GRAECA TERGESTINA
STORIA E CIVILTÀ **4**

GRAECA TERGESTINA

STORIA E CIVILTÀ

Studi di Storia greca coordinati da Michele Faraguna

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Legal Documents in Ancient Societies VI

Ancient Guardianship: Legal Incapacities in the Ancient World

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edited by
Uri Yiftach
Michele Faraguna

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In Memoriam Dieter Nörr
(1931-2017)

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List of Abbreviations

ANRW	*Aufstieg und Niedergang der römischen Welt*, ed. H. TEMPORINI, Berlin-New York 1972-.
RE	*Real-Encyclopädie der klassischen Altertumswissenschaft,* A. PAULY, G. WISSOWA & W. KROLL, eds., Stuttgart 1893-1980.
AC	*L'Antiquité Classique*
AncSoc	*Ancient Society*
APF	*Archiv für Papyrusforschung*
ASJ	*Acta Sumerologica. Bulletin of the Japanese Sumerological Society*
BASP	*Bulletin of the American Society of Papyrologists*
BCH	*Bulletin de Correspondance Hellénique*
BIAO	*Bulletin de l'Institut Français d'Archéologie Orientale*
BICS	*Bulletin of the Institute of Classical Studies*

BIDR	*Bollettino dell'Istituto di Diritto Romano*
C&M	*Classica & Mediaevalia*
CE	*Chronique d'Egypte*
JESHO	*Journal of the Economic and Social History of the Orient*
JEA	*Journal of Egyptian Archaeology*
JJP	*Journal of Juristic Papyrology*
JRS	*Journal of Roman Studies*
MH	*Museum Helveticum*
RA	*Révue Archéologique*
REG	*Revue des Études Grecques*
REL	*Revue des Études Latines*
RHD	*Revue d'Histoire du Droit*
RIDA	*Revue Internationale des Droits de l'Antiquité*
RIL	*Rendiconti dell'Istituto Lombardo*
SCO	*Studi Classici e Orientali*
TAPhA	*Transactions and Proceedings of the American Philological Association*
TR	*Tijdschrift voor Rechtsgeschiedenis*
UF	*Ugarit Forschungen*
ZPE	*Zeitschrift für Papyrologie und Epigraphik*
ZRG RA	*Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung*

Foreword

URI YIFTACH

The sixth meeting of the research group Legal Documents in Ancient Societies (LDAS)—held at and under the auspices of the *Israel Academy of Sciences and Humanities*, and generously sponsored by the *Israel Academy of Sciences and Humanities* and by the *Emil und Arthur Kießling Stiftung für Papyrusforschung*—was dedicated to the subject "Guardianship: Legal Incapacities in the Ancient World". The LDAS group was created in order to bridge disciplinary gaps, and promote intellectual exchange between scholars studying documentary sources in different ancient civilizations, primarily the Ancient Near East, Ancient Egypt, and the Greco-Roman world; this was the objective of the sixth meeting as well.

The papers delivered at the meeting—and subsequently published in this volume—do not offer complete coverage of the phenomenon under investigation: in particular, the conceptual formation of guardianship as a legal institution took place in the Archaic period—a period which is not represented at all in the following discussion. For other periods and regions, in particular the Ancient Near East, we offer only a cursory analysis focusing primarily on the documentation from Emar. However, with the inclusion of a paper on Jewish law, LDAS has now broadened its horizons taking into consideration most key literary and documentary sources stemming from the ancient world.

The term «legal incapacity» is somewhat equivocal, denoting either an incapacity whose origin is legal—an example from the Roman world would be the law prohibiting non-citizens from owning *res mancipi*—or the incapacity of an individual to undertake actions of legal import.[1] This volume focuses on the latter, much broader rendering.

What are the circumstances that render a person incapable of undertaking a legal act? Some are natural: in antiquity, due to the relatively low life-expectancy orphanhood was commonplace everywhere; children bereft of their parents needed protection and, if they owned property, their economic interests would also have needed to be served. The same applied to the elderly. Some impediments were social, particularly those relating to legal activity undertaken by women. Others were a matter of personal status: legal rights were *de iure* not permitted to slaves. Finally, some rights and acts were allowed only to a restricted, well established group of persons—e.g., citizens—and could not be undertaken by anyone not possessing that status.

Protecting underage orphans is a universal problem, and the solution in most cases is social rather than legal: in extended families, for example a domicile of two siblings and their children, the surviving sibling will automatically assume custody of the children of his brother in the event of the latter's death. Such an arrangement is especially unproblematic if the children do not become owners of extensive properties on the death of their father. Moreover, if the mother is capable of acting legally, she is the obvious candidate to assume custody over her children. There is little need to define more closely the duties of the «guardian», or to put him under close scrutiny. However, even under these circumstances, some terminology may evolve, especially if one wishes to depart from the default practice: such is the state of affairs in Emar during the second millennium BCE, as well as in pre-Ptolemaic Egypt.[2]

Yet there is one sphere of activity where guardianship *stricto sensu*—i.e., in the sense discussed in this book—does seem to be universal or at least common outside the Greco-Roman world. Wherever the dynastic principle prevails, a child may become king if his father dies prematurely. The actual administration is then entrusted to a person of confidence who could accumulate considerable influence and, in extreme instances, even become king himself. This is the case both in Roman Armenia, as well as in Macedonia and Ptolemaic Egypt. Sparta offers further examples of underage kings being supported by a guardian.[3]

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1 See in general KASER 1971 32-36, 275-289.

2 Depauw, pp. 52-54; Fijałkowska, pp. 34-38.

3 Cf,. e.g., Plut. *Lyc*. 3.

Let us now consider a further piece of evidence: *Odyssey* 2.226-227. Before Odysseus had left Ithaca for Troy, he entrusted his *oikos* with his friend Mentor, "so that he, the elder, will be obeyed, and will keep everything intact".[4] At first sight, Odysseus would appear to be motivated by the same dynastic consideration: he is not dead but absent, and his son Telemachos is just an infant. Mentor thus represents Telemachos in the assembly, where he formally demands the suitors' departure.[5] Naturally falling within the sphere of competences of a guardian are the activities that Athena assumes, taking Mentor's disguise: when Telemachos sets off to search for his missing father, Athena accompanies him instructing him on how to conduct himself in the meeting with Nestor in Pylos, the first station of Telemachos' journey.[6]

It may, however, be misleading to connect the Mentor episode with the dynastic principle in the sense mentioned above. Mentor is entrusted with the administration of the *oikos*, that is the private household of Telemachos, and it is in this capacity—i.e. the need to protect the *oikos* against financial ruin—that he moves with Telemachos against the suitors.[7] As the same problem would have to be addressed in the case of all *oikos* holders that set off to Troy, guardianship, I argue, must have been commonplace at all levels of the society narrated in the Homeric *epos*.

The appointment of Mentor as guardian thus underscores a fundamental trait of Greek family household: the Greek *oikos* consists of husband, wife and their offspring; the husband is the owner of the family estate and the wife is not, and in principle, has no capacity to undertake any significant activity in the public sphere. When the husband dies the property devolves upon the children who also become the heads of an/the *oikos* regardless of their age. However, in the example of the *Odyssey*, Telemachos is just a child and it becomes necessary to entrust the operation of the *oikos* to a third party. The concept of the guardian—the *epitropos*—embodies the institutionalization of this function. In a sense, what we have here is the dynastic principle applied to the individual household.[8]

With the formation of the city-state, the *polis* assumed responsibility for the preservation of the *oikos*. This responsibility, evident in all well-documented

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[4] Hom. *Od*. 226-227: οἱ ἰὼν ἐν νηυσὶν ἐπέτρεπεν οἶκον ἅπαντα, | πείθεσθαί τε γέροντι καὶ ἔμπεδα πάντα φυλάσσειν.

[5] Hom. *Od*. 2.224ff.

[6] Hom. *Od*. 2.267ff.; 2.401; 3.22ff; 3.240ff.; 4.654ff.

[7] E.g. Hom. *Od*. 1.245-250, 368-375, 397-398; 2.47-48.

[8] The link between royal and private guardianship is cautiously treated here by Noah Kaye. The subject needs further study.

poleis—both real and fictional—manifests itself in a wide array of institutions and procedures aimed at securing the well-being of the weaker members of the *oikos*, as well as its very existence.[9] With high mortality rates, orphanhood was a chronic problem requiring enduring care. In the case of Athens, one of the *archontes*, the *archon eponymos*, who had general responsibility for familial institutions, was also in charge of appointing guardians and maintaining close scrutiny of their activities; these activities culminated in a written account submitted by the guardian after the completion of his duty. Special scrutiny was also necessary if the guardian decided or was compelled to lease out his ward's estate to a third party.[10]

The intricate system present in fourth century Athens was predicated not only on the existence of a competent administrative apparatus, but also on advanced literacy and book-keeping habits. As demonstrated by Gerhard Thür, accounts connected to the activities of the guardian were key pieces of evidence whenever matters came to court, and could be subject to bias presentation due to the inability of the dicasts to study the contents of the account: such problems were symptomatic of a judicial system accustomed to relying on oral evidence (viz. witnesses) in an increasingly document-oriented world.[11]

Sources on Greek law from the Classical period are *polis*-oriented; but this was no longer entirely the case in the Hellenistic period. In Greek papyri from Egypt we find evidence for the legal practices of Greek immigrants settled outside of the *polis* environment. It has been argued repeatedly that there was no '*Oikalsystem'* outside the *polis*; there would thus have been little need for the institutions intended to secure the existence of the *oikos,* nor for the administrative and documentary mechanisms involved in their functioning. These changes account for the complete absence of references to the daughter heir, a pan-Hellenic institution in the world of the *polis*, or to the practice of *engyêsis*, well known particularly from Athens.[12] However, this is *not* the case with guardianship; both the guardian of women (*kyrios*) and that of orphaned children are well attested, and both are scrutinised as heavily as they would have been in the world of the *polis*.[13] This is not surprising. Many legal practices in Ptolemaic and Roman Egypt were, after all, based on concepts and institutions which had evolved in the world of the *polis*. The fact that not every institution found in the few well documented *poleis* was put into use in Egypt

[9] FERRUCCI 2006.

[10] See in particular Maffi's and Thür's papers in this volume.

[11] PRINGSHEIM 1955.

[12] Cf., e.g., WOLFF 1939, 164-171; MÉLÈZE-MODRZEJEWSKI 1983, 53-60.

[13] See, in particular, Kaltsas' and Kruse's papers in this volume.

should not suggest a complete, across-the-board rift. It would undoubtedly have been possible for the Macedonian rulers and Greek settlers to introduce certain elements of the *polis* matrix while discarding others.

The reception of guardianship in the Hellenistic world is extremely well documented, both on papyrus and in literary sources;[14] indeed in the case of Egypt, there were few, if any private legal institutions under such a close scrutiny by the state. Once the system of liturgies—i.e. compulsory public service by private individuals—had started to evolve in the first century CE, the mechanisms relating to the appointment, supervision, and exemption from service of guardians are assimilated with those employed in the case of public liturgies. This is hardly accidental: guardianship was viewed as a sort of liturgy, or *munus*, and quite possibly the only one that did not affect state interests directly.[15]

Why did the state maintain interest in preserving the institution of guardianship? During the course of the Classical period, the role of the guardian had come about as a result of several factors: small families in which the father was the sole owner of the estate; the devolution of the estate upon the children after the father's death; the mother's incapacity to take care of her children in the public sphere; the interest of the *polis* in the preservation of the individual households, the *oikoi*. We do not find evidence for an '*Oikalsystem*' in Egypt, but the other three elements—nuclear family households,[16] the father's right of ownership, and the devolution of the estate upon the children[17]—are present. Furthermore, in both the Hellenistic and Roman periods, one may note an ongoing effort to protect and define property rights;[18] the process of securing the children's inheritance through the appointment of a guardian would certainly fit well with such policies.

Throughout the Hellenistic period we notice two tendencies which move perhaps in opposite directions. On the one hand, there is an attempt on the part

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[14] For the latter here in particular Buraselis, pp. 69-72.

[15] Chevreau, p. 191; Kruse, p. 75.

[16] According to BAGNALL-FRIER 1994, 58-64, 54.8 % of the census declarations that came down to us from Roman Egypt exhibit a conjugal family, consisting of parents and their offspring. Very frequently, children stay with their parents after marriage, thus creating a complex residential pattern with parents, children, and multiple grandchildren. The existence of this complex pattern may explain why in many cases the appointment of an official guardian is avoided, and why, in others, the guardian is appointed from among the closest next-of-kin. Cf., e.g., *BGU* I 115 I = *WChr* 203 (189 CE, Ptolemais Euergetis).

[17] KRELLER 1919, 141.

[18] E.g., WOLFF 1978, 216. This policy culminates in the Roman period in the creation of the acquisition archive, the *bibliothêkê enktêseôn*, in the mid first century CE. Compare, e.g., JÖRDENS 2010, 288-289.

of the state to reinforce its control over guardians through the introduction of ever stricter measures regarding their appointment: thus, for example, in the third century CE—that is after the introduction of the *constitutio Antoniniana,* which bestowed citizenship on all inhabitants of the Roman empire—the *tutores legitimi* and *testamentarii*, increasingly tended to make a formal appeal for appointment as guardians, an appeal that was unnecessary under the precepts of Roman law;[19] we may also note how the factors which might render an individual ineligible to assume the guardianship become more clearly defined.[20]

But there is another side to the coin. As we have stated earlier, some of the incapacities that required guardianship were natural: no infant would be qualified to manage his own affairs until he had grown up. However, no mental incapacity would debar a woman, or a slave from successfully managing their own affairs. There were, accordingly, challenges against formal restrictions as both slaves and women sought various means—in particular informal representation by others—that would allow them to undertake economic and legal activity.[21] In the case of women guardians, it was natural that they would wish to take an active part in the upbringing of their own orphaned children, and would thus manage the affairs of these orphans alongside, or instead of an external male guardian. In cases involving extended families, the family members tended to find informal protection adequate, and wished to avoid the time-consuming and costly process of applying for formal appointment as guardian for as long as they could, even at the risk of breaking the law.[22] As we discover from court verdicts, responses, and imperial constitutions, the state occasionally tried to suppress such conduct but would occasionally tolerate some form of alternative solutions, and occasionally even give way completely.[23]

In geographic terms, this volume begins with a discussion of Near Eastern legal practice, specifically that of Emar. It concludes, centuries later, with Radzyner's discussion of Jewish law in the Roman and Byzantine period in roughly the same region. And what a remarkable change! The Halachic term אפוטרופס is no more than an Aramaic transliteration of the Greek *epitropos*, and the mechanisms connected with this institution leave no room for doubt:

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[19] *P.Diog*. 18, with *P.Harr.* I 68 (225 CE, Philadelphia); *P.Tebt*. II 326 = *MChr* 325 (266/7 CE, Tebtynis) and Kruse, pp. 181-182.

[20] Chevreau, pp. 197-201.

[21] On the former see E. Cohen, pp. 132-136, on the latter E. Jakab, pp. 209-210.

[22] Kruse, pp. 179-180; Radzyner, pp. 254-256.

[23] Gagliardi, *passim*.

Greek guardianship, conceived under unique circumstances in the world of the *polis*, was absorbed into Hellenistic legal practice, whence it found its way into the decidedly non-Greek system of Jewish law. One need only compare Radzyner's discussion with those of Maffi, Kruse and Chevreau to witness how great the affinity is. One could, of course, also study guardianship in other Near Eastern contexts, notably that of Syro-Roman law book; this was one of the original objectives of our meeting.

The volume is introduced with a paper written by Nili Cohen, a specialist in Modern Law. The duties and obligations of parents towards their children generated at the very dawn of human existence, but were not conceptualized—certainly not in writing—either at that stage, nor even throughout Antiquity. The duties of the guardian, however, were quite clearly defined. When those who codified modern Israeli law wished to give a detailed account of parental duties, they drew upon the characteristics which had defined the nature of guardianship since earliest antiquity.

I would like to thank all those friends without whom the meeting—and this volume —would have never been realized: Professor Benjamin Isaac and Professor Hans-Albert Rupprecht, without whose help this project would never have materialized; Ms. Galia Finzi, whose hospitality and kindness was highly appreciated by all the participants in our meeting; Dr. Nicola Reggiani, who carefully read, and assisted us in the edition of this volume; Professor Eva Jakab, Mark Depauw and Sophie Démare Lafont who, as co-members of the steering committee of LDAS, helped bring together the wonderful group of scholars whose contributions make this volume. Last but certainly not least, I would like to thank Michele Faraguna, who, in addition to being a member of LDAS, joined as co-editor of this volume and assisted me in bringing this project to competion. I thank of course all the participants in our meeting; the sixth meeting of LDAS was both a pleasant and extremely enriching experience.

BIBLIOGRAPHY

BAGNALL & FRIER 1994
R.S. BAGNALL & B.W. FRIER, *Demography of Roman Egypt*, Cambridge-New York.

FERRUCCI 2006
S. FERRUCCI, *L'«oikos» nel diritto attico pubblico, privato e individuale nella democrazia ateniese classica*, «Dike 9», 183-210.

JÖRDENS 2010
A. JÖRDENS, *Nochmals zur Bibliotheke Enkteseon,* in G. THÜR (ed.), *Symposion 2009, Vorträge zur griechischen und hellenistischen Rechtsgeschichte (Seggau, 25.-30. August 2009)*, Vienna, 277-290.

KASER 1971
M. KASER, *Das römisches Privatrecht. Erster Abschnitt: Das altrömische, das vorklassische und klassische Recht,* Munich.

KRELLER 1919
H. KRELLER, *Erbrechtliche Untersuchungen auf Grund der graeco-aegyptischen Papyrusurkunden,* Leipzig.

MÉLÈZE-MODRZEJEWSKI 1983
J. MÉLÈZE-MODRZEJEWSKI, *La structure juridique du mariage grec*, in: P. DIMAKIS (ed.), *Symposion 1979. Vorträge zur griechischen und hellenistischen Rechtsgeschichte (Ägina, 3.-7. September 1979)*, Cologne-Vienna 1983, 39-71. Republished in: *Statut personnel et liens de famille dans les droits de l'Antiquité*, Aldershot 1993, V.

PRINGSHEIM 1955
F. PRINGSHEIM, *The Transition from Witnessed to Written Transactions in Athens*, in: *Aequitas und Bona Fides: Festgabe für A. Simonius*, Basel, 287-297.

WOLFF 1939
H.-J. WOLFF, *Die Grundlage des griechischen Eherechts. II. Das übrige Griechenland,* «Tijdschrift voor Rechtsgeschiedenis» 20, 157-181.

WOLFF 1978
H.-J. WOLFF, *Das Recht der griechischen Papyri Ägyptens in der Zeit der Ptolemäer und des Prinzipats*. II: *Organisation und Kontrolle des privaten Rechtsverkehrs*. Munich.

