ABSTRACT

The author argues that the mother as guardian of her prepubescent children in Roman law existed since the second century CE and not since 390 CE, as maintained by most modern scholars. Moreover, both in Rome and in some Oriental provinces of the Roman Empire (there is evidence from Egypt and Arabia), in the classical period of Roman law the mother could act as administrator aiding the appointed guardian. In the Greek speaking provinces of the empire, the latter was called epakolouthetria. The author denies that the mother as administrator aiding the guardian in Rome and the provincial epakolouthetria are generically interrelated.
1. THE MOTHER AS GUARDIAN OF HER CHILDREN IN ROME,
BEFORE AND AFTER 390 CE

It is a much discussed issue whether, in Rome, a mother could be the legal guardian of her children who were below the age of puberty.¹ Most legal historians deny such capacity prior to 390 CE,² the year in which a constitution of Valentinian, Theodosius and Arcadius granted for the very first time mothers the capacity to act as guardians.³ The constitution is preserved in CTh. 3.17.4pr. = C. 5.35.2pr. (Valentin., Theodos. et Arcad. AAA. Tatiano PP., a. 390 CE):

Matres, quae amissis viris tutelam administrandorum negotiorum in liberos postulant, priusquam confirmatio officii talis in eas iure veniat, fateantur actis [only in C. 5.35.2pr. it is added, in comparison with CTh. 3.17.4pr.: sacramento praestito] ad alias se nuptias non venire.

Mothers who have lost their husbands and ask to be appointed to manage the affairs of their children must, before they can be legally appointed to perform such duty, make a statement [under oath], made of record, that they will not remarry [Translation Blume 2009].

The *communis opinio* is also claimed to find support in the following texts:

A: C. 5.35.1 (Alex. A. Otaciliae, a. 224 CE): Tutelam administrare virile munus est, et ultra sexum femineae infirmitatis tale officium est.

The performance of the duty as guardian is the work of a man, and (that duty) is unsuited to the weaker, feminine sex [Translation Blume 2009].

B: D. 26.1.16pr. (Gai. 12 ad ed. provinc.): Tutela plerumque virile officium est. Guardianship is, for the most part, a masculine office.

¹ I have extensively examined this question in GAGLIARDI 2012. In this paper I return once more to the proposed topic with some new observations. Unless otherwise indicated translations are mine.
³ On the later developments of the Justinianic rule, see C. 5.35.3 (Iust., a. 530 CE); Nov.Iust. 22.40 (a. 535 CE); 89.14 (a. 539 CE); 94.1-2 (a. 539 CE); 118.5 (a. 543 CE). Cf. also the Syro-Roman Lawbook L. 8 (and P. 3d, Ar. 3, Arm. 5) and Interpr. CTh. 3.17.4. The Justinianic position is discussed in the following literature: FAYER 1994, 443; CARBONE 2013, 121ff.
C: D. 26.1.18 (Ner. 3 reg.): Feminae tutores dari non possunt, quia id munus masculorum est, nisi a principe filiorum tutelam specialiter postulent.

Women can not be appointed as tutors, because this is a duty for males, unless they petition the emperor specially for the tutelage of their sons [Translation S. Hart, in WATSON 1985].

While C. 5.35.1, part of a rescript of Alexander Severus to a woman called Otacilia, seems to unequivocally support the prevailing view, two other cases do not: doubts are cast, in the case of D. 26.1.16pr., by the term «plerumque» (“for the most part”) as well as by the expression «nisi a principe filiorum tutelam specialiter postulent» (“unless they petition the emperor specially for the tutelage of their sons”) in D. 26.1.18. Both problematic passages have been assumed by the champions of the prevailing view to be interpolated. Yet their authenticity seems corroborated by another text: D. 38.17.2.25 (Ulp. 13 ad Sab.):

Quid si pater eis peti prohibuerat tutorem, quoniam per matrem rem eorum administrari voluit? incidet, si nec petat nec legitime tutelam administrat.

What if the children’s father had prevented her (i.e. the mother) from making application for a tutor since it was his wish that their mother should have the administration of their property? If she does not make application or administer the tutelage legally, she will fall [under the penalty] [Translation S. Jameson, in WATSON 1985].

In this text, authored by Ulpian, a father has provided in his will that no guardian should be appointed for his underage children; rather, their assets should be administered by their mother. It is asked if the failure of the mother to apply for the appointment of guardian subjected her to sanctions introduced by a constitution of Septimius Severus, according to which a woman, by failing

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4 The words «nisi a principe filiorum tutelam specialiter postulent» referred, according to MASIELLO 1979, 11ff., to rules that would have been in force at the time of Neratius and which were later abrogated.

