

Tutor when a father in law be such to his stepson?
1 Tutor testametary becoms hushand must find caution
2 but preferred to every other Tutor even at the distance of
seven years from the testator's death

civil Law. A Stepfather cannot be Tutor Dative to his Stepson 6 July
1627 Campbell contra Campbell.

A Tutor Dative, as well as a Tutor Testamentary, may be given to natural
Children and Bastards. The King gives Tutors to Strangers born in another
Realm, in so far as concerns their Estates in Scotland, tho' none could be see-
wed Tutors of Law to them here 17 December 1627 Donaldson contra Bro-
stair lib. 1. tit. 6. s. 11.

~~Tutor Dative is preferred to Tutor Testamentary, unless the latter be
confirmed by the Court, or unless the Tutor Dative be a stranger born in another
Realm, in so far as concerns their Estates in Scotland, tho' none could be see-
wed Tutors of Law to them here 17 December 1627 Donaldson contra Bro-
stair lib. 1. tit. 6. s. 11.~~

Sect. 4.

Wherein Tutors Testamentary, Tutors of Law and Tutor
Dative differ.

All of these Tutors act generally by themselves for their Pupils, without their
Concurrence, but they differ in the following Particulars.

A Tutor Testamentary is capable to act by Virtue of the simple Nomination, tho'
the Testament be not confirmed, without being obliged to find surety nor provide
salvum fore, or to give his Oath de fidei administratione. Stair lib. 1. tit. 6. s. 7.
because it is presumed that the Parent who pitched upon him was convinced of
his Sufficiency and Fidelity. Tho' if a Tutor Testamentary become lapsus bonis, or
Dative may get him removed, unless he find Caution. Tho' Tutors of
Law must find Caution before they act Stair ibid. s. 9. And Tutors Dative should
both find Caution and make Faith de fidei which Oath de fidei by Tutors Dative
is unknown in the civil Law; and even with us it is never required. The Sufficiency
of the Cautioner is intrusted to the Magistrate Stair ibid. s. 11. who is ordinarily
very easie about it: for where there are more Tutors than one, they are taken
Cautioners for one another.

According to the Usage of France, no Tutor is obliged to give Security, Les
Loix Civiles &c. tom. 1. part. 1. liv. 2. tit. 1. Sect. 1. Art. 2. And tho' by the Law of
England he that is constituted Guardian by the Magistrate or Ordinary, is
bound to put in Security, and to make Oath to administer the Affairs of the
Minor to his Profit and Benefit Cowel. Justit. lib. 1. tit. 24. Yet in Practice this
Law is not now observed, to the great Detriment of many Minors, whose Effects
insolent Actions get Possession of and are never able to account for them. Nor
are Tutors now sworn in England to the faithfull Execution of their Office.

2^d As a Minor's Disposal of his Estate is ever preferred to the blind Disposition
of Law l. 29. ff. de reg. jur. which only takes place when he neglects to set
his House in Order: So a Tutor Testamentary is always preferred to the Tutor of
Law or Tutor Dative; unless there be any Cause which requires the making of
another Choice, as if some Change had afterwards happened either in the Morals
or Substance of the Person whom the Father had named l. 3. s. 3. ff. de penic.
& Admin. tit. yea a Tutor Nominatè having forborn to accept or act for seven
years was preferred to a Tutor Dative actually constitute and in Possession of
the Custody of the Pupils 17 December 1631 Auchterlony contra Auchterlony.

even

even tho' the Tutor Nominatè was Curator to a Person against whom the Pupil
had an Action 6 July 1627 Campbell contra Campbell, no Prejudice being sustain-
ed by the Tutor Nominatè his delaying to accept and meddle. But one of more
Tutors Testamentary having renounced the Office, and the Renunciation being
once produced before the Lords, was not allowed to claim the Benefit of it upon
his taking up and passing from the Renunciation, and desiring to be read-
mitted with the Rest 6 July 1627 Campbell contra Campbell. If a Tutor
Nominatè who for some Time excluded the Tutor of Law, doth cease to be

2 Tutor by Death, or a Female Tutrice Testamentary fall from the Office by her
marrying again, the Tutor of Law may serve within Year and Day of the
others Death or Marriage, when the Impediment hindring his Service was
removed: according to the Rule contra non valentem agere &c. till which
Year elapses, there is no place for a Dative 15 July 1631 Grant contra Grant
10 January 1670 Gray contra Lady Dallegerno. When a Tutor Nominatè is
of less Age, the Tutor of Law should take Place, till the Nominatè arrive at
Majority 1 June 1575 L. Findlater contra the Lady. In which Case the
Nomination of the Minor, is suspended upon this implied Condition, if he
live till he is Major. Again the Tutor of Law is always preferred to a
Dative 10 Feb. 1547. 22 March 1551. & 10 Decemb. 1563 Sinclair contra
Gordon. And where a Tutor Testamentary renounceth or dies, the King
cannot give a Dative within the Year, to the prejudice of the Tutor of
Law 1 Feb. 1559 Davidson contra Adamson. Yea a Tutor of Law being
devoid and returned within the Year without finding Caution, was allowed
after the expiring of the Year to purge his Neglect to give Surety, and pre-
ferred to a Dative who had found Caution: Seeing Matters were still entire
and the Pupil had received no Prejudice 29 June 1632 Grovin contra
Eldick. Differences about Preference to the Office of Tutor cannot be com-
promised, or taken away by Arbitration. Therefore a Deere est Arbitral be-
twixt two Parties contending for the Office, upon a Submission of their
Claims, and what Satisfaction either of them should do to the other for his
Right, was summarily declared null in a Suspension, without Necessity of
a Reduction 19 November 1624 Ramsey contra Play.

In France, the Usage is that the Relations of the Minor are called to
appear before a Judge in Order to see such Tutor assigned: and the Will
of the Father who had nominated a Tutor by his Testament is not im-
plicitly followed, nor yet the Order of Proximity of Blood. But the
Relations are at Liberty to make another Choice, if they think there is
Occasion for it for which Reason all Tutorships in France are said to be
Dative Les Loix Civiles &c. tom. 1. part. 1. liv. 2. tit. 1. pr.

A Father may in his Liege Poustie, name Tutors to his Children with
this Quality, that they shall be neither liable for Omissions, nor yet in Soli-
dum, but only each for himself Act. 2. lib. 6. Par. R. 4. A qualified No-
mination of that Nature on Testated Hands good as to the Nomination,
but

but