Section 1
Modern Perspectives

Modern Guardianship in Historical Perspective

NILI COHEN

ABSTRACT

Guardianship, an old institute classified in law as pertaining to persons and family, functions within and outside the family. Family which is often regarded as a «natural» phenomenon, is a social construct, contingent on time, culture, class and place. The introduction puts emphasis on historical developments that on the one hand have limited the scope of ancient guardianship by bestowing legal independence or capacity to wider categories (e.g., women), and on the other hand expanded it to new categories within modern concepts of family (e.g., de facto adopted children).

The modern concept of parenting which might be detached from coupling and biology is occasionally inter-related with de facto kinship. This trend could be traced back to old times, so that ancient guardianship might serve not only as a tool for comparison with current developments in law and society, but also as some source of insight and inspiration.

INTRODUCTION

Guardianship, an old institute classified in the law pertaining to persons and family, denotes a relation whereby a duty of care and responsibility is employed by one person, the guardian, on behalf and for the benefit of another person whose capacity is wholly or partially impaired. Guardianship functions within the family – parents are natural guardians of their children – and also outside the family.

Family is occasionally regarded as a «natural» phenomenon.[1] Yet family is a social construct, contingent on time, culture, class and place.[2] The following introduction will present the concept of guardianship, its inter-relation with legal capacity and with family relations. An emphasis will be laid on historical developments that on the one hand have limited the scope of ancient guardianship by bestowing legal independence or capacity to wider categories (e.g., women), and on the other hand expanded it to new categories within modern concepts of family (e.g., *de facto* adopted children).

The evolving, flexible concept of family and guardianship is apparent not only diachronically but also synchronically: it might change within the same society itself depending on culture and context. Thus, a person may be regarded as guardian with regard to maintaining a child, but the child might not be regarded as part of a family in the context of citizenship. Form and substance determine status according to policy considerations which might operate differently in the public and private spheres.

The accelerated development characterizing the law of family, persons and guardianship has its origins in new ideas about personal freedom, equality and women's right, children's and wards' rights, and advances in bio-technology and genetic science.[3] Early modern family referred usually to a «nuclear household unit made up of a married heterosexual couple and their biological or adopted children».[4] Nowadays parenting could be detached from marriage and biology, couples might be of the same gender, the couple concept is not necessarily relevant, and guardianship is inter-related with *de facto* kinship. This trend of *de facto* kinship could be traced back to old times, so that ancient guardianship might serve not only as a tool for comparison with current developments in law and society, but also as some source of insight and inspiration.

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1 ALMOND 2008.

2 ALMOND 2008.

3 GLENDON 2004, sec. Introd.-1–Introd.-27; STOLJAR 2004, sec. 7.1–7.298

4 STACEY 1996, 38.

LEGAL PERSONALITY AND LEGAL CAPACITY

The laws of guardianship are closely related to the rules of legal capacity, a broad term encompassing first, the ability to hold rights and to be subject to duties, and second, the capacity to establish, exercise, transfer or renounce rights, namely to perform legal acts, such as contracts, wills, and claiming in courts.[5]

Though the two aspects of legal capacity are jointly presented, the first aspect, the ability to hold rights and assume duties, has been separately developed in legal systems of German origin which distinguish between **legal personality**, implying the ability of a person to hold rights and duties, and **legal capacity**, namely the competence to exercise rights or to assume duties. Common law has not dealt with the abstract notion of legal personality, but rather focuses on its outcomes, that is on legal capacity, which is more significant in practice.[6] The development of the notion of legal personality, apart from being a logical prior step in determining the issue of legal capacity, puts emphasis on the autonomous nature of every human being and was developed by legal scholarship of 18th and 19th centuries following the emergence of individual freedom and human rights.

In the context of legal personality and capacity three basic questions arise: **the first**, what is the fundamental assumption regarding legal capacity; **second**, what categories of people do not possess legal capacity (or full legal capacity); and **third**, who should administer the legal issues relating to those incapacitated. At this last point, the issue of guardianship arises and it concerns the following problems: how is guardianship created; what are the duties and rights of the guardian; what sanctions are imposed on the guardian for breaching a duty; how is guardianship terminated; what is the role of court supervision (all these various problems are discussed by Gerhard Thür, Demokritos Kaltsas, Emmanuelle Chevreau and Amihai Radzyner). Hence, the topic strongly combines private law and public law issues.

I shall address the three questions regarding capacity and guardianship, with special reference to Israeli law. As to the **first one:** Israeli law has adopted the fundamental assumption prevailing in Western civilization regarding legal capacity, by which every person holds a full legal personality from birth until death.[7]

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5 HELDRICH & STEINER 2004, sec. 2.1–2.10; 2.11–2.40.

6 HELDRICH & STEINER 2004, sec. 2.1; 2.11-2.40.

7 HELDRICH & STEINER 2004, sec. 2.2; 2.8.

Israeli Law, oscillating between common law historical imprint and continental-civil law later impact, adhered in this context to the German idea and created a distinction between legal personality and legal capacity.[8] Section 1 of Capacity and Guardianship Law, 1962, constitutes the principle of legal personality by stating as follows:

> Every person shall be capable of having rights and obligations from the completion of his birth until his death.

Section 2 relates to capacity and its limits in the following words:

> Every person shall be capable of performing legal acts, unless he has been deprived of this capacity or it has been restricted by Law or by the judgment of a court of law.

This overall recognition in everyone's legal personality demonstrates a sharp contrast between modern society and ancient, and even pre-modern societies: whereas today (and I refer to Western traditions) every person is fully entitled to rights and duties, this was not the case in the past (even near-past) where large portion, and at times the vast majority, of the population, were not considered as holding a legal personality and did not possess full capacity.

As mentioned earlier this conceptual shift towards universal legal personality is an off-spring of the emergence of human rights theories and notions of equality and human dignity; today, the principle of equality and the elevated position of personal autonomy are in fact regulating society altogether.

Autonomy means the capability to exercise one's own discretion in leading one's life and affaires. Autonomy produces capacity. «In modern legal systems 'capacity' is the principal juridical mechanism by which individuals and entities are empowered to… arrange their affairs using the instruments of private law».[9] Obviously if autonomy is lacking – wholly, partially or temporarily – capacity is impaired. The person who suffers this shortcoming should be taken care of usually by a guardian. But the concept of guardianship was shaped in the past not only according to the nature of mental ability one had, but also by the patriarchic societal structure governing in the past (as explained by Paul du Plessis) and given the fact that capacity to rights was, in some societies, rather limited from the outset.

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[8] ENGLARD 1995, 17.

[9] DEAKIN 2009, 2.

LACK OF CAPACITY

The **second question** revolving capacity concerns the categories of people not possessing legal capacity. Generally speaking, the main categories discussed herewith are the following: children under age; mentally and physically challenged; women; slaves (a special category which caused problems, and as shown by Edward Cohen, Greek law employed the institute of representation to overcome the incapacity). Another relevant group (not discussed herewith) concerns aliens.[10]

Regarding women: As demonstrated by Mark Depauw and Lorenzo Gagliardi in ancient Egypt women did not need a male guardian (actually the whole subject of guardianship was hardly mentioned), a necessity that only arose under the impact of Greek and Roman law. Ancient Egypt should be, therefore, hailed with reservation: along the history of Ancient Egypt there were some women Pharaohs, possibly ruling independently not as regents, the most famous of whom was Hatshepsut, described as a beautiful woman. However, when depicted as Pharaoh she used to bear an artificial beard to conform to patriarchic tradition[11] (this resonates with Lena Fijałkowska's description: a wife could become head of the family, if the former-head was ready to make her "father and mother" of the estate; a daughter could become guardian by being declared "male and female").

Obviously, the most radical current change with regard to guardianship relates to women: families in western traditions can be characterized by a decline in patriarchic authority or its total absence, marital instability, and a different division of labor at home and outside. Though socially, and in some jurisdictions also legally, equality has not been fully attained, in principle women are entitled to the same rights and are loaded with the same duties as men. They are in no need of being guarded and can serve as guardians themselves.

What categories lack legal capacity and are in need of guardians nowadays? Under Israeli Law which reflects universal modern western perceptions two major categories of incapacity exist: **First** (section 3), natural incapacity, which under Israeli law applies to children under 18 (they gradually acquire capacity by the age of 18) (from Eva Jakab we learn that under Roman Law – the age for male was 14; women, however, did not mature ever…); **second** type of incapacity is created by virtue of law or court declaration (section 8), and it applies to people who are mentally ill or those with a defective mind.

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[10] WIJFFELS 2009, 59. Other categories of incapable persons discussed on a later stage were members of religious orders and illegitimate children: WIJFFELS 2009, 59.

[11] TYLDESLEY 1998, 130-131.

Does it mean that legal acts concluded with persons having full capacity are totally protected? The answer is negative. Modern contract law distinguishes between capacity and capability. New protected interests have emerged. In consumer transactions and actually in cases where parties are not on the same footing due to imbalance in bargaining power the court has discretion to annul or change the transaction and in this way to protect those who lack capability. One can say that the rigid, egalitarian rules of incapacity have been transformed to flexible rules examining capability and applied on an *ad hoc* basis.[12]

INCAPACITATED AND GUARDIANS

The **third question**, namely who should take care and administer the legal affairs of those incapacitated, is the core problem of the discussion. The guardians of children are their biological parents (section 14 – the parents are the natural guardians of their minor children) or their adopting parents (adoption is a formal procedure requiring a court decree, as specified in section 1 of The Adoption of Children Law, 1981) or guardians appointed by court (if orphaned); the guardians of mentally ill are appointed by court (often relatives, but not necessarily so).

What are the duties of the guardians? They have to take care of the wards' needs (in a case of a child to rear, to educate), to manage their property, and to represent them (sections 15, 38) and this has not been construed as *numerus clausus* of duties.[13] The parental guardianship is to be equally exercised by both parents (section 18). Adopting parents are subject to the same duties of biological parents (section 16 of the Adoption Law, states in addition that the adoption cuts the links with the biological parents but the court is empowered to limit this effect).

If guardians do not fulfill their duties towards their wards the court can limit the guardianship or cancel it (even with regard to biological or adopting parents) (section 60).

GUARDIANS AND DUTIES

The special relations where life and property of one person are controlled by another who is bound to act solely for the benefit of the other raises a char-

[12] WIJFFELS 2009, 61-62.

[13] See CA 2266/93 Ploni v Ploni (22.2.95) page 241 (Judge Shamgar).

acteristic problem, termed in modern terminology as «the agency problem».[14] This problem is rooted in the inherent conflict of interests involved: it stems from the apprehension that the guardian, having full control of the ward's life and property, may abuse his or her power and instead of acting for the benefit of the ward, he or she will seek to further their own interest. The case of a regent who seeks to become the king or queen is a conspicuous example, as reflected in Kostas Buraselis paper (the regent problem is also discussed by Aram Mardirossian). The aim of the regulating law of guardianship is to minimize the incentives of the guardian to breach the duty towards the ward.

Ancient systems such as classical Athens and Roman-Egypt employed administrative control over guardians (as presented by Alberto Maffi, Gerhard Thür and Thomas Kruse), and this applies also nowadays: there are strict rules designated to avoid the inherent conflict of interests embedded in such relationship. Many situations might raise a conflict of interests, and modern statutory law dealing with the matter, assume the existence of such conflict and refers to the most common, prevalent situations within it. Israeli law specifies that when parents wish to make transactions with their own children, they need to obtain court approval. Court supervision is also imposed on serious transactions with third parties, like selling real estate of the children (section 20), and all this applies *mutatis mutandis* with regard to any guardian (sections 47, 48). Under Israeli Law reflecting current modern legislation parents and guardians should act in the best interests of the ward. In recent years, this term has been replaced with the concept of the child's or ward's rights. The conceptual shift is meant to put emphasis on the legal constitutional status of the child or ward as an autonomous personality, a status lacking in ancient systems.[15]

It should be noted that management of property of incapacitated can be done through the device of trust, a common law institute, which separates between formal ownership and beneficial (or equitable) ownership.[16] In the regular guardian-ward relations, the ward is the owner of the property and the guardian administers it. The trust arrangement preserves the unity of the holding of the right and its exercise by one person (the trustee), yet the ben-

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[14] Ross 1973.

[15] CA 2266/93, Ploni v Ploni (22.2.95) (elaboration of the concept of child's rights, with some doubts as regarding the difference between the principle of the child's best interests and the concept of child's rights); CFa 0491230/03 Ploni v Almoni (19.11.2006, Judge Geifman) (the concept of child's rights is based on a recognition of the autonomy of a child given the circumstances to understand and determine decisions regarding her or his life). Israeli law fortifies the ward's autonomous status by empowering her or him to file an independent claim in the case of an infringement of rights: Section 3(d) of the Family Court Law, 1995.

[16] For the argument that the trust device has its counterparts in Civil Law systems: Beckner, Devaux & Ryznar 2014.

efits are available only to the incapacitated protected person (the beneficiary).[17] Obviously, also in this case the problem of agency and the inherent conflict of interests are conspicuous, and the trustee is subject to strict fiduciary duties and to public supervision.[18]

What is the position of a guardian who breaks his or her fiduciary duties towards the ward? Under Israeli Capacity and Guardianship Law the guardian is subject to sanctions, and the guardianship, even parental one, could be terminated (section 26). The child in this case will be taken care of by another guardian or in severe case might be totally disconnected from his biological parents and adopted by others who become parents for any matter. All these decisions are made following a court order.[19]

Generally speaking, both the Law of Capacity and Guardianship and the Law of Adoption are very formal: they provide for clear, definite rules regarding the **creation** of the status of guardians, their **contents** (rights and duties of the guardian and custodian), and their **termination**.

FORMAL AND INFORMAL GUARDIANSHIP

In light of the law's formal approach to such a complicated and delicate situation, it is worthwhile to address the very relation between formal rules of guardianship and informal dynamics of life and reality. In other words, could guardianship be created even in the absence of kinship or without any court decree of adoption?

This resonates in Amihai Radzyner's paper which deals with creating a *de facto* guardianship according to Talmudic law based on child support. This has ancient roots as apparent in Solomon Judgment, where the conflict was between two women claiming biological motherhood.[20] Some modern reflection is presented in Brecht's play *The Caucasian Chalk Circle* (Bertolt Brecht, Heinemann edition, 1960), where the competition was between the biological mother who deserted the child and the maid who rescued and raised him. In both cases the caring woman is regarded the legal mother. The criterion is not a formal one, but rather a substantive one: caring and concern are the core elements of parenthood.

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17 HELDRICH & STEINER 2004, sec. 2.1.

18 Israeli Trust Law, 1979, sections 10-15.

19 Adoption Law, sections 16, 19, & 20.

20 *Kings* A, 4.16-28.

In a more complex way it also applies to the case of Moses. Yocheved, Moses' mother, did not willingly abandon the child; she put him in the ark on the Nile in order to rescue him from the murderous command of Pharaoh; she also sent his sister, Miriam, to keep an eye on him. Pharaoh's daughter finds the boy, and Miriam offers her a nurse for the boy, without disclosing that the candidate, Yocheved, is in fact Moses' biological mother. Pharaoh's daughter accepts the offer and is willing to give the nurse wages for that task. After being nursed by Yocheved, Moses was returned by Yocheved to Pharaoh's daughter "and he became her son".[21]

In principle, adoption cuts the connection with the biological parent, and the adoptive parent replaces the biological parent. This is typically specified also in section 16 of the Israeli Adoption Law. Along the years, it has been found that the rigid closure of adoption has proved itself as unsatisfactory and harmful.[22] The result is that nowadays a prevalent form of adoption is that of «open adoption» whereby the biological and adoptive family enter into enforceable agreements for on-going contact after the adoption.[23] In the story of Moses there was some kind of an open adoption, with the adoptive mother not being aware to the fact that the nurse is the biological mother.

Moses' case does not reveal a competition between the biological mother and his adoptive mother, because Yocheved was willing to give up the child in order to save his life. Seemingly, a formal procedure of adoption, whereby an official approved it, was not needed. A *de facto* adoption by which the adoptive mother takes the boy and raises him, sufficed.

Nowadays adoption is mostly governed by statutory law. These laws are relatively modern. For example American law did not inherit adoption laws from England for the simple reason that there were not any. Adoption was «a new edition to the Anglo-American lexicon» by statutory laws starting from the 1850s.[24] The hallmark of adoption is a judicial termination of one family and creation of another, attributes which need to conform to rigid formal requirements. With the development of new families, *de facto* adoptions have become very common. Such adoptions stand in a sharp contrast to the formal approach of statutory adoption laws, Israeli Law notwithstanding. Is *de facto* adoption still viable in the light of the current statutory law?

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21 *Exodus* 2.10.

22 Carp 1998, 196-222.

23 Appell 2010, 90-93.

24 Appell 2010, 87-88.

Parental Duties and Rights

The problem raised by the inter-relations between formal adoption and *de facto* adoption reflects one common legal thread: what are the relations between form and substance? Could substantive considerations overcome ceremonial procedure? Is co-existence between the two possible? In modern terms, could guardianship be created deviating from the formal procedure specified by law? Some papers refer to the gap between formal rules and law in practice. This gap is probably eternal and in modern times it is described as the conflict between the law in the book and the law in action.[25] It is especially challenging with regard to family relations where on the one hand status requires clear definition and on the other hand statutory law cannot adequately respond to the rapidly changing models of family. This will be demonstrated by several cases decided by Israeli courts.

In one case two women, unmarried-partners, agreed to have a child, following which one of them gave birth to a baby. The other woman did not adopt the baby. After a while they separated. The biological mother filed a claim against her ex-partner for maintenance (same sex marriage is not recognized if taken place in Israel, but if made abroad, it is validated here). The court ruled that there was a contract (not necessarily formal) between the two women whereby the other woman committed herself to maintaining the child, and she was liable by virtue of it.[26]

A similar case concerned a non-married straight couple who decided to adopt twins. Only the mother was recorded as the adoptive parent. Her partner signed an undertaking saying that if the mother would not be able to take care of the twins, he would be ready to act as their guardian. After the couple's separation the mother filed a claim against her ex-partner asking for a declaration that he was the twins' adoptive father. This was rejected: parental relations may be established either by biology or formal adoption (through a court decree). Adoption *de facto* is not enough. But the court imposed on the ex-partner a duty (albeit minimal) to pay for the twins' support as a result of the fact that he acted as their father, and as such could be considered as a psychological father (a notion developed in American case law to which I shall shortly refer). Status of fatherhood was not recognized, but its monetary

[25] Pound 1910.