5 D. 26.6.2.2 (Mod. 1 excus.): «Divus Severus Cuspio Rufino. Omnem me rationem adhibere subveniendis pupilli, cum ad curam publicam pertineat, liquere omnibus volo. Et ideo quae mater vel non petierit tutores idoneos filiis suis vel prioribus excusatis reiective non confestim aliorum nomina dederit, ius non habeat vindicandorum sibi bonorum intestatorum filiorum» (Translation S. Hart, in WATSON 1985: “The deified Severus to Cuspius Rufinus. I wish it to be clear to everyone that I take all possible care to help pupilli, since this is a matter of public concern. And, therefore, any mother who does not request suitable tutors for her sons or who does not without delay put forward the names of others when the previous tutors have been exempted or rejected, will have no right of vindicatio over the property of her sons if they die intestate”). Cf. D. 38.17.2.28 (Ulp. 13 ad Sab.): Filiiis autem non petendo punitur, utique et filiabus. Quid si nepotibus? Similiter non petendo punitur (Translation S. Jameson, in WATSON 1985: “She (i.e. the mother) is penalized by not making application on behalf of her sons and undoubtedly in the case of her daughters too. What if (the application is) on behalf of grandparents? She is likewise punished for failure to make application”).
to ask for a guardian for her own children, is deprived of the benefit under the senatus consultum Tertullianum. Ulpian responds that if the mother lawfully administers the guardianship herself she should not be deprived of the benefit of the aforesaid senatus consultum. Granted, in this case too the «problematic» text—«Si nec petat nec legitime tutelam administrat» (‘…if she does not make application or administer the tutelage legally’)—may also be claimed to be interpolated, but the interpolative explanation gradually loses force as the number of classical texts that debilitate the communis opinio grows.

So rather than trying to reconcile earlier evidence with what the 390 constitution is assumed to be saying, let us reexamine what it actually says: viz. if it really granted mothers for the very first time the capacity to act as guardians of their own children. In my view this is not the case. CTh. 3.17.4pr., rather than introducing a completely new institution, offered modification to an existing one.6 With this alternative interpretation, we will be able to vindicate the authenticity of the texts that have formerly been claimed interpolated. Even before 390 CE, it will be argued, mothers were allowed to assume the guardianship of their own children.

Let us turn to the text: According to CTh. 3.17.4pr. = C. 5.35.2pr., before the mother should be appointed guardian, before the confirmatio officii is undertaken («priusquam confirmatio officii talis in eas iure veniat») she should state that she will not remarry. The text introduces the mother’s obligation of submitting that statement, not however, the confirmatio itself, that already existed before. Already before 390 CE, the mother’s position as guardian had to be ratified by an imperial order after it had been ascertained that there was no statutory or testamentary guardian, and that no one else could challenge the appointment, claiming a superior right to that office.7

The main innovation introduced by the constitution did not concern the confirmatio but rather the obligation of the mother to solemnly guarantee (in C. 5.35.2pr., it is stated: swear) that she would not be remarried. Another in-

6 This has been proposed by CRIFO 1964, 87ff. It is probable that, if the constitution had introduced the possibility for mothers to be guardians for the very first time, it would have stated something like: «Matres amissis viris tutelam administrandorum negotiorum in liberos postulare possunt» aut similis.

7 This last rule is confirmed in CTh. 3.17.4,3 = C. 5.35.2.3: His illud adiungimus, ut mulier, si aetate maior est, tunc demum petendae tutelae ius habeat, cum tutor testamentarius vel legitimus defuerit vel privilegio a tutela excusetur vel suspicii genere submoveatur vel ne suis quidem per animi aut corporis valetudinem administrandis facultatibus idoneus inveniatur (Translation BLUME 2009: “We also add that a woman who is of age shall have the right to ask for the guardianship only when there is no testamentary or statutory guardian, or when any such person is excused by reason of his privilege, or when he is excluded on account of being suspected, or when he is unable to manage his own property on account of mental or bodily ill health”).
novation relates to the sanction. If the mother does marry anew, a lien will be placed on the assets of her new husband that would curb *mala gestio* of the assets of her underage children:

CTh. 3.17.4.2 = C. 5.35.2.2:

Sed ne sit facilis in eas post tutelam iure susceptam inruptio, bona eius primitus, qui tutelam gerentis adfectaverit nuptias, in obligationem venire et teneri abnoxia rationibus parvulorum praecipimus, ne quid incuria, ne quid fraude depereat.

And in order that a woman who has lawfully undertaken a guardianship may not easily violate the said condition, we direct that the property of a man who wants to marry such woman who carries on the guardianship shall be pledged and held responsible for the proper management of the property of the children, lest anything be done carelessly or be lost through fraud [Translation BLUME 2009].

The aforesaid explanation may cast some light on the term «plerumque» of D. 26.1.16pr.: guardianship was indeed *plerumque* an *officium virile*, yet even prior to 390 CE, it could be undertaken by women, provided that it was ratified officially: *confirmata*. The text of D. 26.1.18 becomes clearer as well: already before 390 CE mothers could “petition the emperor specially for the tutelage of their sons” (*a principe filiorum tutelam specialiter postulent*). The same picture, that as early as the second century CE mothers could under certain circumstances be officially appointed guardians of their own children through an imperial order, is also attested in the passages of Gaius and Neratius quoted above. As already stated, if there were male relatives their right to act as guardians was superior to the mothers’. Therefore, she could be appointed as such only in their absence.

