its principles . . . . As a result, there was, in our prior [Brazilian] law [and, before that, in the ius commune], a certain conceptual imprecision [in the law of curatorship] that is reflected in the words of the great civilists . . . .

Because we are concerned here with an [exposé of] a general institution of protection for those who suffer [from some disorder] in their mental faculties, we will not bring ourselves to reopen the debate regarding the [proper] nomenclature [that should be used] to allude to them or to their status, sometimes denominated “general and total lunatic,” “mentally alienated,” “psychopathic,” “demented,” “bearers of mental infirmity,” and “a-mental.” . . . Curatorship falls on any one who, be it for reasons of a pathological, accidental, congenital, or acquired order, is not in a
position to manage his owner person or to administer his own goods, though they have attained the age of majority.

The factual presupposition of curatorship is incapacity; the juridical presupposition is a judicial decision. There can be no curatorship unless it has been granted by a judge; in this respect, in fact, this institution differs from parental power, whose origin is always by operation of law, and from tutorship, which can proceed from nomination by the parents. . . .

Orlando Gomes, DIREITO DE FAMÍLIA n°s 250-251, at 395-97 (7th ed., Rio de Janeiro, 1988)

Aligned alongside tutorship, in the same field of law – family law – [and in the same part of the civil code], is the institution of “curatorship,” so situated because of the analogies it presents with the structure of tutorship. It is designed, in the same fashion [as is tutorship], for the government of incapable persons, but it is organized for the defense and protection of one whose incapacity does not result from age. It is[,] however,] configured along lines that do not permit the total application of the norms that govern tutorship. Thus, we deal here with an autonomous institution.

Curatorship has a two-fold reach. Sometimes it is granted for the regulation of the person and the goods of someone for whom, though he is a major, acting by himself is impossible due to a determined cause of incapacity; at other times, it is granted for the regulation of interests that cannot be cared for by the person himself, even though he still enjoys his capacity. The former case has a permanent character; the other, a necessarily temporary one.

It is with the curatorship of adult incapables that the treatise writers occupy themselves by preference in the study of the institution. In this modality, it constitutes an office that must be exercised for the protection and representation of those who do not find themselves in a position to act juridically for themselves, be it in relation to all juridical acts or in relation only to those that are patrimonial.

He who exercises curatorship . . . is called the “curator.” He who is under tutorship is designated, indistinctly, as the “curatee” or [more specifically, as the “unborn child,” “absentee,” or] “interdict” [depending on the kind of curatorship]. The latter denomination stems from the fact that an “interdiction” of the incapable, [issued] by the judge, is necessary in order for him [the interdict] to be placed into curatorship.

2 Occasions for curatorship
a Gestation
Curatorship can arise during the gestation of a fetus. But under what circumstances and for what purpose(s)? Read CC art. 252; then re-read CC art. 26; then read CC arts. 940 & 1474.

b Absenteeism
As we learned in our study of the law of “persons,” curatorship can arise whenever someone is declared an “absentee.” Re-read CC art. 47, par. 2.

c  Interdiction

Curatorship can also arise upon the “interdiction” of a major. This kind of curatorship, which is undoubtedly the most common by far and, all things considered, is far and away the most important, is the only kind with which we shall hereinafter be concerned.

1)  Definition

What is interdiction? Read the following doctrinal material:


Though a man may have become a major and may have been rendered master of his rights, he is not above all those events that can deprive him of his intellectual faculties. Thus, if, by virtue of some accident, he comes to be deprived of his reason or if, by virtue of some “error of nature, he has never acquired this reason, the law . . . desires that he be re-established in the situation in which he was as a child, as soon as it is clear that he is dangerous – that he abuses his liberty be it toward himself or be it toward others. Such is the end of interdiction.

Interdiction is the effect of a judgment rendered by a competent authority, which declares an individual incapable of the acts of civil law and deprives him of the administration of his persons and his goods.