[26] FC 21910-02-10 S' v M' (13/8/2013) (family court, Judge Rakover).

effects were partially imposed on the non-father by virtue of the agreement and his actual conduct.[27]

This raises a series of questions: parents may be subject to liability for neglecting their children. Their liability might be based on their parental duties, on tort law and also on criminal law.[28] Are *de facto* parents exposed to such liability? And more generally: If *de facto* parents are liable to duties and obligations of parents, are they also liable for damages caused by their *de facto* children (who as minors are exempt from liability) to third parties? Are *de facto* parents entitled to parental rights such as visitation? Will the child when becoming a grown-up assume responsibility towards such a father? In an *obiter dictum* one of the judges indeed pointed at the problem and mentioned that the father is likely to enjoy rights of visitation.[29]

In the above cases conduct coupled with promise (not necessarily formal) led to the imposition of parental monetary obligation on the *de facto* parent. The question of parental duties remained obscure. The following case demonstrates the creative power of technology and of an explicit contract, which tries to overcome the formal legal limitation of parental and guardianship status. This time the contract involved three parties: two women and a man, all of whom wished to become common parents of twins. All were involved in the birth process: one woman gave birth following an artificial insemination; the second woman contributed eggs; the man was the sperm's donor. In the official state registration the biological parents were the woman who gave birth and the man. The three parties concluded a formal agreement stating that they wished to create a common parenthood whereby they would jointly take care of the twins, and were bound to any rights and duties emanating from that position. A provision in the contract stated that the parties regarded this agreement as valid and binding contract for any matter. After being separated from the mother who gave birth, the other woman filed a claim against the registered parents who wished to exclude her from the family circle claiming

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[27] AFC 22050-06-11 R.S. v A.R. (13.5.12), approved by the Supreme Court in FC 4751/12 Almoni v Almonit (29.8.2013).

[28] Mahoney 1994, 75-86, 200-208. CA 2034/98 Amin v Amin, PD 53(5) 69 (1999): tort liability imposed on a father who caused emotional damage to children as a result of neglect.

[29] Troilo 2011; Scharf 2012; Appleton 2014, 1481-1490. See FC 4751/12, where Justice Amit mentioned that had the de facto father sued for custody or visitation rights he could not have been treated as alien to the girls.
See also FC 1180-08 Plonit v Ploni (27.4.2011) section 92-94, relying on Middleton v. Johnson, 633 S.E.2d 162, 595 et seq. (S.C. Ct. App. 2006); In Re Parental Responsibilities of A.D., 09CA0756 (Colo. app. 4-1-2010). See also In re Clifford K., 217 W.Va. 625,619 S.E.2d 138, 157-158 (2005) (noting that in «exceptional cases and subject to the court's discretion, a psychological parent may intervene in a custody proceeding… when such intervention is likely to serve the best interest of the child(ren)…»).

she did not have any standing and the contract was against public policy. The court rejected these arguments, taking into consideration the twins' best interests, and enforced the agreement.[30]

Duties of guardians are hence imposed by choice and conduct: autonomy and reliance replace formality dictated by law. Formal contracts and promises coupled with conduct embedded in self-preference and mutual reliance creates a deviating road to the public-formal channels of kinship shaped by the state.

Citizenship

Another case which this time reflected a limitation on the *de facto* parenthood was tried recently by Israeli Supreme Court involving the application of the Law of Return, 1950, which gives an automatic citizenship to a Jew, or to a son (or grandson) of one Jewish parent (or grandparent). A claimant wanted to have his right of return following these facts: His parents were non-Jewish, but his non-Jewish mother married a Jew who raised him. Had he adopted him, the son would have been entitled to citizenship. It transpired there was no formal adoption. The core of the petition related to the formal adoption that was made abroad, but actually no such adoption was made and some of the documents were not authentic. Pursuing a formal approach, the court in a majority opinion rejected the claim, expressing the view that in these circumstances adoption *de facto* did not suffice. The minority opinion was ready to adopt a substantive approach – open to further scrutiny - relying on the actual relations of parenthood between the claimant and his mother's husband.[31]

Could we trace a trend in this case law and extract any guidelines? It appears that with regard to inter-family relations in the private sphere the court is more ready to employ flexible concepts of family kinship. When it comes to public rights the position is less tolerant, in particular where some suspicions of fraud are raised, yet the minority approach signals a more lenient tendency even with regard to the public sphere.

To conclude: Israeli law has developed the notion of *de facto* marriage to respond to the problems raised by harsh marriage rules dominated by religious law (no civil marriage in Israel; no same sex marriage either).[32] Following this line case-law paves a parallel path to respond to the growing needs and

[30] FC 37745-03-14 Nili v Orit and Alon (27.4.2014) (Judge Shaked).

[31] HC 5020/08 Poltoretzky v State of Israel (12.9.2013) (majority: judges Rubinstein, Naor; minority: Barak-Erez).

[32] Lifshitz 2008.

number of children in non-formal families. The same device to circumvent the formal rules in marriage, namely the *de facto* conduct of being married, is being employed in the context of parental guardianship: the *de facto* parenthood is a substitute for adoption. Agreement and its implementation replace formal status.

Do we trace here norms which were prevalent in some ancient societies, where marriage was consummated by living as husband and wife in the same household,[33] and guardianship by rearing and upbringing the child, without the need of any special formal ceremony?[34]

CONCLUSION – BACK TO PAST WITH CONTEXTUAL INTERPRETATION

I related earlier to the fluid borders of guardianship. Large categories of guardianship have been cancelled: no woman as such needs nowadays a guardian. Guardianship is applied to those incapacitated either because of age or because of mental defects. But the question who is to become a guardian still retains its fluidity due to the evolvement of new categories of intimacy, kinship and family.

> Research on family meanings and practices in late modernity underlines the continued importance of the bonds of affection and support in families, but it also reveals changing sets of close relatives and a blurring between kin, non-kin and ex-kin in family networks. Personal relationships are today less dependent on marriage and blood ties, with family bonds and commitments going far beyond the nuclear co-resident family and extending across households linked by friendship, vicinity, dissolved marriages, step-parenting and care arrangements.[35]

The move of modernity or post-modernity families from «status to contract»,[36] from the «natural« to the «chosen», raises non-trivial problems, and casts a shadow on the clarity and certainty of legal rules in the family circle. Are the problems involving formal and informal families likely to create a chaotic situation eventually leading back, in a pendulum motion, to formality?

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[33] On the concept of marriage in Roman law see STOCQUART 1907, 304. Yet also this non-ceremonial form of marriage needed to be accompanied by the intention of the husband to have a legal wife. On this concept in Jewish Law see SHOCHETMAN 1993.

[34] As demonstrated by Moses and Pharaoh's daughter, discussed earlier.

[35] WALL & GOUVEIA 2014, 352.

[36] MAINE 1861, 170 («the movement of the progressive societies has hitherto been a movement *from status to contract*»).

Could we trace past-analogues which might shed light on prospective possible developments?

The need for clarity is crucial in property matters, such as the case where an informal daughter claims her share in the estate of her deceased quasi-parents.[37] Indeed under American law there is a controversy whether to stick to the formal inheritance statutes or make changes through judicial interpretation.[38] Some American courts adopted the doctrine of informal adoption in order to enable non-adopted children to inherit. This doctrine is based upon either an intention or agreement to adopt, and some courts put emphasis in addition on reliance on the intention to adopt and the ensuing detriment.[39] This somewhat rigid requirement is justified as preventive fraud machinery and it is clearly applicable to nuclear families.[40] But it might cause difficulties in communities where the concept of extended families prevails and where no formal adoption has been ever considered, or in families with cultural pre-disposition against formal adoption. Modern Intestacy Law which applies absent a will might be under-inclusive as it usually refers to formal families[41] or over-inclusive as it occasionally benefits undeserving heirs.[42] With regard to the under-inclusiveness the proposal is to replace the contractual rigid doctrine with the doctrine of holding out parental relations, namely where «… the proponent and decedent held themselves out as parent and child for a substantial period of time…».[43] Also in order to help limit meritless claims, «courts should continue to require that a proponent prove his claim».[44] Naturally a statutory reform is needed to officially implement this change in all jurisdictions.[45]

Guardianship is closely related to the general question of identity. Identity might relate to guardianship, family membership, citizenship, race or gender. Should it be determined according to substantive or formal criteria?[46] With regard to parenthood substantive criteria might include DNA, commitment,

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37 HIGDON 2008.

38 REEVES 2001; DRAKE 2005, 681-692.

39 HIGDON 2008, 257-266.

40 HIGDON 2008, 271-272.

41 HIGDON 2008. In Israel a non-married spouse is entitled to inherit if both the deceased and the survivor have lived together as husband and wife in a common household, neither of them married to another person: section 55 to the Succession Law, 1965.

42 COHEN 2012, 803-804.

43 HIGDON 2008, 274.

44 HIGDON 2008, 275.

45 HIGDON 2008, 275-278.

46 CLARKE 2015. The article relates in addition to formal and substantive criteria to a third criterion entitled «elective». In parenthood it consists of intention.

love, attachment, caretaking or support; formal ones include birth certificates, voluntary acknowledgement of paternity, adoption papers. Determination of parenthood is crucial not only to the parents' identity, but also to the children's. Formal tests of identity provide safeguards against inauthentic claims and secure stability and equality in norm-application. But formality is confining when applied to cases where there was no awareness to formal requirements and where it is too costly to be accessible.[47]

The balance between form or substance and proper application of either is one of the most intriguing problems of current legal systems. But the struggle is eternal. Present problems reflecting modern or post-modern law of guardianship drive us back as if in a time machine to the pre-modern era of extended family, even tribal communities, where the *de facto* care was considered superior to formal kinship. The challenge facing current legal systems is to adjust legal rules to the rapidly changing family-notions. The rules and principles reflected in ancient times, borrowing from care, affection, proximity, intimacy, might serve not only as reminiscences of a by-gone past, but also as an inspiration for fresh ideas to regulate a new, revolutionary reality.

[47] For a thorough analysis advocating the application of the relevant criteria according to context and policy, see CLARKE 2015.

BIBLIOGRAPHY

ALMOND 2008
B. ALMOND, *Family: Social construction or natural phenomenon?*, «Irish Quarterly Review» 97, 29-43.

APPELL 2010
A.R. APPELL, *Controlling for Kin: Ghosts in the Postmodern Family,* «Wisconsin Journal of Law, Gender & Society» 25, 73-136.

APPLETON 2014
S.F. APPLETON, *Leaving Home? Domicile, Family, and Gender,* «University of California, Davis, Law Review» 47, 1455-1519.

BECKNER, DEVAUX & RYZNAR 2014
D.R. BECKNER, A. DEVAUX & M. RYZNAR, *The Trust as More than a Common Law Creature,* «Ohio North University Law Review» 41, 91-119, available at http://ssrn.com/abstract=2430599.

CARP 1998
E.W. CARP, *Family Matters: Secrecy and Disclosure in the History of Adoption,* Cambridge (MA).

CLARKE 2015
J.A. CLARKE, *Identity and Form,* «California Law Review» 103, 747-840.

COHEN 2012
N. COHEN, *The Slayer Rule,* «Boston University Law Review» 92, 793-810.

DEAKIN 2009
S. DEAKIN, *Capacitas: Contract Law, Capabilities and the Legal Foundations of the Market,* in: S. DEAKIN & A. SUPIOT (eds.), *Capacitas. Contract Law and the Institutional Preconditions of a Market Economy*, Oxford, 1-29.

DRAKE 2005
R.B. DRAKE, *Status or Contract? A Comparative Analysis of Inheritance Rights Under Equitable Adoption and Domestic Partnership Doctrines*, «Georgia Law Review» 39, 675-731.

ENGLARD 1995
I. ENGLARD, *The Capacity and Guardianship Law, 5722-1962, sec. 1-13*, Jerusalem (in Hebrew).

GLENDON 2004
M.A. GLENDON, *Introduction: Family Law in a Time of Turbulence*, in: A. CHLOROS, M. RHEINSTEIN & M.A. GLENDON (eds.), *International Encyclopedia of Comparative Law: Persons and Family*, IV, Tübingen.

HELDRICH & STEINER 2004
A. HELDRICH & A.F. STEINER, *Persons*, in A. CHLOROS, M. RHEINSTEIN & M.A. GLENDON (eds.), *International Encyclopedia of Comparative Law: Persons and Family*, IV, Tübingen, chapter 2.

HIGDON 2008
M.J. HIGDON, *When Informal Adoption Meets Intestate Succession: The Cultural Myopia of the Equitable Adoption Doctrine*, «Wake Forest Law Review» 43, 223-281.

LIFSHITZ 2008
S. LIFSHITZ, *Civil Regulation of Spousal Relationships in Israel: Between Substitute and Alternative*, in: N. COHEN & O. GROSSKOPF (eds.), *Daniel Friedmann Book*, Tel Aviv, 549-582 (in Hebrew).

MAHONEY 1994
M. M. MAHONEY, *Stepfamilies and the Law*, Ann Arbor.

MAINE 1861
H.S. MAINE, *Ancient Law: Its Connection with the Early History of Society, and its Relation to Modern Ideas*, New York.

POUND 1910
R. POUND, *Law in Book and Law in Action*, «American Law Review» 44, 12-36.

REEVES 2001
W.G. REEVES, *Inheritance by Equitable Adoption: An Overview of Theory and Proof*, «Journal of the Missouri Bar» 57, 130-135.

ROSS 1973
S.A. ROSS, *The Economic Theory of Agency: The Principal's Problems*, «American Economic Review» 62, 134-139.

SCHARF 2012
R. L. SCHARF, *Psychological Parentage, Troxel, and the Best Interests of the Child*, «Georgetown Journal of Gender and the Law» 13, 615-641.

STACEY 1996
J. STACEY, *In the Name of the Family: Rethinking Family Values in the Postmodern Age,* Boston.

STOCHETMAN 1993
E. SHOCHETMAN, *Is there a Fear that Cohabitants may be Deemed Married according to Jewish Law?*, «Law Studies» 10, 7-37 (in Hebrew).

STOCQUART 1906-1907
E. STOCQUART, *Marriage in Roman Law*,«Yale Law Journal» 16, 303-327.

STOLJAR 2004
S. J. STOLJAR, *Children, Parents and Guardians*, in: A. CHLOROS, M. RHEINSTEIN & M.A. GLENDON (eds.), *International Encyclopedia of Comparative Law: Persons and Family*, IV, Tübingen, chapter 7.

TROILO 2011
J. TROILO, *Stepfamilies and the Law: Legal Ambiguities and Suggestions for Reform*, «Journal of Divorce & Remarriage» 52, 610-621.

TYLDESLEY 1998
J. TYLDESLEY, *Hatchepsut: The Female Pharaoh*, London.

WALL & GOUVEIA 2014
K. WALL & R. GOUVEIA, *Changing Meanings of Family in Personal Relationship*, «Current Sociology» 62, 352-373.

WIJFFELS 2009
A. WIJFFELS, *Rationalisation and Derationalisation of Legal Capacity in Historical Perspective: Some General Caveats*, in: S. DEAKIN & A. SUPIOT (eds.), *Capacitas. Contract, Law and the Institutional Preconditions of a Market Economy*, Oxford, 49-62.

Section 2
Before Guardianship

Custody of Children in Late Bronze Age Syria, in the Light of Documents from Emar

LENA FIJAŁKOWSKA

ABSTRACT

Emar, a Syrian town situated on the bend of the Euphrates, thrived in the Late Bronze Age. Still, it was an era when life was frequently cut short by diseases, famine, and war, and men often died before their children could grow up. And yet, evidence for guardianship of such children is scarce. Minors are clearly mentioned in few documents, especially testaments, which do not give us much detail. Probably in a normal situation, the widow would take over the guardianship of her children or step-children, without any institutional intervention. Only in a problematic case (foreseen conflict, no wife able to fulfil guardian's duties) the patriarch would settle the question in his will, with a lot of freedom concerning the person of the guardian as well as their rights and obligations. What was not mentioned would be subject to customary law. If the widow could not become guardian, this duty would fall to older siblings or paternal uncles of the child. The article aims at reconstructing the main characteristics of guardianship as mirrored in documents of legal practice.

In contemporary law, custody is defined as «the care, control and maintenance of a child awarded by a court to a responsible adult. Custody involves legal custody (decision-making authority) and physical custody (caregiving authority)».[1] Therefore, the first question to examine is if an institution with such or similar characteristics existed in the ancient Near East, or, more precisely, in the Late Bronze Age Syrian city of Emar.[2] However, it will be useful to start with an outline of the characteristics of the paternal authority in the region.

The authority of the head of the household (usually father or grandfather) lasted till his death or till the emancipation of sons/grandsons and marriage of daughters/granddaughters.[3] It encompassed rights associated with it today as well, such as deciding about the upbringing and education of a minor child and disciplining him/her, by means of physical punishment if need be. However, it went much further; the head of the household could choose the profession for their children, give them into apprenticeship, marry them off (with no need for their consent), and even, when in need, pledge or sell them, although those practices were generally frowned upon by the society and took place only in dire economic circumstances. Those rights lasted in spite of the children's coming-of-age, unless the patriarch decided to bestow on them a part of his estate and thus free them from under his authority. Moreover, the partiarch had domestic jurisdiction over all the subordinate members of his household, i.e. the right of punishing them for several contraventions within the household and in the limits set by law. For instance, according to Middle Assyrian Laws, a father could punish his daughter who "willingly gave herself to a man" "in whatever manner he chooses".[4] Yet, he did not have the right of life and death upon his children.

In case of the death of the father or of the parents' divorce during the children's minority, someone had to take care of the latter, and thus, the issue of

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1 GARDNER 2009, 441.

2 Emar, situated on the bend of the Euphrates, was first under Hurrite rule, and then, probably in XIVth century, it became the main town of the Hittite border province of Aštata. The site yielded documents originating from XIV-XIIth centuries, mostly literary, scholarly and cultic, but also ca. 500 legal texts, especially sales and testaments, as well as adoptions, exchanges, donations, loans etc. They are written following two scribal styles – so-called Syrian and Syro-Hittite. The main differences between the two consist in the shape of the tablet, palaeography, way of sealing, and, more importantly in the legal content, the latter especially as far as sales are concerned. For an outline of both Syrian and Syro-Hittite formularies, see DÉMARE-LAFONT 2010; for an analysis and comparison of sale contracts, see FIJAŁKOWSKA 2014.

3 On paternal authority in the ancient Near East, see WESTBROOK 2003, 39-50.

4 Tablet A § 56 of Middle Assyrian Laws. On domestic jurisdiction in the ancient Near East see DÉMARE-LAFONT 2012.

custody would arise. However, there is no term for «custody» or «guardianship» either in Sumerian or in Akkadian, and no comprehensive legal regulation of this institution may be found in any of the ancient Near Eastern law collections.[5] Therefore, information on the situation of orphaned minors and children of divorced parents must be gleaned from the few existing provisions of the «codes» and from texts of legal practice. Those data are of course casuistic, and show only a very fragmentary picture, highlighting problematic situations. If no conflict regarding the fate of children was expected by the patriarch, there would be no need for a document; by the same token, law collections encompass cases with a potential for a legal dispute. In other words, the usual situation, i.e. a smooth transmission and course of children's care usually means that no documentary trail is left. Still, in the next paragraphs we will try to trace out as detailed a picture of custody of minors as possible based on the scarce data in our disposition.