In light of the foregoing, it is also possible to understand D. 38.17.2.25, where it is said not only that the mother could *legitime tutelam administrare* (“administer the tutelage legally”), but also that she had to request the appointment of a guardian (*tutorem petere*): if there were others qualified to act as guardians, the mother was under the obligation to apply for their appointment, lest she would forego the benefit of becoming her childrens’ heir according to the *senatus consultum Tertullianum*. If no qualified candidates were available, the mother was allowed to apply for that position herself. As soon as the mother was granted the *confirmatio*, she would lawfully assume the guardianship and, therefore, continue to enjoy the said benefit. The mother would, on

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8 So, again, CRIFÒ 1964, 92.
9 CTh. 3.17.4.3 = C. 5.35.2.3.
the other hand, forfeit the benefit if she assumed the guardianship in breach of the prescribed procedure.\footnote{In 315 CE, through a constitution, Constantine permitted a mother to inherit from her son, who died after reaching the puberty, even though she had not asked for him the appointment of a guardian when he was under the age of puberty. C. 6.56.3: *Matres, quae puberes amiserunt filios, licet impuberibus eis tutores non petierunt, praescriptione non petiti tutoris ad excludendam eorum successionem minime debere praescribi certum est* (Translation BLUME 2009: “It is certain that mothers who have lost sons over the age of puberty, though they did not ask for guardians for them while still below the age of puberty, cannot be excluded from their inheritance by setting up the plea of such failure to ask for guardians for them”).}

The said rules could, however, be circumvented: we are informed elsewhere that the mother was not obligated to request the appointment of a guardian if she was very young or if the children were without any property.\footnote{D. 38.17.2.26 (Ulp. 13 ad Sab.); D. 38.17.2.45 (Ulp. 13 ad Sab.); D. 38.17.2.46 (Ulp. 13 ad Sab.); C. 2.34.2 (Diocl. et Maxim., a. 294 CE).} A particular strategy had been developed by Roman jurisprudence from the latter rule: the father disinherited the children and appointed the spouse fiduciary heir, requesting her with a *fideicommissum* to return the assets to the children at a later stage, namely when they reached puberty.\footnote{D. 28.2.18 (Ulp. 57 ad ed.); D. 36.1.76.1 (Paul. 2 decr.); D. 38.2.12.2 (Ulp. 44 ad ed.); D. 38.17.2.46 (Ulp. 13 ad Sab.). On this topic, WATSON 1971, 35 ff.; DIXON 1988, 47ff.; ARJAVA 1998b, 109.} Since the children appeared to be without property, there was no need for a guardian and the mother, that is the fiduciary owner, administered the assets. The mother would thus become the *de facto* guardian of her children without an official act.

We may thus conclude that already in classical Roman law the mother could, by putting forward the relevant request to the emperor, become guardian of her own children. The wording of C. 5.35.1 does not stand in the way of accepting this assumption. The said rule becomes evident in yet another text, C. 5.31.6 (Alex. A. Otaciliae, a. 224 CE):

*Matris pietas instruere te potest, quos tutores filio tuo petere debes, sed et observare, ne quid secus quam oportet in re filii pupilli agatur. petendi autem filii curatores necessitas matribus imposita non est, cum puberes minores anno vicesimo quinto ipsi sibi curatores, si res eorum exigit, petere debeant.*

Your motherly *pietas* can teach you whom to ask to be guardian of your son, and to see that nothing is done in connection with his property that ought not to be done. No duty is, however, imposed on mothers to seek curators for their sons since children over the age of puberty but younger than 25 years should, if their property demands it, personally ask for the appointment of curators for themselves [Translation BLUME 2009].
Just like C. 5.35.1, 5.31.6 was addressed to a woman named Otacilia. It was therefore most likely taken from the same constitution as C. 5.35.1.\textsuperscript{13} As such it may shed light on that former text: Otacilia had raised some queries to the emperor pertaining to her children, one of whom was under the age of puberty. The others were—to the best of my knowledge—under the age of twenty-five. As regards the child under the age of puberty, the mother presumably requested to be authorised to assume the role of guardian herself. The Emperor, Alexander Severus, replied with a seemingly general constitution, of which only two excerpts have been retained in C. 5.35.1 and 31.6. Dealing with Otacilia’s request, the emperor started out from the general assumption that under Roman law guardianship as a \textit{virile munus} was reserved to male persons only. Accordingly, Otacilia was denied that position not because her appointment was legally impossible, but because in that specific case there were male persons entitled to assume the office.\textsuperscript{14} Nevertheless, the emperor set forth that pursuant to the \textit{pietas} the mother was assumed to feel for her children, she could choose the guardians and, furthermore, it would be legally permissible for her to supervise the activity of the appointed guardians by controlling their work.

Finally, I wish to emphasise that from a passage of Papinian, it is possible to conclude—in corroboration of the foregoing—that it was not possible under Roman law for the \textit{pater} to appoint the mother guardian of the children by will and any decision of the provincial governor allowing such appointment should be overturned.\textsuperscript{15} D. 26.2.26pr. (Pap. 4 \textit{resp.}):

\begin{quote}
Iure nostro tutela communium liberorum matri testamento patris frustra mandatur, nec, si provinciae praeeses imperitia lapsus patris voluntatem sequendum decreverit, successor eius sententiam, quam leges nostrae non admittunt, recte sequetur.
\end{quote}

In our law it is of no effect for the tutelage of the children they have in common to be entrusted to the mother by the father’s will: and if the governor of the province, erring through ignorance, has decreed that the father’s wish must be carried out, it is not proper for his successor to follow his decision, which our laws do not allow [Translation S. Hart, in \textsc{Watson 1985}].

It needs be maintained that this response by Papinian was precisely aimed at the existing customs in the Oriental provinces of the empire, discussed in § 3 hereunder, practices which could not apply to Roman citizens.

