

THE WOMAN IN THE ROMAN SOCIETY

Ideals – Law – Practice

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Meeting 4 Legal standing of a woman in Roman law. Women under authority and autonomous. Guardianship (Capacity to Legal Transactions / Legal Capacity)

Suggested readings:

1. Gaius, *Institutions*, book 1
2. Lefkowitz & Fant, Chapters IV & V

A3: LEGAL STANDING IN THE CLASSICAL TIMES

2. Deterior conditio...

Dig.1.5.9 Papinianus 31 quaest.: In multis iuris nostri articulis deterior est conditio feminarum quam masculorum. Dig.1.5.10 Ulpianus 1 ad sab. Quaeritur: hermaphroditum cui comparamus? et magis puto eius sexus aestimandum, qui in eo praevalet. Papinian, Questions, book 31: There are many points in our law in which the condition of females is inferior to that of males. Ulpian, Sabinus, book 1: Question: with whom is a hermaphrodite comparable? I rather think each one should be ascribed to that sex which is prevalent in his or her form.

2. On guardianship (Gaius, *Institutes* I. 144-5, 190-1. Tr. Gordon and Robinson. L)

(144) Where the head of a family has children in his power he is allowed to appoint guardians for them by will. That is, for males while under puberty but for females however old they are, even when they are married. For it was the wish of the old lawyers that women, even those of full age, should be in guardianship as being scatterbrained (*propter animi levitatem*). (145) And so if someone appoints a guardian in his will for his son and his daughter and both of them reach puberty, the son ceases to have a guardian but the daughter still continues in guardianship. It is only under the Julian and Papian-Poppaeian

Acts that women are released from guardianship by the privilege of children. We speak, however, with the exception of the Vestal Virgins, whom even the old lawyers wished to be free of restraint in recognition of their priesthood; this is also provided in the Twelve Tables.

(190) There seems, on the other hand, to have been no very worthwhile reason why women who have reached the age of maturity should be in guardianship; for the argument which is commonly believed, that because they are scatterbrained they are frequently subject to deception and that it was proper for them to be under guardians' authority, seems to be specious rather than true. For women of full age deal with their own affairs for themselves, and while in certain instances that guardian interposes his authorization for form's sake, he is often compelled by the praetor to give authorization, even against his wishes. (191) For this reason, a woman is not granted any action against her guardian on account of the guardianship; but where guardians are dealing with the affairs of male or female children, when the wards grown up the action on guardianship calls the guardians to account.

3. On guardianship (*Tituli ex corpore Ulpiani III.1 L*)

Guardians are appointed for males as well as for females, but only for males under puberty, on account of their infirmity of age; for females, however, both under and over puberty, on account of the weakness of their sex as well as their ignorance of legal matters.

G. 1.115: ... if anyone wishes to get rid of the tutors, she has and find another, she makes a mock sale with their authorization. Then having been transferred back again from the other partying the sale to the man whom she wants and having been mancipated by him, she begins to have as her tutor the man by whom she was manumitted, who is called a fiduciary tutor. 173: Besides it has been permitted to women by a decree of the Senate to request another tutor in place of one who is absent, and when this is requested, the first one ceases to be tutor. It does not make any difference how far away that first tutor is.

4. Legal gender definitions

D. 50.16.1 (Ulpianus, *Commentary on the Edict*, book 1) This expression 'if anyone' embraces males as well as females

D. 50.16.152 (Gaius, *On the Julian and Papian Law*, book 10): There is no doubt that in the name 'man' (*homo*), the feminine as well as the masculine is included

D. 50.16.195 pr. (Ulpianus, *Commentary on the Edict*, book 46) An expression of language in terms of masculine sex is generally extended to both sexes.

D. 50.16.84 (Paul, *On works of Vitellius*, book 2): In the name 'son' (*filius*) we understand all children.

D. 50.16.116 (Iavolenus, *Letters*, book 4): In 'whatever other son or son of my son be my heir': Labeo thinks a daughter is not covered, Proculus the

opposite. Labeo seems to me to be paying attention to the literal meaning of the words, Proculus to the intention of the testator. He replied 'I do not doubt that the opinion of Labeo is not true'.

D. 50.16.52 (Ulpianus, *Commentary on the Edict*, book 46): In the name 'patron', a patroness is also included.

D. 50.16.195.2; 5 (Ulpianus, *Commentary on the Edict*, book 46): Strictly speaking we call a familia several persons, who are subjected under the power of one person, either by nature or by law, as for instance the father of the family (paterfamilias), the mother of the family (materfamilias), the son of the family (filiusfamilias), the daughter of the family (filiafamilias) and those who follow them in succession, as for instance, the grandsons and granddaughters and so on. However, he who has dominion in the home is called paterfamilias, and he is called by this name correctly, even though he does not have a son, for we are describing not only the person, but also the legal status (...) And when paterfamilias dies all persons (*capita*: heads) that were his subjects begin to have their individual families: for individuals succeed to the name of fathers of family. And it will happen likewise in the case of he who has been emancipated, for even this one, having been legally made independent (*sui iuris*, autonomous), has his own family (...) 5. However, a woman is both the beginning (*caput*: head) and the end (*finis*) of her family.