Interdiction is, then, a grave thing, one to which there should be recourse only as an extreme remedy, since its effect, so to speak, is to render the man whom it strikes a stranger to civil life and to the commerce of his fellow men.(a)

(a) The interdict is a “stranger to civil life” not in the sense that he is deprived of all or part of his rights, but in the sense that he can no longer exercise those rights himself.

1-2 Andreas von Tuhr, DER ALLEGEMEINE TEIL DES DEUTSCHEN BÜGERLICHEN RECHTS § 26, no l.1, at 58-59 (Tito Ravà tr. [German to Spanish], Buenos Aires, 1946)

Interdiction is a judicial procedure whereby one’s capacity to act is extinguished or reduced. . . . It takes place in the following cases:

1. For a mental infirmity or disability, when the interested person cannot attend to his affairs as a result of one of the mentioned circumstances. Among these “affairs” must be included the care of one’s own person and all the tasks that are incumbent on men in relation with others, in particular, the exercise of rights and the fulfillment of duties. . . . Interdiction has even [been] declared in a case in which the infirm person could attend to certain affairs; the legal effects of interdiction for mental
incapacity are compatible with a partial capacity: the incapable can realize acts of acquisition and certain important decisions within the ambit of family law by himself; the legislation presupposes, then, the possibility of interdiction even in the case in which the infirm person does not lack volitional capacity in all the aspects of life. I judge that in many cases, incapacity solely with respect to patrimonial management will be sufficient [to justify interdiction], even when the infirm person can act reasonably in familial affairs, for [in the case] the interdiction will not affect this field of activity.

In all cases, the end of interdiction consists in the protection of the infirm person in his interest and to safeguard third persons, who enter into juridical relations with him, against the danger that [their] juridical acts will turn out to be null on account of his incapacity to act.

Then read CC arts. 389-390.

2) Causes of interdiction
   a) Enumeration & explication of causes

For what causes (on what grounds) can a major be interdicted? Re-read CC arts. 389-390. As always, you should read the comments to these articles. In this case, however, you also study them closely.

1] Consistent


775. The state of imbecility, dementia, or madness becomes a cause of interdiction only when it is “habitual.” Thus, a passing derangement of intellectual faculties, due, for example, to a violent cerebral commotion, would not be a cause for interdiction. “It is not on the basis of isolated acts that the judge would be well-advised to decide that a man has lost the sense of reason, but rather when reason is no longer anything but an accident in that man’s life; when this reason can be perceived only farther and farther away, while the [man’s] everyday actions and words are [more and more] the actions and words of an unthinking person, one can say that there exists an habitual state of dementia; there is then a case for intervention.”

776. But it is not necessary that the state of imbecility, dementia, or madness be “continual”: the legislation says that interdiction can be pronounced “even when this state produces lucid intervals.”

2] Inability to –
   a] 1] Make or
2) Communicate
   b) Reasoned decisions
   c) Regarding the care of the person or of property

In what kinds of circumstances might a person be unable to make or communicate such decisions?

3) Unavailability of less restrictive means of protection
   b) Burden of proof

What is the petitioner’s burden of proof? Read the following article of the Code of Civil Procedure:

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Art. 4548. Burden of proof
The petitioner in an interdiction proceeding shall prove by clear and convincing evidence all facts justifying interdiction.

Revision Comments--2000
(a) This Article clarifies the law by making it clear that the burden of proof in all interdiction proceedings is "clear and convincing evidence" rather than a "preponderance of the evidence."
(b) The "clear and convincing" burden of proof applies in all interdiction proceedings, including those in which the petitioner seeks full interdiction, limited interdiction, temporary interdiction, or preliminary interdiction.

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3) Extent of interdiction
What is the extent of interdiction, that is, with respect to which matters and how much / many of those matters does the interdiction order render the interdict incapable of acting?

a) Alternatives
Under current law, there are two possibilities.

1) Full interdiction
What is “full interdiction”? Re-read CC art. 389.

2) Limited interdiction
What is “limited interdiction”? Re-read CC art. 390.

b) Preference
Which kind of interdiction – full or limited – is preferred? Why?