\textsuperscript{13} Cf. \textsc{Rotondi 1922, 203f.}

\textsuperscript{14} So, \textsc{CriFò 1964, 122.}

\textsuperscript{15} This is affirmed in a general way also in D. 26.3.1.1 (Mod. 6 \textit{excus.}).
2. THE MOTHER AS ADMINISTRATOR ASSISTING THE GUARDIAN
IN ROME

Legal sources from the classical period demonstrate that mothers in Rome could assist guardians. Apart from C. 5.31.6, already discussed earlier, we may take into consideration D. 3.5.30(31).6 (Pap. 2 resp.):

Quamquam mater filii negotia secundum patris voluntatem pietatis fiducia gerat, tamen ius actoris periculo suo litium causa constituendi non habebit, quia nec ipsa filii nomine recte agit aut res bonorum eius alienat vel debito rem impuberis accipients pecuniam liberat.

Although a mother, relying on her sense of pietas, may manage her son’s affairs in accordance with his father’s wishes, yet she will not have the right to appoint counsel to engage in lawsuits at her risk, because she herself does not have the right to litigate, to alienate items of his property, or to discharge a debtor of the impubes by receiving his money [Translation T. Kinsey, in WATSON 1985].

In the case considered in this passage, the mother was not formally appointed guardian by way of an imperial decree. The pater set out by will that she should administer the legal affairs of their underage son. According to Papinian the intention of the testator has to be respected. The jurist added, however, that the mother was still banned from appointing a procurator ad litem for her underage child, from selling his assets and from validly receiving money from his debtors—since these were all acts reserved for a guardian. The same principle, which we have already encountered in D. 3.5.30 (31).6, is stated in D. 26.7.5.8 (Ulp. 35 ad ed.):

Papinianus libro quinto responsorum ita scribit: pater tutelam filiorum consilio matris geri mandavit et eo nomine tutores liberavit. non idcirco minus officium tutorum integrum erit, sed viris bonis conveniet salubre consilium matris admittere, tametsi neque liberatio tutoris neque voluntas patris aut intercessio matris tutoris officium infringat.

Papinian, in the fifth book of his Replies, writes thus: A father enjoined that the tutelage of his sons should be managed in accordance with their mother’s guidance, and by these words he released the tutors from their obligation. The office of the tutors is not on that account in any way diminished, but it will be proper for a man of good character to accept the mother’s guidance as beneficial, notwithstanding that neither the releasing of the tutor from obligation nor the father’s wish nor the mother’s intervention lessens the tutor’s office [Translation S. Hart, in WATSON 1985].

The father provided in his will that the guardianship was to be undertaken consilio matris and that the guardians had to be exempted from any liability. Yet Papinian declares this provision invalid; the mother may certainly give
her own advice and even run the sons’ affairs, but this would never lead to an exemption of the guardians from the liability deriving from their munus.

D. 26.7.5.8 is just one of several classical and post-classical sources showing that mothers not only regularly proposed their assistance to guardians, but also substituted them in de facto administering the assets of the children, in agreement with the guardians, of course. How was the liability for mala gestio in this case? Were the guardians liable for bad administration in case of the mother’s negligence? Under these circumstances, official guardians could entrust the mother with the administration of the children’s estate, conditional upon the granting of adequate guarantees, by having recourse to stipulatio or pledge. Such a case is treated in C. 5.51.9 (Diocl. et Maxim. AA. et CC. Iulianus, a. 293 CE): a guardian entrusted the mother with the administration of the estate of her underage child and the mother had promised the indemnitas through stipulatio. Upon this arrangement, the ward asked if he could bring an action against his mother’s heirs through an actio ex stipulatu. The emperors replied that he had to seek redress against the guardian using the actio tutelae, since the actio ex stipulatu could be brought only by the guardian against the mother’s heirs.

Tutorem quondam, ut tam rationem quam si quid reliquirum nomine debet reddat, apud praetorem convenire potes. quamvis enim matrem tuam susceptis bonis vestris indemnitatem pro hac administratone tutori se praestitum promisisse proponatur, tamen adversus tutorem tibi tutelae, non adversus matris successores ex stipulatu competit actio.

You may sue your former guardian before the praetor both for an accounting and to pay you what is due you. For although it is stated that your mother received your property and promised (by stipulation) to hold the guardian harmless by reason of her management thereof, still, you have an action on the guardianship against the guardian, but you do not have an action on the stipulation against the heirs of your mother [Translation BLUME 2009].

Similar cases may be found in D. 16.1.8.1 (Ulp. 29 ad ed.):

Si mulier intervenerit apud tutores filii sui, ne hi praedia eius distraherent, et indemnitatem eis repromiserit, Papinianus libro nono quaestionum non putat eam intercessisse: nullam enim obligationem alienam recepisse neque veterem neque novam, sed ipsam fecisse hanc obligationem.

If a woman appears before the tutors of her son to prevent them from selling his estates and promises to indemnify them in return, Papinian, in the ninth book of his Quaestiones, does not think that she has interceded; for she has taken on no obligation, whether old or new, of another, but she herself has contracted this obligation [Translation R. Evans Jones, in WATSON 1985].
in C. 4.29.6.pr. (Alex., a. 228 CE):

Si mater, cum filiorum suorum gereret patrimonium, tutoribus eorum securitatem promiserit et fideiusserom praestiterit vel pignora dederit, quoniam quodammodo suum negotium gessisse videtur, senatus consulti auxilio neque ipsa neque fideiusser ab ea praestitus neque res eius pigneratae adiuvantur.

If your mother, while managing the property of her sons, promised their guardian protection against loss, and furnished a surety or gave pledges, neither she nor the surety furnished by her nor the things pledged by her are aided by the senate decree, since she appears, in a manner, to have carried on her own business [Translation BLUME 2009].

and in PS. 2.11.2:

Mulier, quae pro tutoribus filiorum suorum indemnitatem promisit, ad beneficium senatus consulti non pertinet.