I. CUSTODY AFTER THE DEATH OF THE PATRIARCH

1. IN GENERAL

This was probably the most common situation. After the patriarch's (usually the father's but sometimes grandfather's) death, the custody of children would typically fall to the widow, together with the administration of her late husband's estate. She was allowed to remarry, and then the authority over the children would be exercised jointly with their stepfather, ceasing upon their coming of age. Moreover, it was subject to limitation and control. According to Code of Hammurabi, a widow could remarry only with the consent of the court, and even then, an inventory of the estate of the deceased had to be taken, the guardians being forbidden to sell any of it; such a transaction was void *ex lege* and the buyer forfeited his money.[6] On the other hand, under economic

[5] «Comprehensive» in ancient Near Eastern sense, i.e. containing enough provisions to give an idea of the institution, even if the said provisions were spread all over the law collection. Of course, there is no comprehensiveness in the modern sense in ancient Near Eastern legal systems, since the principles according to which the law collections were compiled are completely different from ours. On the law collections see, e.g., WESTBROOK 2003, 8-10; LAFONT 2000. English translations of all the collections may be found in ROTH 1997.

[6] § 177 of the Code of Hammurabi.

duress a widowed mother could even sell her children, although probably the consent of closest male relatives was necessary.[7]

2. IN EMAR

A. APPOINTMENT OF THE GUARDIAN

A.1 Widow as guardian

Numerous testaments from Emar contain a provision installing the widow as "father and mother" of the household and usually giving her the control of the estate as well. Another provision that comes together with the former is the obligation of the children to serve/honour (*palāhu*) or support (*wabālu*) such a guardian,[8] under threat of losing their share of the inheritance; they are also prohibited to ask for inheritance division before the woman's death. At first sight, it would seem that it was a way to bestow paternal authority upon the widow, and, by the same token, to appoint her guardian of minor children. Yet it is not the case, or at least not always. On the contrary, sometimes it is clear that the children in question are grown up, as in Emar 181, when the older siblings are supposed to keep in good repair a house for the youngest brother. Moreover, in this document the widow is made "father and mother" of the estate and is to be served, but the duty to marry off the two young men falls to the sister, apparently the oldest of the three. In other texts, the same institution is also used with respect to other relatives of the testator, for instance a daughter who becomes "father and mother" of her sisters, one of whom is already married, but still supposed to "serve" her sibling or lose her share of the inheritance.[9] Therefore, it seems that the title of "father and mother" is primarily connected with the intention to keep the estate undivided, thus securing the support of the widow (or another person who could otherwise find themselves in a difficult position), and does not automatically mean that she

[7] On the sale of children under economic duress see, e.g., Oppenheim 1955; Eph'al 2009, 115-147.

[8] The use of the first verb is characteristic of Syro-Hittite texts, of the second one mostly of Syrian tablets. According to Bellotto, in the latter case the stress is on practical duties, such as delivering bread and clothes. In contrast to sale contracts, the testaments and adoptions from Emar of both styles do not display many significant differences, and these differences do not suggest the existence of two sets of legal rules concerning inheritance and family law, as in the case of sale. See Bellotto 2009, 32; Démare-Lafont 2010, 52-63. For an analysis of the testaments see Undheim 2001.

[9] Emar 31.

becomes guardian of the children; it means only that the children have certain duties towards her.[10]

In an age when life was often cut short by diseases, famine, and war, it is to be expected that a father's death before the coming of age of his children would happen often enough. Yet minors are mentioned only in a few testaments, when the wife is clearly ordered (and at the same time authorized) to "raise her children",[11] or to make decisions pertaining to their future, such as marrying them off. This, in turn, means that they were at least still living at home, even if approaching, or already having attained the adult age.[12] The scarcity of evidence appears to indicate that the widow of a man who died without leaving a testament (or who did not address this question in his will) would automatically become guardian of her children and step-children, or rather, that she would continue to take care of them without even calling it guardianship or custody. Testamentary mentions would be made either in order to extend or to limit her powers, or to avoid possible claims or doubts from other family members, especially if for some reason (e.g. old age or illness) the widow was unable to actively exercise the custody.[13] It is all the more probable since in cases when important decisions are to be taken (marriages of children, slave manumissions, selling children under economic duress), the relevant contracts are often concluded by both spouses acting together, and not by the (alive and well) head of household alone.[14] Also in case of temporary absence or sickness of the husband, the wife could act on behalf of their children, even marrying them off or selling them, although in the latter case, some justification was needed.[15] It is therefore not at all surprising that once widowed, she would become their permanent guardian automatically.

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[10] For the analysis of this institution as means of keeping the estate undivided and the fate of the widow secured, see KAMMERER 1994; WESTBROOK 2001, 30-43.

[11] RA 77 3: 8. … ^{f}*Mi-ir-ta-ba-a'-li* 9. DAM-*ia* DUMU.MEŠ-ˈšiˌ ˈ*lu?*-ú?ˌ ˈ*ta?-ra?*ˌ-*ab-bi* – "Let Mirta-Ba'li, my wife, raise her children".

[12] Emar 70. For the reading of the text, see corrections in DURAND 1989, 190.

[13] As in ASJ 30, where the son of the *de cuius*, ad not the widow, is entrusted with the duty to marry off his sisters.

[14] See, e.g., RE 27 (manumission by a married couple); RE 6 (marriage contract concluded by both parents of the bride); RE 87 (adoption of a man by a married couple); Emar 217 (sale of children by a married couple).

[15] As in Emar 216, where ^{f}Ku'e sells her daughter to be the second spouse of the (female) buyer's husband: 1. ^{f}*Ku-'-e* DUMU.MÍ ^{m}*Zu*-[...] 2. DAM ^{m}*Za-dam-ma* [*a-kán-na iq-bi*] 3. *ma-a* LÚ.*mu-ti*$_4$-*ia il-t*[*a-bi-ir* DUMU.MEŠ-*ni* 4. *ṣe-eh-ru ša ú-bal-la-aṭ-s*[*u-nu ú-ul i-šu*] – "Ku'e, daughter of Zu…, wife of Zadamma, [spoke as follows]: My husband is o[ld, there is no one to] ca[re for our] small children".

If the testator was a widower, a major child could be appointed guardian of his/her siblings. It seems to be the case in a will where an adopted son is supposed to find a wife for his younger adoptive brother, thus fulfilling one of the duties of the guardian.[16]

It might have happened that the father outlived his son. Then, especially if the son had still lived in the paternal house together with a family of his own, his wife and children would remain under the authority of the father-in-law and grandfather, whose duty was to appoint a guardian *mortis causa*, usually probably the daughter-in-law.[17] The same would be true for a widowed daughter who either had lived in an *erēbu*-marriage,[18] or returned to the paternal home after her spouse had passed away, thus falling back under her father's authority. In one of the wills, the testator takes care of the fate of such a woman, who apparently has three sons of her own.[19] She is declared "male and female", a legal fiction enabling a woman to exercise familial cult, which would not be necessary if the sons were grown up.[20] The latter are supposed to support their mother (*wabālu*), and the estate is to be kept undivided until her death. There is no single phrase in the text that might be interpreted as entrusting Unara with the custody of her children, but the wording of the document is reminiscent of the testaments installing the widow as "father and mother" of the estate in order to keep it undivided.[21] It follows that the main purpose of this particular will was threefold – ensuring the continuity of the familial cult as well as the indivisibility, at least temporary, of the inheritance, and securing the support of the testator's daughter. On the other hand, it was not necessary to appoint her guardian of her children, which she would probably become automatically anyway as their mother; however, in view of their age, and perhaps of impending familial conflicts, the *de cuius* thought it preferable to enhance her authority.

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16 Emar 183: 8. *a!-nu-um-ma* ^{md}*Da-gan-h*[*a-ri-iš*] 9. *a-na* ^{m}*A-hi-ha-mi-is* [ŠEŠ-šu DAM-*tu*$_4$] 10. *li-hu-u*[*z* – "Now Dagan-hariş will make Ahī-hamiş take a wife".

17 TBR 76: ^{m}*E-be* DUMU-*ia* GAL BA.UG$_6$ù ^{f}É.GI$_4$-*ia* 4. ^{m}*Ha-ab-*ú DUMU *E-be* DUMU-*ia* GAL *li-ra-ab-bi-ma* - "Ebe, my eldest son, is dead, and my daughter-in-law shall raise Habu, the son of Ebe my eldest son".

18 It is a form of marriage whereby the son-in-law lives with his wife in the house of his father-in-law; often he is also adopted by the latter, in order to ensure the continuity of the family line. For marital adoptions in Emar see BELLOTTO 2009, 91-122.

19 They are called "my sons" by the testator, but from the wording of the text it seems more likely that they are in fact his grandsons, as suggested by the editor. See RA 77, 27.

20 For "male and female" women see most recently YAMADA 2014.

21 Unara is called only "mother", and not "father and mother" of the boys, but the other provisions are analogous to the "father and mother" testaments, including a prohibition on requesting the division of the estate under the penalty of losing one's share.

If there was no widow/mother and no siblings, paternal uncles would probably become guardians jointly.[22] If the wife was not the biological mother of the children, they could be given to her into adoption, probably to strengthen her authority on the one hand and to ensure their inheritance rights to her property on the other hand.[23]

B. DUTIES OF THE GUARDIAN

Not much is said in testaments about the guardian's duties; they were probably regulated by customary law, and the wills mention them only if the testator wanted to make alterations or adjustments.

B.1 In regard to the person of the ward

The main duty seems to have been simply to raise him/her, as ordered by the testator in TBR 76. That would of course encompass making all the most important decisions concerning the child's future, such as choosing the education and job for the boys, and marrying off boys and girls. The latter obligation could be rewarded by the possibility of taking the bride price (often *expressis verbis* mentioned in the will),[24] a sum of money given by the groom to the family of the bride; in case of boys to be married, silver for the bride price should come from the estate.[25] Several marriage agreements testify to these practices. In RE 61 a woman concludes such a contract, marrying off her daughter into another family and accepting a bride for her son from them; she probably acts as guardian of her children after the death of her husband. In another text (RE 76) a girl married off by her two brothers is mentioned; it follows that the brothers were her guardians after the parents' death, or at least were obligated by the father to marry her off and allowed to take her bride price.[26]

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[22] Emar 205.

[23] ASJ 29: 3. *a-nu-ma* ^{f}*Al-um-mi* DUMU.MÍ-*ia a-na* DUMU.MÍ-*ut-ti* 4. ša ^{fd}30-*na-e* DAM-*ia at-ta-din*-ši – "And now I gave Al-ummi, my daughter, to Kusuh-na'i, my wife, as a daughter".

[24] See, e.g., Emar 70 (the widow is to marry off the testator's daughters and to take their bride price); ASJ 30 (brother); TBR 41 (brother); TBR 45 (brother).

[25] The obligation to marry off the testator's children must have encompassed paying the bride price out of the estate (if it was to be kept undivided) or of the share of the inheritance of the obligated. Even in a case of an indebted father who adopted his creditor in exchange for paying off his debts and appointed him sole heir, the biological son of the adopter is still to receive 50 shekels of silver from the estate in order to pay the *terhatum* (RE 10).

[26] The text is an agreement between the two brothers and the man to whom they gave their sister into marriage. Instead of marrying her himself, he gave her away to another man and took the

The duties of the guardian were not set once and for good; if the head of the household wished, he could change them, mainly by setting limits or transferring them partly to another family member. It seems that at least sometimes, he did not trust his wife to make right decisions, and preferred to leave them to his eldest child, or that the widow was simply either too old or too sick to fulfil this duty. Thus, in one text (ASJ 30), the widow is installed as "father and mother" of the house and her daughters are to support her, but if the son returns from abroad, it is he who is ordered to marry off his sister, fulfilling one of the main functions of the guardian. This text shows also that such a (part-) guardian could be appointed conditionally. In another document (Emar 181) there is a widow as "father and mother", but it is the eldest sister who is supposed to find wives for her brothers.[27]

In case of children pledged by their father, after their death it would be up to the guardian to decide about their fate. They could either pay the debts of the deceased (probably from the guardian's own pocket, since people indebted to the point of pledging their children are not likely to leave much wealth behind) and redeem the child, or to agree to their enslavement by the creditor (Emar 205).[28] In dire need the guardian could sell, and probably, *a maiori ad minus*, also pledge the ward, but there are no Emar texts documenting the latter. As for the former, in TBR 52 the uncles of a girl sell her "in a year of distress", and the right of redemption is mentioned.

Sometimes, the authority of the guardian could be hideously misused; such was the case of one Kila'e, a thief caught in flagrante delicto and condemned to slavery, who gave his sister into slavery instead (Emar 257).

B.2. In regard to the estate of the ward

When the widow (or another person the testator wanted to protect) was appointed "father and mother" of the estate, the ward had no right to it until her death, so technically, it is incorrect to speak of custody in that respect. On the other hand, it is usually clearly stated that all the property is intended for the children, and the widow is not allowed to reassign it if the latter do not neglect their support duty. Still, sometimes it was simply impossible to keep the estate

(substantial) bride price, a part of which he must now give back to the brothers of the girl. Semitica 46 1 is another document where a brother is marrying off his sister, whereas in Emar 213 the widow Hūdi is giving her daughter in marriage to a man who paid her (Hūdi's) debts (on this text see below).

[27] In TBR 41, TBR 45, TBR 69 it is the older brother (and not the widow) who is supposed to marry off the younger one.

[28] In this text, the creditor asks the paternal uncles of his pledges to repay the debt. They are unable to do it and decide that the two boys will become his slaves instead.

intact, usually due to an economic crisis caused by war or famine. What happened then is shown by a testament of Hūdi, wife of Abiu (Emar 213). In an earlier document (CM 12, 14) her husband made a substantial bequest to her, to be inherited by their five sons if they took proper care of their mother. But either they did not, or they died or left for a foreign country. In any case, in her will Hūdi, apparently in control of the whole estate of her late husband, mentions only her daughter.[29] Something bad must have happened after the husband's death, since she claims to be destitute and in debts. To survive, she marries her daughter to a rich and powerful man – Ba'al-malik, son of the diviner, and adopts him, bequeathing him all her estate. She seems to own valuable real property, but no cash for immediate needs, and it appears to have been the only way she could support herself and secure her daughter's future.

If there was no "father and mother" of the estate, the guardian would administer it till the maturity of the ward,[30] and would be forbidden to sell it; we can gather that, as in other periods of ancient Near Eastern history, an inventory would be made and then checked. However, sometimes there was no other solution than selling a part of the property. It is demonstrated by several sale contracts, when a mother sells real estate together with her children,[31] or a widow – a building that had belonged to her husband.[32] In all those cases an explanation is given, usually debts or "the year of duress" (an allusion to a general calamity befalling the land); probably those were the only circumstances when such a sale was permitted.

C. TERMINATION

Custody would end upon the majority of the ward or upon their marriage, especially if the ward left to live with another family. However, in case of installing a "father and mother" of the estate, the ward would often enter into the possession of their property only some time after coming of age or marrying.

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[29] It is more probable that the sons are dead, otherwise the reason for their disinheritance should be mentioned, especially since Hūdi explains why she does not install any of her brothers-in-law as heirs ("There is none who cares for me among my brothers-in-law").

[30] It is not clear when exactly a child attained maturity in the ancient Near East; probably individual puberty was the criterion. See WESTBROOK 2003, 39.

[31] TBR 65.

[32] Emar 114; in Emar 82, a woman sells a building so that "her children survive".

II. CUSTODY OF MINOR CHILDREN IN CASE OF DIVORCE[33]

Prima facie it would seem that in a patriarchal society, after divorce the children would always stay with their father, but surprisingly enough, this was not the case in the ancient Near East. Several Old Assyrian legal documents show that it was indeed the divorced father who kept them if he could support them,[34] but according to Old Babylonian law, in case of a woman divorced with no fault, not only could she keep the children, but she also received her husband estate[35] or half thereof if the marriage was polygamous,[36] in order to be able to maintain her progeny. Thus, in that case the mother seems to be the only guardian of her children, but with her authority lasting only till their adulthood. However, it is difficult to determine how far this authority extended, since documents of practice featuring a woman acting on behalf of her children do not inform if she is a widow or a divorcee.

Unfortunately, none of the legal texts from Emar tells us anything about the rights of a divorced woman as a guardian. However, it seems justified to assume that the situation was similar to the one in other countries of the region, with children mostly under the father's care, possibly except such instances as divorce without the wife's fault.

Testaments from Late Bronze Age Syria show striking similarities to contemporary documents from Nuzi, a city situated on the other side of the ancient Near East, east of the Tigris river. In Nuzi, a woman could be entrusted with *abbūtu* – paternal authority, which resulted in keeping the estate undivided until her death. The heirs were forbidden to ask for division, but the penalties were more elaborate than in Emar: putting in chains, in prison (*bīt kilim*), or disinheritance (which could be contested in court). A similar practice is also known from the Old Assyrian times, from Kaneš – an Assyrian colony in Anatolia.[37]

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[33] On marriage and divorce in the ancient Near East see, e.g., WESTBROOK 1988; WESTBROOK 2003, 44-50.

[34] VEENHOF 2003, 455.

[35] § 57 of the Laws of Eshnunna.

[36] § 137 of the Code of Hammurabi.

[37] See PARADISE 1972 (Nuzi); MICHEL 2000 (Kaneš).

III. CONCLUSION

To conclude, let us return to the question asked at the beginning of this article. Did custody, such as we understand it, or at least in a similar form, exist in Emar? As the sources show, the necessity of taking care of an orphaned child had to be faced as frequently as in any other society, but more often than not the question was solved within the family, without resorting to any external institution. The main rules of custody were probably set by customary law, granting it first to the widow, then to the older siblings, and finally to the paternal uncles of the child, and at the same time leaving the patriarch a lot of freedom in regulating details thereof. If no conflict arose, there was no need for a court to intervene; such intervention was certainly unnecessary to appoint a guardian until there was at least one adult family member left. Still, although in many aspects different from what we know today, the institution itself did exist and, moreover, it functioned remarkably well, notwithstanding the lack of detailed provisions and of state control which seem indispensable for us today. It should be also pointed out that on the one hand Late Bronze Age Syrian law concerning custody is well rooted in the ancient Near Eastern, and especially Mesopotamian tradition, but that on the other hand it contains several unusual institutions, surprisingly shared with another peripheral Near Estern site, situated at the other end of that world. If the latter is just a coincidence, or a result of reception or exchange, remains to be found out.

Sigla for Emar texts:

ASJ - A. Tsukimoto, *Akkadian Tablets in the Hirayama Collection* (II), «ASJ» 13, 1991, 275-333.
CM 12 – J. Goodnick Westenholz et al., *Cuneiform Inscriptions in the Collection of the Bible Land Museum Jerusalem. The Emar Tablets*, Groningen 2000.
Emar – D. Arnaud, *Textes sumériens et accadiens. Recherches au pays d'Aštata. Emar VI/3*, Paris 1986.
RA – J. Huehnergard, *Five Tablets from the Vicinity of Emar*, «RA» 77, 1983, 11-43.
Semitica 46 – D. Arnaud, *Mariage et remariage des femmes chez les Syriens du Moyen-Euphrate, à l'âge du Bronze récent d'après deux nouveaux documents*, «Semitica» 46, 1996, 7-16.
RE – G. Beckman, *Texts from the Vicinity of Emar in the Collection of Jonathan Rosen*, Padova 1996.
TBR – D. Arnaud, *Textes syriens de l'age du Bronze récen*t, Barcelona 1991.