3) Dramatis personae curationis propter interdictionem
Who are the “players” in the curatorship-upon-interdiction drama?

a) Curator
What is a curator? Read CC art. 392.

b) Undercurator
What is an undercurator? Read CC art. 393.

c) Court
d) Interdict

4) Characteristics

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What are the essential characteristics of curatorship-upon-interdiction?

a) Non-obligatory
b) Personal
c) Gratuitous
d) Indivisible

1) General rule
2) Exception

In Louisiana, curatorship can, in certain extraordinary circumstances, be “divided,” in particular, all or part of the “patrimonial” power can be given to one person and the rest of the power, to another person. What are those circumstances?

a] Division by law

Read the following provisions of the Code of Civil Procedure:

Art. 4561. Appointment of curator

C.

(2) The court may appoint separate curators for the person and affairs of the interdict pursuant to Article 4069.

Art. 4069. Separate tutor of property

A. In exceptional cases and for good cause shown, the court may appoint a bank or another person as administrator or tutor of the property of the minor. This appointment may be made upon the court’s own motion or upon the motion of the tutor or other person entitled to the tutorship if no tutor has been previously appointed, or upon motion of any interested person after a contradictory hearing with the tutor, administrator, or person entitled to the tutorship or the administration.

b] Division by will

In the case of a “volitional” curatorship, which, as we’ll see below, is one in which the future interdict, by juridical act, appoints someone to serve as curator for him in the event he should be interdicted, can the future interdict “divide” the curatorship power between two or more persons?

5) Determination of the dramatis personae curationis

a) Who is eligible

1) To be curator

What are the different types of curatorship?

a] The possibilities: types of curators

1} Permanent curators

There are two different varieties of “permanent” (i.e., non-provisional) curators: volitional and dative.

a} Volitional
What is a “volitional” curator (curator “by will”)? Who can be one? When? Read CC art. 392 cmt. (c); CCP art. 4561.C(1)(a) (“(1) The court shall consider the qualified persons in the following order of preference: (a) A person designated by the defendant in a writing signed by him while he had sufficient ability to communicate a reasoned preference.”)

b) Dative

What is a “dative” curator? Who can be one? When? Read CCP art. 4561.C(1)(b)-(f) (“(1) The court shall consider the qualified persons in the following order of preference: . . . (b) The spouse of the defendant. (c) An adult child of the defendant. (d) A parent of the defendant. (e) An individual with whom the defendant has resided for more than six months prior to the filing of the petition [for interdiction]. (f) Any other person.”)

2) Provisional curators

Read CC arts. 391 & 397, par. 2; then read the following article of the Code of Civil Procedure:

Art. 4549. Temporary and preliminary interdiction; attorney

A. Temporary Interdiction: (1) When the court finds that immediate and irreparable injury, loss, or damage will result to the person or property of the defendant before a hearing can be held, the court may order temporary interdiction without notice and without an adversarial hearing. In that order, the court shall schedule a preliminary interdiction hearing to be held not more than ten days following the signing of the ex parte judgment of temporary interdiction. On motion of the defendant or for extraordinary reasons shown at a contradictory hearing, the court may continue the hearing for one additional period not to exceed ten days.

(2) A pleading requesting ex parte temporary interdiction shall be accompanied by all of the following:

(a) An affidavit by a licensed physician or psychologist attesting to facts supporting the claim that all grounds for temporary interdiction set forth in Civil Code Article 391 exist.

(b) A verified petition or affidavit attesting to facts supporting the claim that immediate and irreparable injury, loss, or damage will result to the person or property of the defendant before he or his attorney can be heard.

(c) An affidavit by the movant or his attorney attesting to the efforts made to give notice to the defendant or the reasons supporting a claim that notice should not be required.

B. Preliminary Interdiction: (1) The court shall not grant a judgment of preliminary interdiction prior to an adversarial hearing. The court shall conduct a preliminary interdiction hearing within twenty days of signing the order scheduling the hearing.

(2) No later than seventy-two hours prior to a preliminary interdiction hearing, all orders, pleadings, and supporting documents shall be served personally on the defendant and his attorney. To the extent possible, the movant shall give reasonable notice of the preliminary interdiction hearing to all other persons named in the petition.