A woman who promised a guarantee to the tutors of her children, cannot benefit from the senatus consultum.

All these texts further demonstrate that the stipulatio of the mother was fully effective, since she was not able to claim the privilege of the senatus consultum Velleianum to her own benefit (which, in 46 CE, set forth that all acts through which women granted any third party debts were null and void). C. 4.29.6.pr. adds, in so far as the knowledge we have been acquainted with, that the warranty could be granted by the mother not only through stipulatio, but also by providing guarantors or by way of pledge.

Additional information is provided by C. 5.46.2 (Philipp. A. et Philipp. C. Asclepiadi et Menandro), a rescript of Philip the Arab dating to 246 CE. The text reports a case of two guardians, Asclepiades and Menander, who have granted the administration of the wards’ estate to their mother and paternal grandfather. The appointed guardians have also requested the mother and grandfather to provide a stipulatio that they would indemnify them, should they—the appointed guardians—be summoned to court. Indeed, it so happened that once the children had reached puberty, they brought the actio tutelae against the guardians and the latter were able to utilise the guarantee provided for under the stipulatio against the mother and the grandfather.

Quaedam pupillorum vestrorum a matre itemque avo paterno administrata eorumque nomine indemnitatem vobis promissam esse adseveratis, quae si ita sunt et idem pupilli legitimae aetatis effecti non adversus matrem suam itemque avum, sed contra vos congregi malunt, non immerito indemnitatem ab his praestari desiderabitis, quos et administrationem suo periculo pridem suscepisse proponitis.
You assert that certain matters of your minor wards under the age of puberty were managed by their mother and paternal grandfather, they promising to hold you harmless by reason therof. If that is so, and the minors, when they have become of legal age, prefer to sue you (because of such management) rather than their mother and maternal grandfather, you do not unjustly ask indemnity from those who, as you say, formerly undertook such management at their own risk [Translation Blume 2009].

The text shows that the wards could bring an action both against the guardians and against the mother as well as—in this case—against the grandfather, and the latter were fully and directly liable towards the wards (in addition to being liable towards the guardians through the *stipulatio*). We also know that the wards could summon the guardians before the court using the *actio tutelae*, while in the quoted text there is no reference whatsoever to the action that could be brought against the mother. However, from other sources and, above all, from Paul. *Sent.* 1.4.4 (*Mater, quae filiorum suorum rebus intervenit, actione negotiorum gestorum et ipsis et eorum tutoribus tenebitur*), we conclude that the mother was liable through the *actio negotiorum gestorum directa*.18

3. THE LAW OF THE ORIENTAL PROVINCES: EVIDENCE FROM EGYPT AND ARABIA

The sources allow us to draw comparison between Roman law and legal practices evident in the eastern part of the empire, in particular in Egypt and Arabia, in the pursuit of mutual influences.

In Roman Egypt, it was permitted in the first two centuries CE for a woman to act as guardian.19 The term used was *epitropos*. In most cases, the *epitropos* was the mother who, upon the death of her husband, assumed the role of

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16 See D. 3.5.33(34) (Paul. 1 *quaest.*); C. 4.32.24 (Diocl. et Maxim., a. 294 CE); C. 2.18.4 (Sev. et Ant., a. 201 CE).

17 Translation: “The mother, who intervened in the things of her sons, will be liable to an action by them and by their guardians for unauthorized administration”.

18 *Contra Solazzi* 1933. The opinion of LA PIRA 1930, 56 f., based on C. 5.51.9, that the wards could summon also the mother before the court using the *actio tutelae*, has been refuted by FREZZA 1933-1934. See more recently CHUSI 1994,167 ff.; CHUSI 2005, 128.

guardian of their joint children.\textsuperscript{20} Other female relatives—the grandmother,\textsuperscript{21} sister\textsuperscript{22} and aunt\textsuperscript{23}—of the underage child are rarely documented as \textit{epitropoi}. The latest account of a female \textit{epitropos}, an aunt to be precise, dates to 181-189 CE,\textsuperscript{24} while the latest evidence of a mother labelled \textit{epitropos} dates to 175-178 CE.\textsuperscript{25} The term \textit{frontistria} is also used in the papyri to denote a female guardian. It is documented in six papyri, the earliest dating to 174 CE and the latest to 212 CE: in five of them, the aforesaid role is assigned to the mother in connection with her children and there is no evidence of the existence of any other guardian apart from her,\textsuperscript{26} while in another text the term \textit{frontistria} is used to define the position of the grandmother who acts in a sort of «co-guardianship» with the father of the wards.\textsuperscript{27} In Egypt, the mother became \textit{epitropos} if it had been stipulated by the husband in the marriage settlement or by will, as documented by different sources such as P.Oxy. II 265 (81-95 CE), P.Oxy. III 496 = M.Chr. 287 of 127 CE and P.Oxy. III 497 of the first years of the second century CE. A woman acting as \textit{epitropos} of her children is also documented in an inscription of the province of Lycia and Pamphylia, which dates from the