BIBLIOGRAPHY

BELLOTTO 2009
N. BELLOTTO, *Le adozioni a Emar*, Padova.

GARNER 2009
B. A. GARNER (ed.), *Black's Law Dictionary*, St. Paul.

DURAND 1989
J.-M. DURAND, Rev. D. Arnaud, "Recherches au Pays d'Aštata. Emar VI/1-3. Textes sumériens et accadiens, Paris 1986", «RA» 83, 163-191.

DÉMARE-LAFONT 2010
S. DÉMARE-LAFONT, *Eléments pour une diplomatique juridique des textes d'Emar*, in: S. DÉMARE-LAFONT & A. LEMAIRE (eds.), *Trois millénaires de formulaires juridiques*, Geneva, 43-84.

DÉMARE-LAFONT 2012
S. DÉMARE-LAFONT, *La juridiction domestique au Proche-Orient ancien*, in: L. OTIS-COUR (ed.), *Histoires de familles. A la convergence du droit pénal et des liens de parenté*, «Cahiers de l'Institut d'anthropologie juridique», 32, Limoges, 55-77.

DÉMARE-LAFONT & LEMAIRE 2010
S. DÉMARE-LAFONT & A. LEMAIRE (eds.), *Trois millénaires de formulaires juridiques*, Geneva.

EPH'AL 2009
I. EPH'AL, *The City Besieged*, Leiden–Boston.

FIJAŁKOWSKA 2014
L. FIJAŁKOWSKA, *Le droit de la vente à Emar*, Wiesbaden.

KAMMERER 1994
TH. KAMMERER, *Zur sozialen Stellung der Frau in Emar und Ekalte als Witwe und Waise*, «UF» 26, 169-208.

MICHEL 2000
C. MICHEL, *A propos d'un testament paléo-assyrien: une femme de marchand "père et mere" des capitaux*, «Revue d'Assyriologie et d'archéologie orientale» 94, 1-10.

OPPENHEIM 1955
A. L. OPPENHEIM, *"Siege Documents" from Nippur*, «Iraq» 17, 69-89.

PARADISE 1972
J.S. PARADISE, *Nuzi Inheritance Practices*, PhD Diss, University of Pennsylvania.

ROTH 1995
M. ROTH, *Law Collections from Mesopotamia and Asia Minor*, Atlanta.

UNDHEIM 2001
T. UNDHEIM, *Late Bronze Age Middle Euphrates Wills in the Context of their Ancient Mesopotamian Analogues: A Window on Emar Society*, PhD Diss., Hebrew Union College.

VEENHOF 2003
K. VEENHOF, *Old Assyrian Period*, in: R. WESTBROOK (ed.), *A History of Ancient Near Eastern Law*, I, Leiden-Boston, 431-484

WESTBROOK 1988
R. WESTBROOK, *Old Babylonian Marriage Law*, Horn.

WESTBROOK 2001
R. WESTBROOK, *Social Justice and Creative Jurisprudence in Late Bronze Age Syria*, «JESHO» 44, 22-43.

WESTBROOK 2003
R. WESTBROOK (ed.), *A History of Ancient Near Eastern Law*, Leiden-Boston.

YAMADA 2014
M. YAMADA, *The Women Designated "Man and Woman" in Emar and Eklate*. Paper given at the 4th workshop of REFEMA, June 26-27, 2014, Tokyo. http://refema.hypotheses.org/category/workshops/workshop-4-tokyo-05-2014, accessed on 29.11.2015.

Legal Incapacity in Ancient Egypt

MARK DEPAUW

ABSTRACT

This paper studies the phenomenon of legal incapacity in Ancient Egypt throughout the ages, with special attention for the Graeco-Roman evidence in Demotic, the late stage of the indigenous language and script. Because the concept of guardianship is in many ways problematic for the Egyptian tradition, the paper looks at some areas of legal discrimination, and examines how differently women, the under-aged or the old were treated in the case of capitation taxes or the performance of legal acts, specifically inheritance. In all, the evidence points towards very minor discrimination of certain population categories: they were probably considered as constitutive members or membres-to-be of society. While they had most rights and could perform legal acts, as «weaker» individuals they were often assisted by others. As is typical for Egyptian law, much remains implicit. This is certainly annoying for legal historians, but may well be symptomatic of a strong sense of what was legally «proper».

INTRODUCTION

Guardianship seems a very natural concept to us today. Those who cannot act legally themselves need to be represented by someone who can: young children need an adult, slaves need a master, while the mentally challenged need someone who is *compos mentis*. The inclusion of women in this list is almost shocking to 21st century western society, as gender is no longer seen as a valid criterion to determine whether a person is able to act legally or contractually.

Ancient Egyptians may well have shared some of that indignation, as in contrast with Greek or Roman society, women did not need a male guardian to represent them: they could be a party in a legal transaction or in court proceedings in their own right. At first sight, the entire concept of guardianship may seem inapplicable to Ancient Egypt. This is illustrated nicely by the dearth of attention the subject gets in Egyptological compendia. Thus the *Lexikon der Ägyptologie*, that landmark achievement of the late 20th century, under Vormundschaft («Guardianship») suffices with the following brief entry:

> Eine V[ormundschaft] ist selten erwähnt: sicher in einem Kahun-Papyrus des MR, vielleicht in einem Totenbrief. Wenn wir die Angaben des pWilbour verallgemeinern dürfen, so war im NR die Mutter für die Kinder verantwortlich, und es war keine Notwendigkeit für einen Vormund.[1]

Although in German law the term «Vormundschaft» has since 1992 been exclusively used for legal representation of those under age (with the other cases falling under «Betreuung»),[2] this short entry (dated 1986!) also illustrates egyptological conceptions: in Ancient Egypt women are not even mentioned as possibly needing a guardian, since they can act in their own right.

Despite the fact that the concept of guardianship thus seems rather unproductive for ancient Egypt, it may be instructive to examine whether the population segments that needed guardians in other societies were legally treated any differently than the (free) male adults. After all, the autobiographies boasting to have supported widows and orphans (or the elderly and orphans) prove that these were considered population groups in need of protection in Egypt also.[3] In the following I will thus look for «legal discrimination» of children and women, and occasionally also the old and those not *compos mentis*. I will only mention slaves and their «guardians» in passing, as the word «guardian» is not normally used in that context and the social situation is indeed quite

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1 HELCK 1986.

2 See Wikipedia <http://de.wikipedia.org/wiki/Vormundschaft> accessed 15.10.2014.

3 See, e.g., KÓTHAY 2006. For autobiographies in general, see GNIRS 1996 and FROOD 2007.

different. Moreover the concept of slavery itself is also problematic in Egypt, certainly for the earlier, pre-Hellenistic times.[4]

In what follows I will use evidence from all periods of Egyptian history, trying to discern evolutions where possible. In many cases, however, the dearth of sources makes it problematic to observe changes in the social and legal position. Before the late period (from ca. 700 BCE onwards), there are only few hieratic papyri and ostraca to reconstruct the legal praxis of the Old (ca. 2650-2200 BCE), Middle (ca. 2050-1650 BCE) or New Kingdoms (ca. 1550-1050 BCE). Afterwards, the abnormal hieratic and demotic documents are much more numerous, especially in the early Ptolemaic period, from the 4th to the 2nd century BCE, and strikingly illustrate many facts of Egyptian law.[5] There are even some legal manuals in Demotic that inform us about its principles.[6]

1. LEGAL INCAPACITY, CAPITATION TAXES AND CENSUS

The right to pay capitation taxes is a fundamental one: by contributing, the tax-payer is fully recognized as a constitutive member of society. Tax liability is often linked to the right to perform other legal acts, e.g. voting in early Western democracies.[7] Capitation tax thus confirms the individual's legal status, with exemptions for the elite or otherwise privileged populations groups on the one end of the spectrum, and with non-liability for those incapable to act at the other.

Despite the fact that there was clearly a census of citizens,[8] there is very little evidence for capitation taxes in kind in the non-monetary economy of ancient Egypt before the Ptolemies. Under the Greek and Roman rulers of Egypt, however, the capitation tax was one of the main sources of income,[9]

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4 See LOPRIENO 2012. For a recent introduction to slavery in the Graeco-Roman and Byzantine periods, which probably is not too dissimilar from earlier times, see ROTMAN, SCHOLL & STRAUS 2014.

5 The Demotic texts of the Ptolemaic and Roman period should of course be studied together with their Greek counterparts, as is the case, e.g., KEENAN, MANNING & YIFTACH-FIRANKO 2014 or LIPPERT 2008.

6 The most famous one is the so-called Demotic Legal Code (TM 48855 – for the TM text identifiers see www.trismegistos.org/text/ followed by the number). For another example see P. Berlin P. 23757 Ro (TM 56178; studied by LIPPERT 2004).

7 Compare also the famous «no taxation without representation» in British history: see Wikipedia <http://en.wikipedia.org/wiki/No_taxation_without_representation> accessed 15.10.2014.

8 For which, see KRAUS 2004, 69-98.

9 CLARYSSE & THOMPSON 2006, 1-35.

and the fluctuation of the precise modalities could be revealing about the status of certain population categories. Although many uncertainties about details remain, the history of the capitation tax in Egypt may thus shed some light on the issue of «full citizenship» and thus indirectly guardianship.

For Ptolemaic Egypt we have firm evidence about a listing of all inhabitants, male and female, (young and) old, free and slave, and even human or animal, from the reign of Ptolemy II onwards (earliest evidence 263 BCE).[10] The main purpose of this irregular census, which probably already existed in the pre-Ptolemaic era, in this case was the levy of the "salt tax" or *halike*. This may have been an innovation, replacing the earlier capitation tax, called "yoke tax". For the early history of these two taxes there is also plenty of evidence in the form of receipts, which show an evolution in the rates (A, B, C) applied.[11] The receipts, however, disappeared after 219 BCE, despite the fact that the tax itself in all likelihood survived until the advent of Roman rule. The new Roman rulers introduced the *laographia*, a much higher tax based on a periodical census every fourteen years. In this case the primary evidence are declarations by taxpayers (combined with lists from the administration).[12]

Table 1 lists the liability of various population categories in comparison with the rate of a free adult male.

Table 1. Liability of population categories
We have no evidence at all about physically or medically handicapped people

	MALE	FEMALE	YOUNG	OLD	SLAVE
Yoke tax	100%	Exempt	?	?	?
Salt tax A	100%	66%	-14 exempt?	100%?	Same
Salt tax B	100%	50%	-14 exempt?	100%?	Same
Salt tax C	100%	37.5%	-14 exempt?	100%?	Same
Laographia	100%	Exempt	-14 exempt	+62 exempt	Same

[10] CLARYSSE & THOMPSON 2006, 36-89.

[11] CLARYSSE & THOMPSON 2006, 36-52.

[12] See BAGNALL & FRIER 1994.

If it is assumed that the young did not pay capitation taxes and that they were only levied from the age of 14 onwards, the main difference between the various stages is the position of women. Discounting the scarce evidence for the very early period, a progressive decline of the proportional rate for women can be observed, culminating in their exemption in the Roman period. Nevertheless women can still be listed as heads of households, on their own, and they also are found paying the salt tax itself.[13]

2. LEGAL INCAPACITY, CONTRACTING AND SUING

2.1. WOMEN

In ancient Egypt, women had the right to appear as parties in a contract without a guardian, probably already from the Old Kingdom onwards. They apparently could also be plaintiffs in court in their own right.[14] The situation does not seem to change markedly in the later periods of Egyptian history, although some have pointed towards women moving to the somewhat «softer» sectors of the economy.[15] Also, the (rare) cases where women appear as witnesses to an agreement no longer occur. This is possibly related to loss of independence, which could be explained by influence of Greek and later Roman law. In those legal systems they need a *kyrios* or "guardian", at least in theory. And although some women may have disobeyed this law and others may not have taken the concept seriously,[16] the evidence clearly points out that in most Greek contracts women appear with a male guardian, even if the same ladies appear in Demotic deeds on their own, including in the Roman period.[17]

Nevertheless the contrast between Greek law (with guardian) and Egyptian law (without) may not be so black and white. Indeed nothing impeded women to be represented occasionally by men for certain transactions. A New Kingdom text talks about fields owned by a woman but sold by a man described as her *šnw*, perhaps "male kinsman".[18] For several consecutive years the woman

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[13] CLARYSSE & THOMPSON 2006, 301-304 for women as heads of households; O. Varia 20 (TM 3016) for an example of a woman paying the salt tax.

[14] LIPPERT 2008, 14, 35, 57.

[15] MENU 1989, 201-202.

[16] See PESTMAN 1995, 83-84 for the examples of Nahomsesis appearing without *kyrios* in Greek contracts and Sennesis choosing the other party to play that role.

[17] SCHENTULEIT 2009, 192-212.

[18] P.Brooklyn 16.205, as published in PARKER 1962, 50 (TM 372045). See also LIPPERT 2008, 57.

Tetehathyris leases out her own land in Ptolemaic Thebes.[19] Twice she does this by herself, and three times her husband Totoes implicitly acts on her behalf. Did Tetehathyris really act on her own and was she unaccompanied in the other two cases, or in further contracts for that matter? The incorrect use of male second or third person suffixes rather than their correct feminine counterparts sheds doubt on this. Of course, these errors may be mere mistakes of the notary caused by habit. Indeed, although women did have the right to figure as a party in contracts, most of the contracting parties did remain men: in my database of Demotic contracts only 17% and 29% (n = 777) of the first and second parties are women.[20] Just as in current western society nurses are typically women and truck drivers are typically men, thus the archetypical contracting parties for an ancient Egyptian notary will have been male. But there is more: in another contract from the earlier generation of the same family, a woman Tanouphis (Totoes' mother) is stated to have acquired property.[21] But four years later Tanouphis' husband sells the same property, stating that he acquired it himself from the vendor, and adding that he had caused "to write out the contract in the name of Tanouphis".

This evidence suggests that in some cases the independence of women may have been apparent only. On the other hand the famous Siut trial papyrus shows us a woman, Chratianch, suing against the eldest son of her father-in-law's second marriage, Tefhape, on account of the inheritance of their common father or father-in-law respectively, Petetum.[22] The amazing thing is that Chratianch, although only an in-law, is the only one to appear in the trial for the suing party, her husband Totoes being remarkably absent, despite being alive. Chratianch even states that she acts "in the name of Totoes", which led the first editor to speculate that he was perhaps *non compos*. Even more puzzling is the brief appearance of a certain Ouertes, when the judges ask her:

> Is there a man who makes your plea (*ḫrw*, literally "voice")?

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19 PESTMAN 1995, 83-85.

20 For the database see DEPAUW 2007. Compare also JOHNSON 1998, 1417-1420 or O'BRIEN 2002. Compare also the forthcoming investigation of Renate FELLINGER (Cambridge), as illustrated by her presentation on 4.9.2014 at the Demotic congress in Würzburg: «The legal role of women in Ptolemaic Thebes: A case study of cross-cultural influence».

21 PESTMAN 1995, 85.

22 P. BM 10591 Ro (TM 43343; published in THOMPSON 1934). The best introduction to the archive as a whole is probably in Dutch: VLEEMING 1989. A new edition of the entire archive is now in preparation by Bahar LANDSBERGER in Heidelberg (supervision K. DONKER VAN HEEL and J.F. QUACK).

To which Chratianch replies:

> Ouertes is he who makes my plea; my plea is his plea. If he is justified, I am justified; if he is false, I am false.

This Ouertes then upon the request of the judges adds an apparent detail to Chratianch's long pleas, but otherwise just confirms that what has been stated by Chratianch is the plaintiff's case.[23] The presence of this Ouertes is very puzzling: is he a lawyer, contradicting Diodorus' famous statement that these did not exist in Egypt?[24] Or is he the guardian, who only turns up at this stage of the procedure? The latter seems implausible, certainly in a trial before the Egyptian court of the *laokritai* rather than the Greek *chrematistai*.

On the whole, the picture is thus complex. In some contexts, and perhaps more in the later periods under Greek influence, women in fact did not do the dirty work themselves, but relied on men. Like the lack of women witnesses, however, this may equally be related to lower levels of female literacy: since women were often not able to write, they were more likely to be accompanied at the transaction by a man who could. That not all women were illiterate and that their statement could be legally valid is shown by a procedure described in a law manual: when all witnesses had died and they had left no sons, daughters could confirm their fathers' agreement, at least if they «knew letters».[25]

2.2. Young And Old

As to age requirements for contracting and suing, even less can be said. Although some have postulated fourteen as the moment of coming of age, there is actually no hard evidence in favour of this before the Greco-Roman period.[26] Others have suggested that there was no fixed age for maturity in ancient Egypt, and that marriage played an important role.[27] What complicates matters further is that the age of contracting parties was normally not indicated, making it very problematic to recognize children appearing as contracting parties. Thus in a contract the son receiving liturgical days (i.e. income from priestly offices) turns out to be less than six years old at the time of the con-

[23] P. BM 10591 Ro (TM 43343), col. 6 lines 11-16.

[24] Manning forthcoming.

[25] Lippert 2004, 37-38.

[26] For some arguments for 14 as the age of legal majority in the Graeco-Roman period: Clarysse & Thompson 2006, vol. 2, 41-42.

[27] Janssen & Janssen 1990, 99. See also Lippert 2008, 35, 57, 116-118.

tract, and probably was brought to the notary's office by his mother, although this is not made explicit anywhere.[28] In another case, we know that a woman who appears to buy part of a house is in fact a twelve year old girl, perhaps about to marry, in which case the father may have played a crucial role in the transaction.[29] This raises questions about the interpretation of the switch observed in marriage settlements: in earlier contracts the bride's father appears to deal with her husband, while later the bride herself is the other party in the agreement. Perhaps this is not related to the age of the bride to be,[30] although twelve is older than the traditional age of ten, before which children in ancient Egypt were not assumed to be able to distinguish between good and evil and which may have constituted a limit for the under-aged.[31]

3. A CASE STUDY: LEGAL INCAPACITY AND INHERITING

A crucial legal act involving property is of course inheriting.[32] In inheritance law, society clearly stipulates whose rights to property prevailed over those of others, and who could own e.g. real estate in his/her own right. In the oldest ancient Egyptian law the ideal scenario apparently was for the oldest (first-born) son to inherit everything from his father, and becoming the new head of the family with all that entailed. If there were no sons, and even no adopted sons, the oldest daughter could take over the role of legal heir, and her rights were higher than those of brothers of the deceased. Spouses had no rights to inherit: special arrangements had to be made for them to become the owners of their husband's property, although they were entitled to a third of his property by mere marriage.