C. Attorney. In an ex parte judgment of temporary interdiction and in every order scheduling a preliminary interdiction hearing, the court shall appoint an attorney to represent the defendant. If the defendant either retains his own attorney, or intelligently
and voluntarily waives the assistance of an attorney, the court shall discharge the
court-appointed attorney.

Revision Comments--2000
(a) This Article changes the law. While this Article is substantially similar to
the provisions enacted by the legislature in 1997, some differences exist. First, this
Article tracks to a greater extent the provisions of the Code of Civil Procedure
relating to preliminary injunctions and temporary restraining orders. See C.C.P.
Arts. 3601-3613. Indeed, this Article adopts that terminology rather than
"provisional interdiction" and "ex parte provisional interdiction." Second, this Article
assures that there is no period during which the interdict is not protected by a
curator pending a final interdiction hearing.
(b) Civil Code Article 391 (Rev. 2000), sets forth the grounds for temporary
interdiction and preliminary interdiction. Civil Code Article 397 (Rev. 2000),
prescribes the time at which any judgment of interdiction shall terminate. See C.C.
Art. 397(B) (Rev. 2000). This termination date, or any earlier date established by
the court, shall appear on any judgment of temporary interdiction or preliminary
interdiction.

________

a} Temporary curator

What is a “temporary” curator? In what sense is he different from a “permanent” curator?
Under what circumstances may a temporary curator be appointed?

b} Preliminary curator

What is a “preliminary” curator? In what sense is he different from a “permanent” curator?
A “temporary” curator? Under what circumstances may a preliminary curator be appointed?

b] Prioritization: the “order of call” of (permanent) curators

What is the order or priority among possible curators? In other words, if there’s a need for a
curator and there’s an eligible, qualified, and willing volitional curator and an eligible, qualified, and
willing dative curator, which one “gets” it? Read the following article of the Code of Civil
procedure:

Art. 4561. Appointment of curator
A. The court shall appoint as curator the qualified person who is best able to fulfill
the duties of his office.

. . .
C. (1) The court shall consider the qualified persons in the following order of
preference:
(a) A person designated by the defendant in a writing signed by him while he had
sufficient ability to communicate a reasoned preference.
(b) The spouse of the defendant.
(c) An adult child of the defendant.

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(d) A parent of the defendant.
(e) An individual with whom the defendant has resided for more than six months prior to the filing of the petition.
(f) Any other person.
(2) The court may appoint separate curators for the person and affairs of the interdict pursuant to Article 4069.

D. At any time prior to qualification, the court may revoke the appointment for good cause and appoint another qualified person.

Revision Comments--2000

(a) This Article changes the law. Under this Article, a defendant's preincapacity choice regarding a curator is given priority. Formerly, the defendant's preincapacity choice was given preference only if expressed in a power of attorney. Furthermore, this Article changes the law by enumerating additional persons (other than the defendant's designee and spouse) in the statutory order of preference. This Article preserves the option of appointing separate curators over the person and property of the interdict. This Article changes the law, however, by rendering ineligible for service as a curator (but not as undercurator) the operator of a nursing home or similar facility.

(b) As to what constitutes a signed writing, see Comment (c), Civil Code Article 1837 (Rev. 1984).

(c) The court may appoint a nonprofit curatorship service program to serve as curator. See R.S. 9:1031-9:1034.

2] To be undercurator
Who can be the undercurator? Read the following article of the Code of Civil Procedure:

Art. 4565. Undercurators
A. (1) The court shall appoint as undercurator the qualified person best able to fulfill the duties of his office. The person appointed as undercurator qualifies by taking an oath to discharge faithfully the duties of his office.

What does the term “qualified,” as used in CCP art. 4565, mean?

b) Who is (or may be) dispensed (of incapacities, other disqualifications, etc.)