\textsuperscript{20} P.Mich. V 232 = SBV 7568 (36CE); P.Oxy. II 265 (81-95CE); P.Oxy. III 497 (first years of the II centuryCE); P.Oxy. VI 898 (123CE); CPR 6.1 (125CE); P.Oxy. III 496 = M.Chr 287 (127CE); SBXVI 12288.1.11-15 (ca 175-178 CE). Very uncertain P.Mich. XVIII 785 (47 or 61CE); PIFAO 3.5 (II century CE). The \textit{epitropos} mother is attested also before the first century CE in BGU VIII 1813 (62-61 BCE) and, as \textit{epitropos anagogistos}, in SB VI 9065.8-19 (1 century BCE) and in BGU XIV 2374 (88-81 BCE): see MONTVECCCHI 1997. Equivalent to the \textit{epitropos} was the \textit{prostatis} mother of P.Med.Bar. 1 (142 BCE): cf. MONTVECCCHI 1981; MONTVECCCHI 1989. For a detailed comparison between Ptolemaic and Roman law on our topic, see YIFTACH-FIRANKO 2006, 164ff., who observes that in Ptolemaic wills the husband used to make the wife beneficiary in hereditary provisions, but the wife’s title was limited, since she was not allowed to alienate the assets: P.Petr.\textsuperscript{2} I 25.9-38 (226-225 BCE). In the Roman period, on the other hand, the most common strategy was to accord the wife in a special clause usufruct and guardianship of underage children. The author observes also that the Ptolemaic strategy was not abandoned, however, completely in the Roman period, as he infers from P.Oxy. III 493 = M.Chr 307 (before 99 CE). Cf. on this respect also JA\textsc{ka}B 2001, 68 ff. and moreover CHAMP\textsc{li}N 1991, 109ff. and K\textsc{rause} 1994, 92. On the Ptolemaic law concerning our topic see K\textsc{reller} 1919, 177. On spouses made beneficiaries of each other in hereditary provisions, HÀ\textsc{ge} 1968, 91 ff., 171ff. and YIFTACH-FIRANKO 2003, 221ff.

\textsuperscript{21} P.Fouad 35 (48 CE); P.Vind.Tand. 27 (I century CE).

\textsuperscript{22} P.Athen. 7 (I century CE: a sister, \textit{epitropos} together with her brother).

\textsuperscript{23} P.Oxy. III 495.14 (181-189 CE): in this case, the \textit{epitropos} was the sister of the father of the ward.

\textsuperscript{24} P.Oxy. III 495.14 (181-189 CE).

\textsuperscript{25} SB. XVI 12288.1.11-15 (ca 175-178 CE).

\textsuperscript{26} P.Brux. 1.4 = P.Lugd.Bat. 5.4 (174 CE); BGU VII 1662 (182 CE); SB X 10571 (194 CE); PCair. 10575 = SB XVIII 10757 (195 CE); PLond. III 1164a, p. 156 (212 CE).

\textsuperscript{27} P.Diog. 11/12 (132 CE). The term exhibits also a masculine form: P.Fay. 95 (II century CE); BGU XIII 2345 (159-160 CE). More uncertain, in comparison with that of \textit{frontistria}, is the meaning of words such as \textit{kedestria} and \textit{ekdikos}, which appear later: see GAGLIARDI 2012, 425 n. 11.
reign of Domitian. After 212 CE, the year in which it is possible to date the latest evidence of the use of the term *frontistria*, there is no further evidence from Egypt of mothers formally appointed guardians of their children by way of marriage settlement or by will of their husbands.

But in the same province of Egypt, before and after 212 CE, yet another term is documented: *epakolouthetria*. *Epakolouthetria* was the woman who did not possess the formal title of guardian but simply collaborated with the existing guardian in the administration by substituting him in fulfilling specific acts. The aforesaid role was very often undertaken by the mother, but it could also be performed by the grandmother, as documented by a number of papyri, and it seems that the rules were identical regardless of whether the *epakolouthetria* was the former or the latter. Evidence as to this practice may be found in different Egyptian documents from 132 CE and until the end of the third century CE.

It is likely that, within the scope of the laws of the Oriental provinces of the Roman Empire, the *epakolouthetria* existed in the second and third century CE not only in Egypt, but also in other regions: this is in particular the case with the province of Arabia, a region where, in the Jewish context, it was traditionally admitted that the mother could act as the guardian of her children if so appointed by her husband prior to his death. From two papyri of the Babatha archive, P.Yadin 20 (130 CE) and 25 (131 CE), it seems that the matters of the two underage children of the brother (called Jesus) of Babatha’s second husband (called Judas), were managed not only by a guardian (called Besas), but also by a woman, Julia Crispina, who collaborated with the guardian taking the designation of *episkopos*. In P.Yadin 25 Julia Crispina, in

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28 SEG VI 672 (late 1 century CE).
29 It seems that informally – but substantially – also after 212 CE in Egypt, mothers could continue in several cases to administer the patrimony of their fatherless children, but the appellations of *epitropos* and *frontistria* are never attested. It was then probably an unofficial and factual task. Among the papyrological sources of fourth century CE, see P.Cair.Isid. 133; Stud.Pal. XX 86; P.Duk. Inv. 208; SB VI 9219; SB XIV 11881; P.Lips. 28. Moreover, cf. Lib. or. 1.4; Joh. Chrys. de sacerd. 1.5.
30 P.Anh. II 91 (159 CE); SB VI 9619 (184 CE); BGU IV 1070 = MChr 323 (218 CE); P.Oxy. VI 909 = Sel. Pap. I 35 (225 CE); P.Lips. 9 = MChr 211 (233 CE); P.Oxy. VI 907 = MChr 317 = FIRA II F, 51 = Migliardi-Zingale 1997, no. 24 (276 CE); P.Vind.Tand. 3 (III century CE). Also the variant *parakolouthetria* is attested: P.Oxy. LVIII 3921-3922 (219 CE).
31 PSI X 1159 (132 CE); P.Mich. Inv. 2922 = SB V 7558 = FIRA III F, 30 (172-173).
33 Jesus was also the name of Babatha’s son.
her capacity as *episkopos*, summons Babatha before the court.\(^{34}\) As stated in the papyrus, Crispina takes this action because the guardian, who was ill, was unable to do so personally. It is possible to assume, on good grounds, that the *episkopos* of the Babatha archive in Arabia corresponded to the Egyptian *epakolouthetria*.\(^{35}\) However, it is uncertain whether Julia Crispina was the mother of the two young orphans.