5. Capacity to Legal Transactions and Court Proceedings (D. 45.1.121.1, Papinian, Book II of Replies)

In order to create an effective stipulation, a woman, who was about to marry a man, stipulated two hundred from him, if he should resume cohabitation with his concubine during the marriage. I gave an opinion that there was no reason why, if the condition was fulfilled, the woman should not sue on the stipulation, since the promise was based on sound morals.

6. Weak in mind? Women before the Law:

D. 1.16.9.5 (Ulpian) A provincial governor should in general grant advocates to those requesting them: to women, or wards or those weak in other respects, or to those who are not in their right mind, if someone else requests on their behalf.

D. 2.13.1.5 (Ulpian) Aid will be given to those, who having made a mistake on account of their age or rusticity, or on account of their sex, have not given formal notice

D. 2.8.8.2 (Paulus) ... Help must be given to the minor under 25 years, and perhaps also to a woman on account of her inexperience.

D. 22.6.9 pr. (Paulus) The rule is that ignorance of the law does hurt a person, but ignorance of fact does not. Let us see therefore, in what types of situation

this can hold true, having mentioned in advance that minors under 25 are allowed to be ignorant of the law. This is also said in regard to women in certain cases, on account of the weakness of their sex; and so wherever there is not a delict but ignorance of law they are not harmed.

D. 50.17.110.4 Paulus: Aid must be given to woman when they are being defended in court, not so that they more easily practice legal chicanery!.

7. The problem of Senatus Consultum Velleianum

D. 16,1,1,pr.-1: Paul, Edict, book 30,
The Velleian Decree of the Senate very fully provides that women cannot become sureties for anyone.

For just as by custom the undertaking of civil duties by them has been denied to women, and these [undertakings] for the most part are not valid by operation of law, so much the more had that power to be taken away from them in which not only their work and mere employment was concerned but even the risk of the family property.

D. 16,1,2pr.-3: Ulpian, Edict, book 29,: Now, first in the reign of the deified Augustus, and then soon afterward in that of Claudius, it was forbidden by imperial edict for women to intercede on behalf of their husbands. Thereafter a senatus consultum was enacted by which help was given in a very full manner to all women; the wording of the senatus consultum follows: "Because Marcus Silanus and Velleus Tutor, the consuls, had written what ought to be done concerning the obligations of women who became debtors on behalf of others, the senate lays down the following: Although the law seems to have said before what pertains to the giving of verbal guarantees and loans of money on behalf of others for whom women have interceded, which is that neither a claim by these persons nor an action against the women should be given, since it is not fair that they perform male duties and are bound by obligations of this kind, the senate considers that they before whom the claim would be brought on this matter would act rightly and consistently if they took care that with regard to this matter the will of the senate was observed".

And so let us examine the terms of the senatus consultum, having first praised the foresight of the most distinguished order [the senate], because it brought help to women, seduced and deceived in many cases of this kind, on account of the weakness of their sex.

But relief is only granted to them if they have not been guilty of deceit; for this the deified Pius and Severus have laid down by rescript. This is because relief is given to those who have been deceived, not to those who deceive. This has also been stated in a Greek rescript of Severus in the following terms: "The decree of the senate does not give assistance to women who are guilty of deception"; for it was the vulnerability of women, not their cunning that deserved assistance.

8. Women in courts: Carfania...

Valerius Maximus, VIII 3.2.1-2

Nor should I be silent even about those women whose nature and matron's sense of shame did not avail them so that they would be silent in the forum and in legal cases.

1. Maesia of Sentunum, a defendant, pled her own case with the Praetor Lucius Titius, convening the court and a very great gathering of the people being present. She pursued all the manners and points of her defence not only diligently but also bravely, and she was acquitted on the first actio and by almost all voted. They called her Androgyne, because she bore a manly spirit under the appearance of a woman.

2. But Carfania, the wife of senator Licinius Buccio, quick to engage in lawsuits, always made speeches on her own behalf before the Praetor, not because she lacked advocates, but because she abounded in impudence. And so by her unusual barking in the forum in continually harassing the tribunals, she ended up being the most notorious example of female calumnia, to the point where the name of Carfania is thrown at women of shameless habits and a reproach.

D. 3.1.1.5 (Ulpian) In the second section, an edict is published in regard to those who are not to bring a request on behalf of others. In this edict the praetor made particular mention of sex and misfortune, and likewise he marked with infamy persons conspicuous due to shameful behaviour. In regard to sex: he prohibits women from bringing a request on behalf of others. And indeed there is a reason for prohibiting them: so that women not get themselves mixed up in other people's lawsuits contrary to the modesty suitable for their sex, and so that woman not discharge men's duties. But the origin (of the prohibition) was introduced by Carfania, a very wicked woman, who by bringing requests without shame and disturbing magistrate, provided the reason for the edict...

8. Women in court: the reality

Sent. Pauli 1.2.2: A woman is not prohibited from undertaking a legal representation in the court (*cognitoria opera*) in her own affair. D. 3.3.41 (Paulus) it is permitted for women to act sometimes on behalf of their parents, when there is a legal hearing, if by change illness or age impedes their parents, or they do not have anyone else who can act for them.

9. Husband's adultery (Codex 9.9.1, Severus & Caracalla to Cassia, ad 197)

The Julian Law declares that wives have no right to bring criminal accusations for adultery, even as regards their own marriage, for while the law grants this privilege to men, it does not concede it to women.