1] Incapacity to be curator & other disqualifying conditions
Is any particular kind of capacity required of him who would be curator? Are there any other conditions, aside from “incapacity” properly so called, that might disqualify an otherwise eligible and willing would-be curator? Read the following article of the Code of Civil Procedure:
Art. 4561. Appointment of curator

B. (1) The following persons are not qualified to serve as a curator of an interdict:
(a) A person under eighteen years of age.
(b) An interdicted person.
(c) A nonresident of the state without a resident agent for service of process.
(2) Except for good cause shown, the following persons are not qualified to serve as a curator of an interdict:
(a) A convicted felon.
(b) A person indebted to the interdict at the time of appointment.
(c) An adverse party in a lawsuit pending against the interdict at the time of appointment.
(d) An owner, operator, or employee of long-term care institutions where the interdict is receiving care, unless he is related to the interdict.

It is important to note that the otherwise eligible and willing would-be curator must possess these capacities and qualifications not only as a prerequisite to his being judicially recognized as curator, but also as a prerequisite to his remaining curator once he has been so recognized. According to CCP art. 4568 cmt.(c), “Good cause for removal exists when the curator becomes disqualified because he no longer satisfies the requirements set forth in Code of Civil Procedure Article 4561 (Rev. 2000), “[t]he court may remove any curator who is or has become disqualified.”

2] Excuses from curatorship (?)

Does it make sense to take of “excuses from curatorship” as it did to talk of “excuses from tutorship”? Explain.

3] Resignation from curatorship

Once he has assumed his responsibilities as curator, can a person resign or at least ask for permission to do so? Can he resign without showing “good cause”? As you ponder that question, consider the matter of “removal” of a curator, the legislation concerning which seems to be broad enough to cover cases of “resignation.”

4] Removal from curatorship

Once he has assumed his responsibilities as curator, a person can, at least under some circumstances, be removed from office against his will. The matter is addressed in the following article of the Code of Civil Procedure:

Art. 4568. Removal of curator or undercurator

On motion of any interested person, or on its own motion, the court may remove a curator or undercurator from office for good cause. Unless otherwise ordered by the court, removal of the curator or undercurator by the court is effective upon qualification of the appointed successor.
Revision Comments--2000

(c) Good cause for removal exists when the curator becomes disqualified because he no longer satisfies the requirements set forth in Code of Civil Procedure Article 4561 (Rev. 2000).

(d) R.S. 9:1025 supplements this Article by enumerating several circumstances under which good cause exists for removal.

6) Commencement of curatorship
   a) How it begins

Read the following articles of the Code of Civil Procedure:

Art. 4541. Petition for interdiction
   Any person may petition for the interdiction of a natural person of the age of majority or an emancipated minor. The petitioner shall verify the petition and set forth the following with particularity:
   (1) The name, domicile, age, and current address of the petitioner and his relationship to the defendant.
   (2) The name, domicile, age, and current address of the defendant and the place the petitioner proposes the defendant will reside if the relief sought in the petition is awarded.
   (3) The reasons why interdiction is necessary, including a brief description of the nature and extent of the alleged infirmities of the defendant.
   (4) If full interdiction is requested, the reasons why limited interdiction is inappropriate.
   (5) If limited interdiction is requested, the capacity sought to be removed from the limited interdict, and the powers sought to be conferred upon the limited curator.

   (10) The name, domicile, age, education, and current address of the proposed curator, and the reasons why the proposed curator should be appointed.

Art. 4543. Service upon defendant and notice to interested persons
   A. Service of the citation and petition shall be personal. Nevertheless, if the defendant is domiciled in this state, but is located elsewhere, service may be made by the delivery of a certified copy of the petition, citation, and all attachments, to the defendant personally by any person over the age of eighteen years. Service is effective as of the date a notarized affidavit is filed into the record affirming the personal delivery. Failure to serve the defendant as provided in this Paragraph shall preclude the court from granting the relief sought in the petition.
Art. 4544. Appointment of attorney
A. If the defendant makes no timely appearance through an attorney, the petitioner shall apply for an order appointing an attorney to represent the defendant. Pursuant to such a motion, or on its own motion, the court shall appoint an attorney to represent the defendant. If the defendant either retains his own attorney, or intelligently and voluntarily waives the assistance of an attorney, the court shall discharge the court-appointed attorney. The court-appointed attorney shall represent the defendant until discharged by the court.