As to the substantive regulation of the *epakolouthetria* and to the issue of liability for *mala gestio*, we know that, at least in Egypt, the existence of an *epakolouthetria* did not eliminate the liability of the guardian. The guardian was fully liable and the *epakolouthetria*, who granted adequate guarantees of her own liability at the moment she assumed that position, shared the liability with him.

In this respect, it is worth quoting PSI X 1159 of 132 CE,\(^{36}\) where a certain Arsinoe asks the prefect, through the strategos,\(^{37}\) that a certain Ammonios be appointed guardian of her own underage grandchildren.\(^{38}\) In the same application she also requests that she herself be granted the *epakolouthesis*:

καὶ αἰτησαμένης (scil. Ἀρσινόης) τῷ ἰδίῳ κινδύνῳ ἐπίτροπον τῶν ἑπάνω τοῦ Ἡρακλείδου κατὰ ἐμφάνεις πάντων Μάρωνι τῷ καὶ Ἀρτοκράτιον καὶ τοῖς ἄλλοις καὶ τῶν ἀδελφῶν τῶν Μάρωνι ἑτέρῳ καὶ Ἡρακλείδῃ καὶ Διδύμῃ, ὅμως ἀφῆλίξῃ, Ἀμμώνιον Ἐὐρήμωνος τοῦ Μάρωνος μητρὸς Ἀνδρομάχης τῆς Ἀμμώνιον ἀπὸ ἀμφόδοι(ou) Φρεμεί, ἔπαξακολουθούσης αὐτῆς τῇ ἐπιτροπῇ καὶ παραλαμβανούσης αὐτῆς τὰ ἐξ αὐτῶν περιγεινόμενα.\(^{39}\)

As (Arsinoe) at her own risk asked for Ammonios son of Euremon, son of Maron, whose mother is Andromache, daughter of Ammonios, from the quarter Phremei, as a guardian of everything that was left behind by Herakleides to Maron alias Harpokration and his remaining brothers, the other Maron, Herakleides and Dydime, who are equally underage, while she herself collaborates with the guardianship and receives the yields.

Ammonios requested that Arsinoe pledged the real estate she owned in the district of Polemon by way of guarantee in respect of the guardianship and the *epakolouthesiosis*:

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\(^{34}\) See on this point COTTON 2005, 38f.


\(^{36}\) The *editio princeps* may be found in Vitelli 1931. See also Wilcken 1932, 88f.

\(^{37}\) The petition would have been made directly to the prefect, according to Haensch 1994, 527 n. 4.

\(^{38}\) They were the children of his predeceased son Herakleides.

\(^{39}\) PSI X 1159, 8-12.
Addresses to the guardian, Ammonios, regarding the assets of the Polemon meris, which included the office of the kosmetes, and all other expenses for the ward...  

Since Ammonios asked that in order that he will not be subject to false accusations, while she pays the expenses for the office of the kosmetes, and all the other expenses, her assets in the Polemon meris will be entrusted and given as security for the guardianship and the epakolouthesis.

Ammonios also demanded that Arsinoe shall not dispose of the aforementioned assets until the wards reached puberty and before she and the guardian had been formally released from guardianship:

While the case documented in PSI X 1159 pertains to a grandmother and not to a mother epakolouthetria, identical rules were applicable for both. The guardian accepted the epakolouthetria mother (or grandmother) upon obtaining certain warranties, pursuant to what may be retrieved from PSI X, 1159. If the intended epakolouthetria did not furnish these warranties, the guardian would not give his own consent and the woman could not assume her position. The epakolouthetria was also directly liable towards the ward for her acts.

The provisions stated in PSI X, 1159 on the relation between the liability of the guardian and that of the epakolouthetria seem to fit well with another papyrus of the Babatha archive, P.Yadin 15 of 125 CE, the dating of which allows us to further move back the date of the introduction of the position of the epakolouthetria. Babatha complained about the two guardians of her son Jesus, John and Abdoobdas, who had invested the assets of the ward, claiming that they were paying too little maintenance to her son. The mother then proposed to the two guardians, through a testatio, that the latter left her the administration of the assets, by undertaking to provide a guarantee of real property using her own assets (declared to be essentially equal in value to that of the ward), in the event of maladministration:

40 PSI X 1159, 13-16.
41 PSI X 1159, 20-22.
διὸ προεμαρτυροποίησα ἵνα εἰ δοκεῖς ὑμεῖς ἰόναί μι[οι τὸ] ἄργυριον δι᾽ ἀσφαλίας... [Translation N. Lewis, in LEWIS, YADIN & GREENFIELD 1989]

Therefore I previously deposed in order that you might decide to give me the money on security involving a hypothec of my property, with me contributing interest on the money at the rate of a denarius and a half per hundred denarii, wherewith my son may be raised in splendid style...