Gradually, however, the pressure from the siblings against the monopoly of the legal heir seems to have risen, and in the New Kingdom there is evidence for a new role of the oldest son as *rwḏw*, which can be translated as "agent" or "caretaker". This implies that the legal heir of the estate had the duty to manage it for the entire family. Not very different from the role commonly associated with that of a guardian, actually. At least from the Late Pharaonic Period onwards, these claims had developed into rights, and all children had a right to a part of the estate of their father. Nevertheless the share of the oldest

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28 P. Turin Suppl. 6069 (TM 45082): see PESTMAN 1995, 87.

29 P. Louvre N 2410 (TM 3570): see PESTMAN 1995, 86.

30 LIPPERT 2008, 146, 75.

31 Insinger (TM 55918) col. 17 line 22.

32 This section is largely based on LIPPERT 2013.

son was higher (often by 100%) than that of his siblings, and he remained the "manager" of the property if it was indivisible (e.g. for a house). Exceptional is a single document from the 6th Dynasty appointing a trustee for the whole estate, "one who eats without being able to damage".

The age of the heirs does not seem to have played a role, or majority of age is at least never specified as a criterion to qualify for inheritance. Of course the underage children who inherited needed someone to take care of their interests for them, a mother, an older sibling or other relatives. And of course a parent who remarried and somehow turned malignant could be a disaster for the children, as is illustrated by a moving Demotic letter to the local gods written by two brothers, complaining about the cruel behavior of their father.[33]

Nor do we have any evidence that suggests that people in their old age were any less legally capable to act as testator. Several documents drawn up by fathers in favour of offspring may indeed function as wills, but these normally never refer to the testator's forthcoming death, in all likelihood for magical reasons.[34] Their *post mortem* validity remains implicit, and placing the document in the hands of a trustworthy third party solved the problem of premature and unintended transfer of ownership. Nevertheless, at least some documents are more explicit: P. Kahun 7 thus states:

> Deed of conveyance made by the controller of the watch X for his son Y. I am giving my (position of) controller of the watch to my son Y in exchange for (being) staff of old age, because I am now grown old. Let him be appointed at once.[35]

In this case it seems certain that someone who retired because of old age – and infirmity as a result of that – opted to have his son installed as his successor in his lifetime. But this of course does not imply that he needed a guardian or was legally incapacitated. In fact the contract itself rather proves the opposite.

Perhaps, finally, it is time to have a look at the single certain case of a guardian mentioned in the LÄ-lemma, P. University College London 32058, a contract, perhaps a will, to be dated in the Middle Kingdom, around 1800 BCE.[36] A man called Wah transfers all the property his (elder?) brother gave him earlier, to his wife, Teti. Interestingly, a postscript ("codicil") adds that he appoints a certain Gebu to act as *šd-ḫnw*, literally "child raiser", for his son. The precise purpose of the addition, its meaning and its legality are all uncer-

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33 P. BM 10845 (TM 48779; HUGHES 1969).

34 For the *donatio propter mortem*, see CLARYSSE 1995.

35 P. University College UC 32037 (TM 372046), in the translation of COLLIER & QUIRKE 2004, 101.

36 P. University College UC 32058 (TM 372047).

tain. It has even been suggested that this is just possibly a teacher for the boy, although this seems unlikely in this context. Even so, it remains puzzling why Wah's son would need a guardian, unless perhaps Wah's wife Teti was not his mother. But in that case the addition of an unrelated issue to this contract is very unexpected indeed.

4. CONCLUSION (PRELIMINARY)

Although the concept of guardianship remains a problematic one for Ancient Egypt, some population categories may indeed have been «more equal than others». Women, although they could independently perform legal acts such as paying taxes, appearing as contracting parties in various property transactions, and even inheriting their father's estate, also paid less than the full tariff, were probably regularly assisted by men, and had to give priority to male siblings. For children the evidence is meager, as in some cases abstraction seems to have been made of their young age. In the exceptional case where a trustee "child-raiser" is explicitly appointed, his precise role is unclear. The old may well not have been a separate category at all, although some did take a conscious step back from public life, appointing their beloved heirs in their stead. As a rule, mothers seem to take their children's interests at heart. For those not *compos mentis*, there is even less, not to say no material: their legal position must remain uncertain.

In all, I think the evidence points towards very minor legal discrimination of certain population categories in Ancient Egypt. Women, the old and the under-aged were probably considered constitutive members of society, or at least members-to-be in the case of children. They had most rights and could perform legal acts, although as «weaker» individuals they often needed assistance from others. Like the younger siblings in the case of an undivided inheritance, they often needed someone to manage certain things for them. Typical for Egyptian law is that much remains implicit: «sales» can in fact be donations, mortgages, or even wills, without this being specifically marked. In the same way, men may have acted for women and young children may have been represented by their mothers or other family. This lack of a precise and accurate description of affairs may be annoying for legal historians, but it may well be symptomatic for a strong sense of what was legally «proper», i.e. the right thing to do. For things that are self-evident, laws are after all considered unnecessary…

BIBLIOGRAPHY

BAGNALL & FRIER 1994
R.S. BAGNALL & B.W. FRIER, *The Demography of Roman Egypt*, Cambridge.

CLARYSSE 1995
W. CLARYSSE, *Ptolemaic Wills,* in: M. GELLER, H. MAEHLER & A. LEWIS (eds.), *Legal Documents of the Hellenistic World. Papers from a Seminar arranged by the Institute of Classical Studies, the Institute of Jewish Studies and the Warburg Institute, University of London, February to May 1986*, London, 88-105.

CLARYSSE & THOMPSON 2006
W. CLARYSSE & D.J. THOMPSON, *Counting the People in Hellenistic Egypt, part 2: Historical Studies,* Cambridge.

COLLIER & QUIRKE 2004
M. COLLIER & S. QUIRKE, *The UCL Lahun Papyri: Religious, Literary, Legal, Mathematical and Medical*, Oxford.

DEPAUW 2007
M. DEPAUW, *The Use of Mother's Names in Ptolemaic Documents. A Case of Greek-Egyptian Influence?*, «JJP» 37, 21-29.

FROOD 2007
E. FROOD, *Biographical Texts from Ramessid Egypt*, Atlanta.

GNIRS 1996
A.M. GNIRS, *Die ägyptische Autobiographie*, in: A. LOPRIENO (ed.), *Ancient Egyptian Literature: History and Forms*, Leiden, 191-241.

HELCK 1986
W. HELCK, *Vormundschaft*, in: *Lexikon der Ägyptologie VI*, col. 1076.

HUGHES 1969
G.R. HUGHES, *The Cruel Father, A Demotic Papyrus in the Library of G. Michaelides*, in: *Studies in Honor of John A. Wilson*, Chicago, 43-54.

JANSSEN & JANSSEN 1990
R.M. JANSSEN & J.J. JANSSEN, *Growing up in Ancient Egypt*, London.

JOHNSON 1998
J.H. JOHNSON, *Women, Wealth and Work in Egyptian Society of the Ptolemaic Period*, in: W. CLARYSSE et al. (eds.), *Egyptian Religion. The Last Thousand Years. Studies Dedicated to the Memory of Jan Quaegebeur, Part 2*, Leuven, 1393-1421.

KEENAN, MANNING & YIFTACH-FIRANKO 2014
J.G. KEENAN, J.G. MANNING & U. YIFTACH-FIRANKO (eds.), *Law and Legal Practice in Egypt from Alexander to the Arab Conquest: A Selection of Papyrological Sources in Translation, with Introductions and Commentary*, Cambridge.

KÓTHAY 2006
K.A. KÓTHAY, *The Widow and Orphan in Egypt before the New Kingdom*, «Acta Antiqua Academiae Scientiarum Hungaricae» 46, 151-164.

KRAUS 2004
J. KRAUS, *Die Demographie des Alten Ägypten. Eine Phänomenologie anhand altägyptischer Quellen*, Diss. Göttingen.

LIPPERT 2004
S.L. LIPPERT, *Ein demotisches juristisches Lehrbuch. Untersuchungen zu Papyrus Berlin P 23757 rto*, Wiesbaden.

LIPPERT 2008
S.L. LIPPERT, *Einführung in die ägyptische Rechtsgeschichte*, Berlin.

LIPPERT 2013
S.L. LIPPERT, *Inheritance*, in: E. FROOD & W. WENDRICH (eds.), *UCLA Encyclopedia of Egyptology*, Los Angeles. <http://digital2.library.ucla.edu/viewItem.do?ark=21198/zz002hg0w1>.

LOPRIENO 2012
A. LOPRIENO, *Slavery and Servitude*, in: E. FROOD & W. WENDRICH (eds.), *UCLA Encyclopedia of Egyptology*, Los Angeles. <http://digital2.library.ucla.edu/viewItem.do?ark=21198/zz002djg3j>.

MANNING forthcoming
J.G. Manning, *Courts, Justice and Culture in Ptolemaic Law: or The Rise of the Egyptian Jurists*, in: H.D. BAKER, M.J. JURSA & H. TÄUBER (eds.), *Administration, Law and Administrative Law. Proceedings of the 2nd International Conference of the NFN Imperium and Officium*, Vienna.

MENU 1989
B. MENU, *Women and Business Life in the First Millennium B.C.*, in: B. LESKO (ed.), *Women's Earliest Records from Ancient Egypt and Western Asia: Proceedings of the Conference on Women in the Ancient Near East, Brown University, Providence, Rhode Island, November 5-7, 1987*, Atlanta, 193-207.

O'BRIEN 2002
A. O'BRIEN, *Women in Ptolemaic and Roman Thebes*, in: K. RYHOLT (ed.), *Acts of the Seventh lnternational Conference of Demotic Studies. Copenhagen, 23-27 August 1999,* Copenhagen, 273-281.

PARKER 1962
R.A. PARKER, *A Saite Oracle Papyrus from Thebes in the Brooklyn Museum (Papyrus Brooklyn 47.218.3)*, Providence.

PESTMAN 1995
P.W. PESTMAN, *Appearance and Reality in Written Contracts: Evidence from Bilingual Family Archives*, in: M. GELLER, H. MAEHLER & A. LEWIS (eds.), *Legal Documents of the Hellenistic World. Papers from a Seminar arranged by the Institute of Classical Studies, the Institute of Jewish Studies and the Warburg Institute, University of London, February to May 1986*, London, 79-87.

ROTMAN, SCHOLL & STRAUS 2014
Y. ROTMAN, R. SCHOLL & J.A. STRAUS, *Slavery in Greco-Roman Egypt*, in: J.G. KEENAN, J.G. MANNING & U. YIFTACH-FIRANKO (eds.), *Law and Legal Practice in Egypt from Alexander to the Arab Conquest: A Selection of Papyrological Sources in Translation, with Introductions and Commentary*, Cambridge, 442-469.

SCHENTULEIT 2009
M. SCHENTULEIT, *Nicht ohne Vormund? Frauen in römerzeitlichen bilinguen Urkunden aus Soknopaiu Nesos*, in: R. EBERHARD ET AL. (eds.), *„... vor dem Papyrus sind alle gleich!" Papyrologische Beiträge zu Ehren von Bärbel Kramer (P. Kramer)*, Berlin-New York, 192-212.

THOMPSON 1934
H. THOMPSON, *A Family Archive from Siut from Papyri in the British Museum, including an Account of a Trial before the Laocritae in the Year B.C.170*, Oxford.

VLEEMING 1989
S.P. VLEEMING, *Strijdom het erfdeel van Tefhap*, in: P.W. PESTMAN (ed.), *Familiearchievenuit het land van Pharao*, Zutphen, 30-45.

Section 3
The Origin?
Guardians and Kings

Royal *epitropeia*

Remarks on Kingship and Guardianship in Macedonia and the Hellenistic Kingdoms

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ABSTRACT

*The institution of the guardianship (*epitropeia*) of the infant or otherwise disabled king in Macedonia and the Hellenistic kingdoms has never been separately examined. Its description with the modern term «regency» only partly corresponds to its essence. Royal guardianship in those times presents, however, many interesting aspects pertaining to the persons exercising this function, their relation to the royal house or other social provenance, the way(s) of their selection, their own ambitions in this role and their eventual success in ascending the throne themselves. A careful study of some relevant cases may allow useful vistas into the whole problem, and, actually, the institution of Macedonian and Hellenistic kingship.*

I. INTRODUCTION – TERMINOLOGICAL CLARIFICATION

Succession is perhaps the most delicate process in the preservation of a dynasty and a monarchic state. For it is very difficult to replace one of those persons (most often men) who have every interest, as long as they live, in presenting themselves as irreplaceable, unless they have again themselves prepared a convincing continuation of their rule by a member of their family or someone else. Dynastic power tolerates real vacuums as little as nature does. Therefore an able heir, so important for a private person, is imperative for the normal development of a monarchy. However, ideal conditions are often denied by realities: a king may die without having had the possibility of leaving behind a successor of his blood or of his choice, or one who has the ability necessary for the continuation of the state. Especially if a minor or a disabled successor is the only available solution, someone else has to assume the role of the real governor in a generally acceptable capacity, usually as guardian of the legitimate and, at least temporarily, nominal king. This situation has repeatedly occurred also in classical antiquity and led to the constitutional expedient of what we call today «regency/ régence/ Regentschaf» etc.

However, one should note from the beginning that the significance of the modern term «regent» – «the one who acts as king (<*regens*)» – cannot be equated with that of the corresponding ancient Greek term and its meaning as we know it especially from the best attested example of Macedonian and Hellenistic monarchy.[1] There the standard term for the regent is *epitropos*, which lays the emphasis on the temporary role of the real holder of royal power as guardian of the nominal king. In employing this term, ancient Greek monarchy in the wider sense clearly borrowed an institution from private relations and projected it into the context of a monarchy. Not the real fact of acting as a king, but the position of taking care of whoever formally sits on the throne and is regarded as the ruler of the state, was the programmatic essence of that sort of «regent». Therefore, also in respect to royalty the modern term «guardian» is much nearer to both form and essence of the ancient Greek *epitropos*.

Of course, a crucial factor in this perception of «regency» was the fundamental idea of the dynastic «oikos», the monarchic house, from which the line of rulers came. The continuation of the ruling house imposed solutions of

[1] Cf. HAMMOND & WALBANK 1988, 99: «The technical term for guardian was ἐπίτροπος. There was no term in Greek for our word 'regent'». There have been few special examinations of the royal *epitropos* in Macedonia and the Hellenistic world. Apart from the very old and concise but still useful remarks of BRECCIA 1903, 57-60, 74, see esp. HATZOPOULOS 1986 and 1996, I, 276-279, 303-312; LE BOHEC 1993, 113-121 (with the tables, ibid. 150-151); ANSON 2009; MEEUS 2009, esp. 296-302.

safety similar to those practised in the purely private sphere, which was highlighted by the use of the same term for this royal institution.

Another preliminary point of importance is the degree of continuity between Macedonian and Hellenistic kingship as far as the succession of rulers and its forms are concerned. Despite the development of Macedonian royalty towards absolute forms of power since Alexander (after the model of the Persian king), at the Hellenistic courts there seems to be no significant deviation from the old Macedonian practice by which such problems of rule were solved, apart from examples of collegial guardianship, to which we shall come back later. The form of collegial guardianship, however, is also easily retraceable inside Greek familial practice (perhaps the best-known case is that of the infant Demosthenes' three guardians, arranged as such by his father while still alive).[2] The title itself, *epitropos*, is used continuously in our sources from the case of Aeropos, guardian of Archelaos' infant son in Macedonia of 400 BCE (see below), to the two warring guardians of Antiochos V Eupator at the Seleucid court in 166/5 BCE, Lysias and Philippos,[3] and beyond.[4]

II. RELATION OF KINGSHIP AND GUARDIANSHIP IN MACEDONIAN PRACTICE AND THEORY

A.

After what has already been said, it is understandable that the *epitropos* of the infant king was chiefly recruited from within the royal house itself; that is, among the nearest relatives of the nominal king. The earliest such known case in the Macedonian house was probably that of the already mentioned

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[2] Dem., *Against Aphobos*, 27.4-7; *Against Onetor*, 30.6. Plut. *Dem*. 4. Cf. CARLIER 1990, 40-49.

[3] Josephus, *AJ* 12.9.2 (360-361), 7 (386); *Macc*. I, 6.13-15, 55-57; II, 9.28-29, 11.1; Just. 34.3.5. Cf. NIESE 1903, 219, 242; BIKERMAN 1938, 42 (n. 8); SAVALLI-LESTRADE 1998, nos. 56, 63. Very interesting in this later case is the basis of the two rival epitropal claims: Lysias seems to have acted as curator of the young successor already during the absence of the king (Antiochos IV) on his last expedition, while Philippos was entrusted with the guardianship of the successor by the dying king during the expedition itself. As proof of his new position, Philippos is reported to have received at the deathbed of the king his royal insignia (diadem, dress and seal) to bring them to his son and successor whose care he officially undertook. It is noteworthy that the guardian who was in actual possession of the young successor, and officially proclaimed him as new king (with the title of Eupator), that is Lysias, was the final winner.

[4] One of the famous later cases (also because of Pompeius' end) is that of Potheinos and Achillas at Alexandria, who acted as guardians of the still too young Ptolemy XIII in the period 51-48 BCE. Especially Potheinos' real position of power is clearly expressed in Plut. *Pomp*. 77: ὁ…πάντα διέπων τὰ πράγματα Ποθεινός… Cf. HUSS 2001, 707, and GEHRKE 2005, 113 (cited also below on Ptolemaic arrangements of rule after Epiphanes' period).

Aeropos: after Archelaos' death during a royal hunt (400/399 BCE) he acted first as *epitropos* of the latter's infant son Orestes, though he later had Orestes executed and assumed the royal power himself, having ruled in all for six years.[5] As Hammond-Griffith have reasonably concluded,[6] Aeropos seems to have belonged to the ruling house of the Argeads, and was possibly a half-brother of the deceased Archelaos by another mother. Here the position of the guardian was simply the starting-point for gaining the royal title, without any known reactions from any side.

Another such early case[7] where the infant age of the lawful successors caused the solution of guardianship to be invoked, after complicated family vicissitudes and arrangements, occurred after the death of Amyntas III in 370 BCE. The eldest son of the dead king, Alexander II, already of adult age, succeeded his father but was assassinated after two years by a shrewd probable relative (of unknown degree), Ptolemy of Aloros (Alorites), who had managed to gain the love of Eurydike, the queen mother, and her collaboration in his plans.[8] Officially, he married Eurydike and undertook in 368 BCE the role of *epitropos* to the two remaining infant sons of Amyntas III, Perdikkas (the later Perdikkas III) and Philip (the later Philip II). Whether Ptolemy Alorites also aspired to the royal title we cannot know with certainty, although it looks very likely.[9] Anyway, the elder of the two brothers under his guardianship, Perdik-

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[5] Diod. 18.37.6: Κατὰ δὲ τὴν Μακεδονίαν Ἀρχέλαος ὁ βασιλεὺς ἔν τινι κυνηγίωι πληγεὶς ἀκουσίως ὑπὸ Κρατεροῦ τοῦ ἐρωμένου τὸν βίον μετήλλαξε… τὴν δ' ἀρχὴν διεδέξατο Ὀρέστης παῖς ὤν, ὃν ἀνελὼν Ἀέροπος ἐπίτροπος ὢν κατέσχε τὴν βασιλείαν ἔτη ἕξ. Cf. Sync. *Chr*. p. 500 D.