Revision Comments--2000
(a) This Article changes the law. Under prior law, every defendant who did not answer an interdiction petition through counsel was afforded an attorney. While this Article continues to mandate the appointment of counsel in all interdiction cases, it requires the petitioner's attorney affirmatively to move for the appointment of counsel if the defendant has either filed no answer or has answered in proper person. Finally, unlike prior law, this Article requires an attorney to personally visit his client and advise him of the allegations made in the petition, the nature of the interdiction proceeding, and the client's rights and options.

Art. 4545. Appointment of examiner
After the filing of a petition for interdiction, the court may appoint an examiner who has training or experience in the type of infirmity alleged. The court may compel the defendant to submit to an examination by the examiner. Not less than seven days prior to a hearing, the examiner shall provide a written report to the court, all counsel of record, and any unrepresented parties. The report shall include such matters as the court directs. The report may consider the infirmities suffered by the defendant, the appropriateness of interdiction, including whether a less restrictive means of intervention is available, the type of interdiction that is appropriate, and any other relevant matters.

Revision Comments--2000
(a) This Article refines prior law. Under Civil Code Article 393 (1870), the court could appoint “any” person, including a health-care professional, to visit and to examine the defendant prior to an interdiction hearing. This Article preserves the substance of prior law but more fully defines the reporting requirements of any such court-appointed examiner. This Article supersedes the requirement that an examiner be appointed when the defendant is located out of this state.

Art. 4551. Judgment
A. In the judgment of interdiction, the court shall:
(1) Appoint a curator.
(2) Appoint an undercurator, unless an undercurator is not required by law.
(3) State that the powers of the curator commence only upon qualification.
(4) Direct the clerk of court to record the judgment in the conveyance and mortgage records of the parish where it was rendered.

B. In addition, a judgment of limited interdiction shall confer upon the limited curator only those powers necessitated by the interests of the limited interdict to be protected through limited interdiction and shall state that the limited interdict retains the capacity of a natural person except as expressly limited by the judgment.

C. In addition, a judgment granting or extending temporary or preliminary interdiction shall set forth the date of termination.

Revision Comments--2000
(a) This Article changes the law. This Article sets forth all matters that shall be addressed in every judgment of interdiction, including judgments of full interdiction, limited interdiction, temporary interdiction, and preliminary interdiction.
(b) The court shall appoint a curator in every judgment of interdiction. However, if the court believes that additional hearings are necessary regarding the appointment of a more permanent curator, the court can conduct such hearings after entry of the judgment of interdiction.
(c) The court need not appoint an undercurator when it appoints as curator a nonprofit curatorship program. R.S. 9:1031(F): "Notwithstanding any law to the contrary, in cases wherein the program is appointed curator ..., the appointment of an undercurator ... is not required."

Art. 4552. Recordation of notice of suit and judgment
A. The clerk of court shall cause to be recorded a notice of the filing of the interdiction suit in the conveyance and mortgage records of the parish in which the interdiction action is pending. The clerk of court shall record every judgment granting, modifying, or terminating interdiction in the conveyance and mortgage records of the parish in which the judgment was rendered.

B. Within fifteen days of his qualification, the curator shall cause every judgment granting, modifying, or terminating interdiction to be recorded in the conveyance and mortgage records of every other parish in which the interdict owns immovable property.

C. A clerk or curator whose failure to perform his duties causes damage is liable only to those who contract with the interdict and who neither knew nor should have known of the interdiction proceedings or judgment.

Revision Comments--2000
(a) This Article changes the law. This Article requires the clerk of court to record a notice of the filing of an interdiction suit in the mortgage records as well as the conveyance records of the parish in which the interdiction suit is pending. This Article allows a curator fifteen days from his qualification, rather than ten days
from his appointment, to record an interdiction judgment in parishes other than the one in which judgment was rendered. This Article relieves the curator of the obligation to record a judgment of interdiction in the parish in which judgment was rendered because the clerk of court has this responsibility.