4. COMPARISON BETWEEN ROMAN LAW AND THE LAW OF THE ORIENTAL PROVINCES OF THE EMPIRE

What final conclusion can we draw from comparing the Roman rules with their provincial counterparts? In my view, the conclusions may be focused on the following two points. The first concerns the existence of similar or comparable institutions in different social and legal contexts (Roman and provincial). The second leads us to consider whether there were any interaction between Roman law and the law of the Oriental provinces of the empire.

1. Both in Rome and in the provinces analysed, mothers acted in the course of the second and third centuries CE both as guardians and as administrators aiding guardians; the latter was termed, in the Greek speaking provinces of the empire, *epakolouthetria*. At the same time, there is a key difference between the position of the guardian mother in the two legal cultures: in Roman Egypt, mothers were formally appointed, and were validly acting as guardians of their children through a private act (marriage settlement or will); according to Roman law, this was not permitted: mothers could solely request the emperor to become guardians and could only do so if there were no male guardians that could be appointed. The provisions on liability of the *epakolouthetria*, or administrator mother, were similar: both in Greco-Egyptian law and in Roman law the *epakolouthetria*, or administrator mother, was jointly liable with the guardian. Nonetheless, also in this case, there is a difference. In Roman law, the administrator mother was not summoned before the court using the *actio tutelae*, but the *actio negotiorum gestorum*. While we are not informed of the form of the action through which the *epakolouthetria* was summoned before the court, we may assume that the liability of the woman was formally traced back to guardianship.  

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42 Ll. 24-27.

43 The fact that in Egypt wards, when they reached puberty, acquitted both the *epakolouthetria*
2. As far as the issue of interaction goes, until some decades ago it was commonly maintained that the practice of appointing the mother as guardian through a private act ended in Egypt around 130 CE: the known latest private legal document recording such appointment was P.Oxy. III 496, dating to 127 CE. The epakolouthetria, on the other hand, is first documented in 132 CE for a grandmother and in 159 CE for a mother. It was therefore thought that the two institutions were never simultaneously applied, and that the said chronological pattern did go back to an imperial act, dating to ca. 130 BCE, which under the influence of Roman legal principles banned women from acting as epitropoi. The epakolouthesis was introduced (so the older view) around the same time as a substitute.

However, documents discovered more recently allow us to postpone the latest evidence as to an epitropos mother to 175-178 CE (and epitropos aunt to 181-189 CE) and, if we deem epitropos and frontistria to be equal, as held in this paper, we may even reach 212 CE. Therefore, there is an overlap between women epitropoi and epakolouthetriad, the latter being documented, as stated, since 159 CE. The older view as such needs be abandoned. Personally, I would be prone to identify the turning point in 212 CE, in connection with the issue of the Constitutio Antoniniana. Roman law did not influence Graeco-Egyptian legal practices around 130 CE. It was only the grant of the Roman citizenship to the provincial subjects in 212 CE, leading to the application of Roman law that prohibited mothers (and other female relatives) from formally becoming epitropoi of their minor children, by way of a private act.

One may further study the extent to which the administrator-mother, as documented by the Roman legal sources, goes back—as held by part of modern

and the guardian of their debts through a written receipt is shown by the fundamental PSI X 1159, ll.21-22.

44 PSI X 1159.
45 P.Amh. II 91. The documents concerning Arabia permit us to move back, in that province, to the year 125: P.Yadin 15.
46 monteveCChi 1981, 113.
47 Cf. MITTEIS 1912, 250f.; ARANGIO-RIUZ 1930, 46f. n. 3; MONTEVECCHI 1981, 114; FREZZA 1930-1931, 380; FREZZA 1933-1934 (contra SOLAZZI 1933, 380 and SOLAZZI 1937, 1ff.).
48 SB XVI 12288.1.11-15 (ca 175-178 CE).
49 P.Oxy. III 495.14 (supra n. 23).
50 P.Lond. III 1164a, p. 156.
51 It should be taken into consideration that the Roman patria potestas seems to have been attested in Egypt only at the beginning of the third century CE: ARIJAV 1998a, 155ff. On the rules which applied before this period, cf. LEWIS 1970.
scholars\textsuperscript{52}—to the Graeco-Egyptian institution of *epakolouthesis*. Granted, the provincial *epakolouthetria* and the mother as administrator aiding the guardian in Rome exhibit such affinities as to assume that the institution was taken over from one legal system to the other. At the same time, the mother as administrator aiding the guardian in Rome is not an «outsider» institution, a totally unrelated body under the Roman legal system. Its origins should not by necessity be sought elsewhere, in alien legal traditions. The institution of the guardian mother appears to be integrated in a rather wide set of corrective measures (starting from the mother’s guardianship exceptionally granted by way of an imperial order) which were introduced in the Roman world as from the early empire to overcome former restrictions on mothers’ capacity to act as guardians of their underage children. In addition, the tendency to increasingly allow mothers to act as administrators of their children’s estate is certainly Roman and does not seem to derive from any external influence. All this leads me to believe as probable that the institutions of the mother as administrator aiding the guardian in Rome, on the one hand, and the Graeco-Egyptian *epakolouthetria* (and other possible corresponding institutions in the other Oriental provinces), on the other, even if quite similar, did not derive one from the other, but represent the outcome of different paths walked in different legal systems to achieve the same goals.

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