[6] HAMMOND & GRIFFITH 1979, 168-170. Cf. further HATZOPOULOS 1986, 283.

[7] Whether Archelaos (413-399 BCE) initially also acted, even very shortly, as an *epitropos* of his half-brother and lawful heir of Perdikkas II (Alketas or Meropos according to schol. Ael. Arist., *Pros Platona hyper ton tessaron*, 46.120, 2) before murdering him, does not explicitly emerge from our sources. The chronologically nearest tradition in Plat. *Gorg*. 471 C seems rather to imply that Archelaos has decided from the beginning not to play such a role. On this hypothetical guardianship of Archelaos see HATZOPOULOS 1986, 284-285 (with the earlier lit.).

[8] On Ptolemy Alorites see Aesch. 2.29: περὶ Πτολεμαίου, ὃς ἦν ἐπίτροπος καθεστηκὼς τῶν πραγμάτων, ὡς ἀχάριστον καὶ δεινὸν ἔργον διεπράξατο. More details in the ancient schol. ad loc.: Πτολεμαίου] οὗτος ἦν ὁ ἐπικαλούμενος Ἀλωρίτης, ὃς ἀνελὼν Ἀλέξανδρον τὸν Ἀμύντου, συλλαβομένης αὐτῷ πρὸς τοῦτο Εὐρυδίκης τῆς μητρὸς Ἀλεξάνδρου, καὶ γήμας τὴν Εὐρυδίκην καὶ ἐπιτροπεύσας Περδίκκου καὶ Φιλίππου παίδων ὄντων ἐβασίλευσεν ἔτη ε΄, καὶ ἀποθνήσκει ἀναιρεθείς, Περδίκκου αὐτοῦ τὴν ἐπιβουλὴν συστήσαντος (Vat.Laur. Bgim.). ὃς ἦν ἐπίτροπος] τῶν περὶ Φίλιππον ἔτι μικρῶν ὄντων (Vat.Laur.Fgm.). On Diodorus' testimony see next note. Cf. HAMMOND & GRIFFITH 1979, 182-184; HATZOPOULOS 1986, 281-282.

[9] This is rendered at least very probable by the form in which his rule is presented in Diod. 15.71.1: Πτολεμαῖος ὁ Ἀλωρίτης ἐδολοφόνησεν Ἀλέξανδρον, καὶ ἐβασίλευσε τῆς Μακεδονίας ἔτη τρία; 77.5: κατὰ τὴν Μακεδονίαν Πτολεμαῖος μὲν ὁ Ἀλωρίτης ἐδολοφονήθη ὑπὸ [τἀδελφοῦ] Περδίκκα, βασιλεύσας ἔτη τρία…; cf. also Eusebius, *Chron*. I, coll. 227, 229 Schoene. However, his real position is clearly reflected in Aeschines' contemporary reference to him (see above), and the

kas, was finally (after *c*. three years) able to dispose of him in time and ascend the throne himself. In Alorites' case the post of guardian of the infant king or kings was successfully combined with a marital connection to the current royal family. However, this latter fact itself, and the existence of no fewer than two minor kings and aspirants to real royal position under his own official guardianship, may have retarded any further ambitions on the part of Alorites and, in the end, allowed the proper reestablishment of lawful succession. Also in this case, we have no indication of an intervention by an external party in this family game of power. Apparently, the efficiency of any real incumbent of royal power in an epitropal role, whether initial or not, silenced any reactions in a state like the early Macedonian kingdom, which was regularly suffering foreign invasions and instability.

It is instructive that this basic remark also holds true in two further Macedonian cases where the implementation of guardianship remained bloodless but equally efficient and a preparation for the royal title itself: the relevant and illustrious examples are here Philip II, Alexander the Great's father, and, during the Hellenistic period, Antigonos III Doson. In the first case, Philip succeeded his brother Perdikkas III (after his unexpected death in war) in 359 BCE, initially as *epitropos* of the latter's infant son Amyntas (that is, as *tutor pupilli*), according to the clear testimony of Justinus (7.5.9-10) which we have no reason to reject.[10] As this source further (ib.) relates, external perils and Philip's ability persuaded the Macedonians, somewhat later, to make him king. Philip subsequently ruled until his assassination (for other reasons) in 336 BCE without ever having had to dispose of his nephew Amyntas, even after the latter had grown up, or ever having seen his new position contested because of that relative's existence. Only Alexander later, after he himself succeeded his father Philip, felt it necessary to get rid of that cousin and other members of the royal house who might eventually present rival ambitions.[11]

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absence of any coinage in his name. Cf. already GEYER 1930, 133-134, and recently ANSON 2009, 281-283.

[10] Thus also HATZOPOULOS 1986, 280, 286-287. Justin's testimony and Philip's regency have been unconvincingly contested by HAMMOND & GRIFFITH 1979, 208-209, 702-704. Anson's 2009 view that a person from the clan of the Argeads could be simultaneously accepted as *both* guardian and king, while someone of different descent (like Ptolemy Alorites, cf. above) would only be a «true regent» in Macedonia cannot carry conviction. It constitutes, I think, an interestingly but desperately formalistic attempt to solve the problem of the Macedonian *epitropeia* = «regency» (in modern terminology). Especially the further case of Antigonos Doson (see below), whose position developed from guardianship to the acquisition of kingship for himself, seems to me to prove this truth beyond doubt. It is also characteristic that MEEUS 2009 accepts Anson's basic interpretation but has then to differentiate himself in various points.

[11] Arrian, *FGrHist* 156 F 9.22. Cf. Curtius 6.9.17; 10.24.

An important detail in Philip's development from the position of *epitropos* to that of formal and official king was the intervention of the Macedonian people: *conpulsus a populo regnum suscepit* is the formulation of Justin. It would be futile here to reopen the complicated problem of the relations between people and king in ancient Macedonia.[12] However, some sort of expression of will on the part of the Macedonian people (or the Macedonian aristocracy as their traditional and powerful representatives, cf. Doson's case below!) may be safely assumed. What is important in our context is the firm wish of the Macedonians, however represented, finally to invest their royal guardian with full royal power, setting customary etiquette aside. Moreover, this expression of popular feeling apparently also secured Philip's further rule from the appearance of any really dangerous pretender. That factor and his complete success as a king guaranteed his rule to the end.

In the case of Antigonos Doson we have a variant of the same situation. After the death of Demetrios II a royal uncle undertakes again the role of *epitropos* to the infant successor (the later Philip V). After he has proved worthy of kingship by valiantly defending the national interest, he is also subsequently recognized as king himself. At three points the type of the whole development differs from Philip II's case just examined. According to Plutarch (*Aem*. 8.2-3) Doson's successive investiture, first as *epitropos* of the infant successor and then as king in his own right, is implemented by the Macedonian nobles (οἱ πρῶτοι Μακεδόνων), who fear a power vacuum in the state (δείσαντες… τὴν ἀναρχίαν) in critical times. Here the "*populus*" in Philip II's case is most probably, and valuably, specified. The second point is that a marital connection with the current dynastic line strengthens the position of the *epitropos* who then becomes king: the widow of Demetrios II, Phthia,[13] marries Doson, again as a part of the whole settlement of the succession by the nobility. A third point, often neglected but crucial, is that this «interim king» suffers a natural death in due course *c*. eight years later, and the adult (eighteen years old) Philip V ascends the throne without difficulties. We simply cannot know what would have happened if Doson had lived longer. It is, however, very unlikely that he would have simply laid down the sceptre himself for the sake of a nephew of adult age, given his own spectacular royal record of success.

Thus, in all these cases analysed, royal efficiency appears as a fully sufficient qualification to ascend the throne for a member of the wider royal family,

[12] The basic positions have been clearly argued esp. by ERRINGTON 1978 and HATZOPOULOS 1996, I, 261ff.

[13] On the problem of her personality (and her relation to Chryseis, also reported as wife of Doson) cf. LE BOHEC 1993, 143-149.

from the stepping-stone of an initial epitropal function, though this progression could be assisted by some further advantages (marriage into the dynasty, consent of the people/nobility). One may conclude in general that an able guardian of the infant successor and the state was often finally and officially accepted as king himself.

B.

We may now detect, after a careful scrutiny of our sources, that this «constitutional/institutional reality» in Macedonia seems to have corresponded to elements of the understanding of kingship and its intrinsic connection with guardianship in Macedonian perception. An important relevant testimony is put by our sources into the mouth of no less experienced a person than Alexander the Great himself. As Arrian (7.9.9) reports, Alexander described his royal office in the following way while addressing his mutinous troops at Opis (324 BCE):

> After these toils [that is, the whole Asiatic expedition] what remains to me but this purple and this diadem? I possess nothing privately nor could anyone point to treasures of mine but the possessions belonging to you or safeguarded for your sake (ὅσα ἕνεκα ὑμῶν φυλάττεται). For there is no purpose to keep all this for myself as I share the same food with you and I take the same sleep. Nonetheless, I think that the food of the luxurious among you differs from mine, and I am aware that my vigilant protection saves your sleep.

Despite the obvious rhetorical tendentiousness of these phrases there is here a precious piece of content that illuminates Macedonian royal ideology. In particular, the idea that state property is not owned by, but entrusted to, the king as its administrator actually attributes to his position the significance of a guardianship on behalf of the people.[14] This idea is then completed by that of protecting the general welfare and safety of his subjects.

The same idea was later dramatically emphasized (and exaggerated) in the famous description of royalty as "glorious servitude" (Ael. *VH* 2.20) by Antigonos II Gonatas. Gonatas appears to have tried thus to admonish his son whose behavior to their subjects tended to be abusive. The real, that is, the successful king should demonstrate the understanding of his role as servant of the state, like that of a slave-steward of his master's property (not his own!).

[14] The same idea is echoed also in Curtius 10.6.23: «Quin igitur ad diripiendos thesauros discurritis? *Harum enim opum regiarum utique populus est heres*» (from Meleagros' speech during the discussions after Alexander's death at Babylon, see below).

It is equally noteworthy that similar strands of thought are then found in the entries on *basileia* in the much later lexicon of Suda (approximately 10th cent. AD) where various older material has been collected.[15] Two of these entries touch on the questions raised here. In the first (the third in Suda) we find the following views:

> Kingship is a piece of public property (κτῆμα τῶν κοινῶν), and not the public goods the property of royalty. Therefore one should hate compulsory and abusive demands of payment [understand: by a king] as a sort of tyrannical excesses, while one should honour reasonable and humane contributions asked for as a sort of tutelage (ὥσπερ κηδεμονίαν).

If this entry unmistakably recognizes traits of a guardianship in a worthy kingship, the second entry (also in Suda) very interestingly disengages kingship from natural descent and dynastic pedigrees altogether:

> Neither nature nor right (δίκαιον) invests men with kingship, but able military leadership and prudent government of the state. Such was the case with Philip [that is, Philip Arrhidaios] and Alexander's Successors. For the son by nature [that is Arrhidaios as son of Philip II] was not helped at all by his parentage because of his mental weakness, while those wholly unrelated [understand: to the Argeads] became nevertheless kings of almost the whole world.

The context makes clear, as noted long ago, that these passages are mainly concerned with the facts of early Hellenistic kingship. However, the basic idea that kingship is linked with military and governing skill more than with nature and, especially, «right» does not need to postdate Alexander. Furthermore, if one sees the two entries in connection with each other, they may describe, and also be inspired by, that line of examples where dynastic right ceded to the royal capability of a man who was initially «just» an *epitropos* of a king and kingdom but finally proved to deserve the purple himself. In other words, if the ability to take proper care of nominal ruler and state clearly existed, the basic conditions for advancement to royal status were fulfilled. It was considerably easier for an *epitropos* to develop into a king, as the ideal of the king naturally included the fundamental quality of a guardian of the state. In the light of these remarks one can better perceive how in Macedonian history men who were initially *epitropoi*, if they possessed some direct or indirect connection with the current royal dynasty, could not only aspire to royalty but also be accepted relatively easily as kings. The talent of the incumbents and the difficulties of the state appear early as decisive factors in that process.

[15] On the background and historical role of Hellenistic treatises on *basileia* in detail cf. HAAKE 2003 (on the entry in Suda: 92 with n. 132).

Of course, the centuries after Alexander also brought changes with regard to royal guardianship, especially the growth of ambition on the part of persons of the royal entourage and the phenomenon of collective guardianship of the king. Two more or less characteristic examples of these further developments will now be focused upon as concisely as possible.

III.1. ALEXANDER'S SUCCESSION

Alexander's succession has often, and rightly, been treated as an exceptional situation. However, even there the value and strength of some recurring traits of Macedonian and of the gradually emerging Hellenistic kingship, especially in regard to royal guardianship, should not be overlooked. The main facts as given in our (partly dissenting) sources may first be recalled: Alexander's lawful successors available were (a) his queen's, Roxane's, baby (not yet born while the main arrangements of rule were being put in place after the king's death!) and (b) his apparently mentally disabled half-brother Arrhidaios. The dying Alexander had left his signet ring, an emblem of royal administration, to Perdikkas, who had succeeded Hephaistion as chiliarch, already a very distinguished Achaemenid royal post beside that of king. It was thus clear that Perdikkas would be the main claimant for the guardianship of Alexander's son as he proved to be. However, the possible ambitions of such a royal steward were equally clear. Therefore Perdikkas' opponents, who relied mainly on the support of the Macedonian infantry (as opposed to the cavalry of the *hetairoi*, supporting his claim), insisted on a nominal double kingship including Arrhidaios (as Philippos Arrhidaios) and Alexander's son. The former was then finally placed under a separate, practical guardianship by Krateros, another noble Macedonian. It seems characteristic, though, that neither Perdikkas nor Krateros is expressly mentioned in our main sources on the post-Alexander period as *epitropos* of Alexander IV or Philip III Arrhidaios, neither is anyone else.[16] Perdikkas is called *epimeletes tes basileias* in Diodoros, while his official function remained that of chiliarch, which, as Arrian,[17] writing in the

[16] Perdikkas is, however, mentioned as ἐπίτροπος καὶ ἐπιμελητὴς τῶν βασιλικῶν πραγμάτων in the Heidelberger Epitome (*FGrHist* 155 F 1.2) and as τῆς ὑπὸ Ἀλεξάνδρῳ γενομένης γῆς ἐπιτροπεύων (and Antipatros as his successor in this capacity) in App. *Mithr.* 8. However, in the first case the juxtaposition of the terms *epitropos* and *epimeletes* suggests that they had to complement the sense of each other (cf. MEEUS 2009, 300) – thus one cannot know which of them might have been an original and official title, while in both these sources the standard imperial Roman use of ἐπίτροπος/ἐπιτροπεύω to denote the office of a *procurator (Augusti)* may have also influenced the choice of vocabulary (cf. MASON 1974, s.vv. ἐπιτροπεύω, -ή, -ος).

[17] *FGrHist* 156 F 1, 3: … ἐφ' ᾧ…εἶναι… Κρατερὸν δὲ προστάτην τῆς Ἀρριδαίου βασιλείας,

Roman imperial period, has to explain, meant «the guardianship of the whole kingdom» (ἐπιτροπὴ τῆς ξυμπάσης βασιλείας), to be perceived then as a de facto role.[18] Only the even later writer Justinus (13.2.14) mentions expressly but collectively Perdikkas and Krateros, but also Leonnatos and Antipatros, as *tutores* of the expected son of Alexander. Krateros himself was not called *epitropos* of Arrhidaios in the Greek sources, most probably because it made no sense (or would be tactless) to install a guardian over an adult king. Therefore he appears in Arrian (*loc. cit.*) as *prostates* ("protector, chief administrator") of Arrhidaios' kingship. It is understandable that this fine use of titles to describe the result of a highly difficult negotiation and division of powers is partly clouded in the sources of much later date. Nonetheless, the fact emerges clearly that an experiment in collegial guardianship was made, corresponding to the form of a post-Alexander double kingship, imposed partly by the intervention of the army.[19]

The situation changed considerably after Krateros' death in 321, which in practice left the way even more open to Perdikkas' ambitions. The latter appears to have been descended from a noble Macedonian family with royal links, as Curtius reports (10.7.8). The guardian decided then to strengthen these links significantly by attempting to win the hand of Alexander's sister Kleopatra. If Perdikkas had managed to effect such a marriage, he would have entered the royal dynasty as a retroactive son-in-law and gained a weighty advantage over his rivals.[20] His efforts in this direction were soon detected, however, and contributed to his enemies' uniting against him and ending his grander plans.

The vacuum left by Alexander was at the same time too big to be filled by one person and too small to house the parallel ambitions of several candidates for guardianship, already aspiring to royal positions for themselves. Under such conditions any solution in the form of collective guardianship, rendered even more difficult by the double kingship that had been arranged, was doomed to fail, as was Perdikkas' attempt to free himself from such limitations. The formally discreet guardian remained here an abortive king.

Περδίκκαν δὲ χιλιαρχεῖν χιλιαρχίας ἧς ἦρχεν Ἡφαιστίων (τὸ δὲ ἦν ἐπιτροπὴ τῆς ξυμπάσης βασιλείας).

[18] On Perdikkas' chiliarchy in detail: MEEUS 2009, 302-310 (with previous lit.). His view, however, that Arrian's testimony (see above) on the sense of Perdikkas' *chiliarchia* is due to a misconception of the epitomizing Photius does not convince. Already the previous connection of the post with Hephaistion, its previous incumbent, must have added a special weight to its significance.

[19] Cf. ERRINGTON 1978; HAMMOND & WALBANK 1988, 98-107; RATHMANN 2005, esp. 26-32. In these studies the main previous bibliography is cited.

[20] RATHMANN 2005, 62-64 tends to underscore this intended marriage in his effort to sketch a policy of Perdikkas which would have been more loyal to the dynasty of Alexander.