(b) A petitioner may, but is not required to, file notices of pendency of the interdiction proceeding in parishes in which the interdict owns immovable property in accordance with Code of Civil Procedure Articles 3751 through 3753.

b) When it begins

When does curatorship “begin”? When can an eligible, qualified, and willing would-be curator be considered curator? When can an eligible and qualified would-be curator begin to exercise curatorship prerogatives? Do we have the same problem here that we had in connection with tutorship (in particular, natural tutors)? Why or why not?

Read the following Code of Civil Procedure articles:

Art. 4562. Qualification of curator

A. The person appointed qualifies as curator upon furnishing the security required by law and taking an oath to discharge faithfully the duties of his office.

B. (1) If the person fails to qualify for office within ten days from his appointment or within such other period specified by the court, the court on its own motion, or on motion of any interested person, may revoke the appointment and appoint another qualified person.

(2) The delay allowed for qualification may be extended by the court for good cause.

C. The court rendering an interdiction judgment may issue any protective order necessary to protect the interest of the interdict in the interim between the appointment and qualification of the curator.

Art. 4564. Letters of curatorship

Upon qualification of the appointed curator, the court or clerk thereof shall issue letters of curatorship in the name and under the seal of the court. The letters shall set forth the date of the qualification of the curator and the date, if any, on which the letters expire. Letters of curatorship issued to a limited curator shall also set forth the powers of the limited curator.

Revision Comments--2000

This Article changes the law. This Article requires that letters set forth the date of qualification and the date, if any, on which the letters expire. This Article requires that letters of limited curatorship set forth the powers of the limited curator.

7) Effects of curatorship
a) Incapacity of the interdict

1] Capacity before & after interdiction

a) Pre-interdiction acts

Does a judgment of interdiction affect the interdict’s capacity with respect to pre-interdiction acts? Read CC art. 394.

b) Post-interdiction acts

Does a judgment of interdiction affect the interdict’s capacity with respect to post-interdiction acts? If so, how? Read CC arts. 395, 1918 & 1482.

1] Full interdicts

a] In general

b] Donations

1/ Inter vivos

2/ Mortis causa

2] Limited interdicts

2] Timing of interdiction

When is the interdiction order deemed to be effective? Read CC art. 396.

b) Powers, rights & duties of curatorship

1] Duties the fulfillment of which is a prerequisite to qualification

a] Inventory or descriptive list

Read the following article of the Code of Civil Procedure:

Art. 4563. Inventory . . .

B. A detailed descriptive list, sworn to and subscribed by the applicant setting forth the fair market value of each item of property of the interdict, shall be permitted in lieu of an inventory in interdiction matters, unless otherwise ordered by the court.

Revision Comments--2000

This Article changes the law by permitting the substitution of a sworn descriptive list for an inventory in all cases. See Cf. C.C.P. Art. 4462. . . .

b] Security

Read the following articles of the Code of Civil Procedure:

Art. 4563. . . [S]ecurity

A. The person appointed as the curator shall furnish security conditioned on the faithful discharge of his duties. The rules provided in Articles 4101 through 4102, 4131 through 4133, and 4136 apply to interdicts. However, establishing such rules for interdicts and parents shall not apply in the context of interdiction and curatorship.

. . .
Furthermore, this Article clarifies that the provisions setting forth special security rules for "natural tutors" have no application in the context of interdiction.

Are there any exceptional situations in which security might not be required at all or a different form of security from the usual might be provided?

2] Powers, right & duties consequent (?) upon qualification

What powers, rights, and duties does the curator have over or owe to the interdict with respect to the interdict’s “person” and his “patrimony”? Read the following articles of the Code of Civil Procedure:

Art. 4566. Management of affairs of the interdict

A. Except as otherwise provided by law, the relationship between interdict and curator is the same as that between minor and tutor. The rules provided by Articles 4261 through 4269, 4270 through 4274, 4301 through 4342, and 4371 apply to curatorship of interdicts. Nevertheless, provisions establishing special rules for natural tutors and parents shall not apply in the context of interdiction.

C. A curator may accept donations made to the interdict. A curator shall not make donations of the property of the interdict except as provided by law.

D. A curator may place the property of the interdict in trust in accordance with the provisions of Article 4269.1. The trust shall be subject to termination at the option of the interdict upon termination of the interdiction, or if the interdict dies during the interdiction, at the option of his heirs or legatees.

E. A curator shall inform the undercurator reasonably in advance of any material changes in the living arrangements of the interdict and any transactions materially affecting his person or affairs.

F. A curator shall not establish or move the place of dwelling of the interdict outside this state without prior court authorization.

G. A curator may not consent to an abortion or sterilization of the interdict without prior court authorization.

H. Neither a curator nor a court shall admit or commit an interdict to a mental health treatment facility except in accordance with the provisions of R.S. 28:50 through 64.

I. A curator appointed in an order of temporary interdiction shall have no authority to admit the defendant to a residential or long-term care facility in the absence of good cause shown at a contradictory hearing.

Revision Comments--2000

(a) This Article changes the law. Although this Article retains the basic structure of Code of Civil Procedure Article 4554 as it existed prior to the 2000
Revision (by retaining extensive cross-references to tutorship Articles governing management of a minor's affairs), it omits cross-references that are not necessary or that are made elsewhere in the Revision.

(b) R.S. 9:1022-1024 set forth detailed provisions governing a curator's ability to donate the interdict's property.

Art. 4567. Expenses of interdict and legal dependents

The curator shall expend that portion of the revenue from the property of the interdict as is necessary to care properly for his person or affairs, and with court authorization, to support his legal dependents. If the revenue is insufficient for these purposes, the curator may expend the capital of the interdict, with court authorization in the manner provided by Article 4271.

8) Vicissitudes of curatorship: modification or termination

Read the following articles of the Code of Civil Procedure:

Art. 4554. Modification or termination of interdiction

On motion of the court or any person, including the interdict, the court may modify or terminate its judgment when the court finds, by a preponderance of the evidence, that the terms of that judgment are currently either excessive or insufficient or that the ability of the interdict to care for his person or property has so changed as to warrant modification or termination. Except for good cause, the court shall follow substantially the same procedures that apply to an original petition for interdiction before it modifies or terminates an interdiction judgment.

a) Modification
1] Causes of modification
2] Effects of modification
b) Termination
1] Causes of termination

What events bring about the termination of curatorship? Read CC art. 397, par. 1.

a] Death

Read CCP art. 4568 cmt. (e) (“A curator's office terminates automatically upon his death or upon termination of interdiction.”)

b] Lifting of the interdiction order

What are the consequences, juridically speaking, of the termination of curatorship?

a] Accounting of the curator to the interdict

Read the following article of the Code of Civil procedure:
Art. 4569. Post-judgment monitoring and reporting

A. A curator with responsibility for affairs of the interdict shall file an account annually, upon the termination of his office, and at any other time ordered by the court. A curator with responsibility for the person of an interdict shall file a personal report describing the location and condition of the interdict annually, upon the termination of his responsibilities, and at any other time ordered by the court. At the time of filing, the curator shall send copies of any required account or personal report by first class United States mail postage prepaid to the undercurator and any successor curator. The provisions of Articles 4393 and 4398 shall apply to accounts by curators.

B. The court may appoint an examiner at any time to review an account or personal report of the curator, to interview the interdict, curator, or undercurator, or to make any other investigation. At any time, the court may appoint an attorney to represent the interdict.

Revision Comments--2000

(a) This Article changes the law. This Article omits any cross-reference to Code of Civil Procedure Article 4392, because that Article makes final accounts merely permissive in most cases. This Article changes the law by mandating the filing of a final account or personal report at the termination of every curator's appointment. This Article eliminates the requirement that all accounts be served and homologated in accordance with Code of Civil Procedure Articles 4394 through 4396.

(b) The curator's personal report should, among other things, describe whether there has been a material change in the functional ability of the interdict to care for his person and affairs.

(c) The accounting and personal-reporting requirements applies to all curators, including temporary and preliminary curators.

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