III.2. THE GUARDIANS OF PTOLEMY V EPIPHANES

The setting of a later situation where the death of a king offered the occasion for new experiments in collegial guardianship of an infant successor is the kingdom of the Ptolemies at the close of the third century BCE, after the dynasty had been long structured. The episode in question occurred after Ptolemy IV Philopator's death (204 BCE). Thanks to the extensive excerpts from the relevant chapters of Polybios that are preserved,[21] we are able to learn much more about this than about almost any other procedure of royal succession and guardianship in Hellenistic history, although crucial details are again missing. However, what actually seems to have happened is that, initially, two of the most influential ministers and *philoi* of Philopator, Sosibios the Elder and Agathokles, were able after the king's death to eliminate his widow Arsinoe III, a possible obstacle in their plans. Some time later, they announced the death of the royal couple, presented the infant new king, and invested him solemnly with the diadem, in a typical "proclamation of royal enthronement" (*anadeixis*),[22] during a carefully organized assembly of the palace guards and the commanders of royal infantry and cavalry at the court. Simultaneously, the same ministers read there a testament of Philopator (fabricated, according to Polybios) which installed them both as *epitropoi* of Ptolemy V. The fellow conspirators were thus advanced to the role of royal guardians in front of a supposedly representative conference of the kingdom's military elite. The more experienced of the two in administrative respects, "a shrewd and enduring gadget (of state)", as Polybios poisonously calls him,[23] was Sosibios. He seems to have died soon afterwards, though from what cause is unknown, so that Agathokles was left to rule the state alone on behalf of the royal child. He then took care to send away from Alexandria most of the other important personalities of court and state, among them the experienced and widely respected military commander Tlepolemos, entrusted now with the governorship of the district of Pelousion. Tlepolemos, remarks Polybios (15.25.27), hoped first that some sort of collegial tutorship of the king would be installed, taking on the form of some kind of council of state (ὑπάρξειν τι συνέδριον ὃ τήν τε τοῦ παιδὸς ἐπιτροπείαν ἕξει καὶ τὴν τῶν ὅλων προστασίαν), obviously with his own participation. However, Agathokles worked more and more towards a complete control of the state by him and his family, and thus gradually

[21] Pol. 15.25-34; 16.21-22.

[22] Still fundamental on this ceremony at Hellenistic courts BIKERMAN 1937.

[23] Pol. 15.25.1: Σωσίβιος ὁ ψευδεπίτροπος Πτολεμαίου ἐδόκει γεγονέναι σκεῦος ἀγχίνουν καὶ πολυχρόνιον, ἔτι δὲ κακοποιὸν ἐν βασιλείᾳ.

concentrated against himself the resentments of various people in the capital and beyond it. Increasingly, it was realized that the kingdom was being ruled not by a collegial guardianship but by a sort of family mafia (with important female members including Agathokles' sister Agathokleia, an ex-courtesan of Philopator, and her equally ill-reputed mother Oinanthe). Tlepolemos was clearly the unifying figure among the opposition to Agathokles' regime, so that the latter, when he felt he was losing the plot, had to try a palace assembly again, inviting to it the Macedonians at the court: he obviously hoped to attain at that meeting a condemnation of the actions of Tlepolemos (who was preparing to invade the capital) and a confirmation of his own actions as sole guardian of king and state. The new show resulted in a collapse of his case, as those assembled already understood the ideological and practical weakness of Agathokles' present position. His arguments and testimonies supposedly proving Tlepolemos' ambitious schemes, that is, his imminent claim to the diadem and royal cult for himself (Pol. 15.26.5-7), were so evidently propagandistic that they increased the antipathy towards Agathokles' family and finally contributed to the outbreak of a real revolt in Alexandria, during which the guardian, his family and many of his followers met a cruel death.

An important role in this revolt was played by Sosibios the Younger (son of the previous co-guardian of the king), who managed, at the height of the uprising, to elicit from the terrified child-king his consent "to deliver to the people those who had wronged him or his mother (that is, Arsinoe III)".[24] Having thus received *carte blanche* to instigate a reign of terror against Agathokles and his party, Sosibios is reported to have also taken the little king into his house and his personal custody. It is no surprise, then, to find that, in the settlement following Agathokles' overthrow, Sosibios turns up as a key collaborator of the effective victor Tlepolemos, in a new type of collective guardianship over Epiphanes. Tlepolemos now had, from the beginning, the indubitable main role, as the affairs of state (as well as the crucial sectors of army and finances) were in his hands; but Sosibios was entrusted with the king's seal, with his personal care, and most probably also with certain aspects of the diplomatic relations of the kingdom (Pol. 16.22.2).[25] Tlepolemos apparently tried to realize a sort of collaborative government programme, for the absence of which he had presumably once become alienated from Agathokles. He is depicted by Polybios (16.21), however, as a militarily talented man who understood

[24] Pol. 15.32.7-8: …ἐπύθετο (*scil*. Sosibios the Younger) τοῦ βασιλέως εἰ παραδώσει τοῖς πολλοῖς τοὺς εἰς αὐτὸν ἢ τὴν μητέρα τι πεπλημμεληκότας. τοῦ δὲ κατανεύσαντος.

[25] His functions certainly exceeded those of a «chamberlain», the Macedonian court official known as ὁ ἐπὶ τῆς θεραπείας (as once suggested by CORRADI 1929, 298 and still pondered by WALBANK 1967, 526-527). On his eventual mention on Ptolemaic coins see HUSS 2001, 502[1].

little of politics and diplomacy, whereas Sosibios represented an old political family with long experience of intrigues. Its next offshoot, Sosibios II's son Ptolemaios, finally emerged as the principal critic of Tlepolemos at court. The main criticism against the latter was that he was handling state affairs not as a guardian but as an heir; in other words, he believed that he owned what he had undertaken to care for and administer. The reaction of the disputed guardian, interestingly, was seen only after his opponents held a sort of council at court to discuss his policy. He himself then convened the (proper) synedrion (Pol. 16.22.10: τὸ συνέδριον), apparently the official state council of principal officials under his presidency, at which he accused Sosibios with reference to his machinations and took away from him the seal and body of the king. Of course, there is no reason to think that Tlepolemos was not already confident of the stance of the members of the synedrion towards him. However, once again, a re-legitimization of the acting guardian in front of a selective miniature of public opinion was thought necessary, and this time it worked to his benefit.

We do not know how Tlepolemos's *epitropeia* ended; but he obviously survived it, as he had a subsequent career in his home city of Xanthos in Lycia.[26] However, as the king was still too young, a third phase of *epitropeia* began, at the head of which we meet again one of the protagonists of the rebellion against Agathokles, Aristomenes the Akarnanian. A sensible and timely side-changer, he had acted on the earlier occasion as a person of contact between the rebels and his previous patron Agathokles; in this capacity he finally communicated to the latter their demand that the king be delivered to them,[27] which took place and sealed the fallen regent's end. On the later occasion, Aristomenes clearly had supreme power in the name of the king;[28] but he seems also – like Tlepolemos – to have tried to govern with at least some pretence of collegiality, often convening the royal council under his presidency: this emerges at least from his skillful handling of Skopas' trial and condemnation.[29] The new (and strange) element was now that the almost adult king himself participated in the sessions of the council until he was officially declared to have come of age during his *anakleteria* of 197/6 BCE.[30]

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[26] Sources and bibliography on this later phase of his career cited in Buraselis 2010, 426-429.

[27] Pol. 15.31.6, 10-12.

[28] Pol. 15.31.7: …γενόμενος κύριος τῶν ὅλων πραγμάτων, κάλλιστα καὶ σεμνότατα δοκεῖ προστῆναι τοῦ τε βασιλέως καὶ τῆς βασιλείας. The fact that he is not expressly described as *epitropos* of the king may be due to the fact that the king was officially regarded as a «half-adult» and he needed no formal guardian but a formal "prostates", a "chief caretaker" of the kingdom (cf. Arrhidaios' case above).

[29] Pol. 18.53.1-54.6.

[30] Cf. Huss 2001, 504ff.

In all, the kaleidoscope of Epiphanes' guardians had shown again how difficult, and often impossible, it was to combine administrative talent, the support of the whole court and the principal officials as representatives of a wider «public opinion», and loyalty to the royal house in undertaking such duties. The temptation to play or even become king was (or was regularly thought to be!) too great, although in this series of guardianships we see no attempt to marry into the ruling dynasty in order to replace the king-to-be. On the other hand, the expedient of collegial guardianship was tried in more than form but it mainly worked as a collaboration between the guardian and a council of state (even if the recruitment of the latter may have been partly in his hands).[31]

IV. CONCLUDING REMARKS

Guardianship is in the end a very personal relationship, depending on good faith, and its eventual absence, towards one dead person and possibly not one but many more living persons. The greater the goods to be guarded, the bigger the temptations and the perils accompanying it. Therefore it is no surprise that the royal guardian could often think of or even achieve his advancement to the kingship. This was aided by useful methods of strengthening a guardian's relationship to the dynasty whose continuation he was supposed to guarantee, but also by existing notions of how kingship and guardianship were intimately related (as analysed above). The experiments in collegial guardianship that we have been able to study here, seem to have ultimately worked not so much as suitable methods for the transmission of power, but as mutual control by the guardians *and* potential rulers-to-be. However, the institution of royal guardianship, in the last analysis, often proved to be a solution not only for lawful heirs and ambitious guardians, depending on their final ability and loyalty respectively. The expedient of guardianship also contributed to the albeit temporary cohesion of, or at least the safe continuation of power, in entire states, in a way quite resembling the need of sequence in private families. Only the glory, the temptations and the dangers were of a very different scale and impact.[32]

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[31] On the later cases of royal guardians in the Ptolemaic house and their historical contexts see the penetrating study by GEHRKE 2005.

[32] I wish to thank Graham Shipley for a friendly revision of my original English text, while I remain, of course, responsible for any remaining errors of language and content. Selene Psoma has kindly offered bibliographical advice.

BIBLIOGRAPHY

ANSON 2009
E. ANSON, *Philip II, Amyntas Perdicca, and Macedonian Royal Succession,* «Historia» 58, 276-286.

BIKERMAN 1937
E. BIKERMAN, *ΑΝΑΔΕΙΞΙΣ*, in: M. LEROY (ed.), *Mélanges Émile Boisacq*, Brussels, 117-124.

BIKERMAN 1938
E. BIKERMAN, *Institutions des Séleucides*, Paris.

BRECCIA 1903
E. BRECCIA, *Il diritto dinastico nelle monarchie dei successori d'Alessandro Magno*, Rome.

BURASELIS 2010
K. BURASELIS, *Eponyme Magistrate und hellenistischer Herrscherkult*, in: G. Thür (ed.), *Symposion 2009. Vorträge zur griechischen und hellenistischen Rechtsgeschichte*, Vienna, 419-434.

CARLIER 1990
P. CARLIER, *Démosthène*, Paris.

CORRADI 1929
G. CORRADI, *Studi ellenistici,* Torino.

ERRINGTON 1978
R.M. ERRINGTON, *The Nature of the Macedonian State under the Monarchy*, «Chiron» 8, 77-133.

ERRINGTON 1986
R.M. ERRINGTON, *Geschichte Makedoniens von den Anfängen bis zum Untergang des Königreiches,* Munich.

GEHRKE 2005
H.-J. GEHRKE, *Prinzen und Prinzessinen bei den späten Ptolemäern*, in: V. ALONSO TRONCOSO (ed.), *ΔΙΑΔΟΧΟΣ ΤΗΣ ΒΑΣΙΛΕΙΑΣ. La figura del sucesor en la realeza helenística*, Madrid, 103-117.

GEYER 1930
F. GEYER, *Makedonien bis zur Thronbesteigung Philipps II.*, Munich.

HAAKE 2003
M. HAAKE, *Warum und zu welchem Ende schreibt man Peri basileias? Überlegungen zum historischen Kontext einer literarischen Gattung im Hellenismus,* in: K. PIEPENBRINK (ed.), *Philosophie und Lebenswelt in der Antike,* Darmstadt, 83-138.

HAMMOND & GRIFFITH 1979
N.G.L. HAMMOND & G.T. GRIFFITH, *A History of Macedonia, II: 550-336 B.C.*, Oxford.

HAMMOND & WALBANK 1988
N.G.L. HAMMOND & F.W. WALBANK, *A History of Macedonia, III: 336-167 B.C.*, Oxford.

HATZOPOULOS 1986
M. HATZOPOULOS, *Succession and Regency in Classical Macedonia,* in*: Ancient Macedonia*, IV, Thessaloniki, 279-292.

HATZOPOULOS 1996
M. HATZOPOULOS, *Macedonian Institutions under the Kings*, I-II, Athens.

HUSS 2001
W. HUSS, *Ägypten in hellenistischer Zeit (332-30 v. Chr.)*, Munich.

LE BOHEC 1993
S. LE BOHEC, *Antigone Dôsôn roi de Macédoine*, Nancy.

MASON 1974
H. MASON, *Greek Terms for Roman Institutions. A Lexicon and Analysis*, Toronto.

MEEUS 2009
A. MEEUS, *Some Institutional Problems Concerning the Succession to Alexander the Great:* Prostasia *and Chiliarchy*, «Historia» 58, 287-310.

NIESE 1903
B. NIESE, *Geschichte der griechischen und makedonischen Staaten seit der Schlacht bei Chaeronea, III*, Gotha.

RATHMANN 2005
M. RATHMANN, *Perdikkas zwischen 323 und 320. Nachlassverwalter des Alexanderreiches oder Autokrat?*, Vienna.

SAVALLI-LESTRADE 1998
I. SAVALLI-LESTRADE, *Les philoi royaux dans l'Asie hellénistique*, Geneva.

WALBANK 1967
F.W. WALBANK, *A Historical Commentary on Polybius*, II, Oxford.

Išxanakan dayeak

Le tuteur princier dans l'Arménie ancienne

ARAM MARDIROSSIAN

ABSTRACT

*Institution très ancienne en Arménie, le tutorat (*dayekut'iwn*) représente un instrument politique majeur qui connaît une triple évolution. Il apparaît à l'origine comme un moyen défensif forgé par les dynastes dans leur lutte contre la royauté afin de préserver leurs familles d'un anéantissement total en confiant leurs enfants à un tuteur appartenant à une autre clan. Le tutorat va par la suite acquérir une dimension plus offensive en permettant de renforcer la solidarité entre les familles princières grâce au mariage du pupille avec l'une des filles du tuteur. Paradoxalement, dans un troisième temps, le roi arsacide s'empare du tutorat pour essayer de saper les fondements juridiques et institutionnels du système dynastique. Cette tentative sera un échec, et seules les invasions turco-mongoles du bas Moyen-Âge finiront par détruire totalement les familles princières qui constituaient la colonne vertébrale de la société arménienne ancienne.*

“ Des rois seront tes pères adoptifs, et leurs princesses tes nourrices. Face contre terre, ils se prosterneront devant toi, ils lécheront la poussière de tes pieds. Et tu sauras que je suis Yahvé, ceux qui espèrent en moi ne seront pas déçus. ”[1]

« Tačat Rštuni et Šawaš Arcruni échappèrent au massacre de leurs clans ordonné par le roi d'Arménie, grâce à l'intervention armée de ses généraux Artawazd et Vasak Mamikonean qui sauvèrent les deux jeunes garçons d'une mort certaine, avant de les élever au sein de leur maison, puis de les marier avec leurs propres filles. » Cet épisode coloré est extrait des *Buzandaran Patmut'iwnk'* ou *Récits épiques*, chronique rédigée vers 470 par un clerc anonyme proche du puissant clan princier des Mamikonean qui retrace l'histoire du royaume d'Arménie au IV^e^ siècle.[2] Le passage en question permet surtout de mettre en lumière les principaux éléments relatifs à l'institution complexe du tutorat – le *dayekut'iwn* – dans l'Arménie antique.[3]

Ce terme comme tant d'autres dans la langue arménienne plonge ses racines dans le vocabulaire iranien où *dāy* signifie “ prendre soin ”, “ nourrir ”, sachant que le pehlevi *dāyag* veut dire “ nourrice, serviteur ”, alors que l'avestique *daēnu* désigne “ celle qui donne du lait ”.[4] Après la création de l'alphabet arménien par le moine Maštoc' vers 405 – dans le but d'achever la christianisation du pays près d'un siècle après la conversion officielle du pays par le roi Trdat IV le Grand en 311[5] –, le premier texte traduit dans la langue locale fut sans surprise la Bible. Au sein des Écritures, le terme *dayeak* est alors employé avec deux acceptions différentes : d'une part, pour désigner la nourrice, mais aussi la gouvernante, cette dernière étant dans le contexte

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1 *Isaïe* 49.23.

2 Cf. Garsoïan 1989, 11-16.

3 L'historiographie s'est très peu intéressée à l'institution du *dayeak* ; cf. pour l'essentiel, Widengren 1969, 69-80, et surtout Bedrosian 1984, ainsi que la brève notice donnée par Garsoïan 1989, 521, s.v. *dayeak*.

4 *Ibid*. L'institution des pères nourriciers occupe une place prégnante dans le contexte caucasien. Elle apparaît notamment dans le mythe fondateur du royaume de Kartli. Ainsi, Alexandre le Grand – dont l'intervention légendaire pare de gloire les origines de celui-ci – aurait institué en ce lieu des pères nourriciers, cf. Pätsch 1975. De fait, la parenté de lait joue un rôle crucial dans les sociétés caucasiennes en étant aussi puissante que celle fondée sur le sang. Par exemple, dans le domaine clef du droit pénal, elle permet de prévenir les cycles de vengeance qui étaient particulièrement vivaces dans ces contrées. Une pratique fréquente consistait pour une tribu donnée à accueillir en son sein un enfant d'une autre tribu et à l'éduquer. Ce transfert rendait impossible pour l'avenir toute forme de vendetta entre les deux groupes. Je remercie le professeur Jean-Pierre Mahé de m'avoir communiqué les éléments développés dans cette note.

5 Sur la question, toujours discutée, de la date du « tournant » chrétien opéré par le roi Trdat IV (298-330), cf. Mardirossian 2001-2002.

arménien systématiquement attachée aux jeunes princesses ; et, d'autre part, pour nommer le tuteur ou le gardien qui reçoit de façon particulière et pour une longue durée la charge de nourrir et d'éduquer un enfant.[6] C'est ce dernier sens du vocable *dayeak*, le plus spécifique au contexte arméno-iranien, qui retiendra ici notre attention. En outre, et la chose n'est pas fortuite, l'expression est fréquemment employée de façon conjointe avec le terme *snucʿičʿ*, " père adoptif " (lit. " nourricier ").[7]

Ainsi, le *dayekutʿiwn* " tutorat " représentait dans l'Arménie ancienne et, tout particulièrement sous la royauté arsacide – qui dirigea le pays du Ier au Ve siècle ap. J.-C. –, une institution qui permettait à un jeune prince (*išxan*) ou dynaste (*naxarar*) d'être élevé par un tuteur appartenant à un autre clan de même rang. Une fois son éducation achevée, généralement vers l'âge de quinze ans, le protégé retournait dans sa propre famille, parfois accompagné d'une épouse issue du clan de son *dayeak*. Dans tous les cas, un lien particulièrement étroit et profond unissait désormais, à titre personnel, le jeune prince et son tuteur, et à titre plus général, leurs familles respectives.[8]

L'examen du *dayekutʿiwn* nécessite au préalable une brève présentation de la société dynastique qui prévalait dans l'Arménie ancienne.[9] En l'occurrence, cette société reposait sur deux principes qui conditionnaient de façon impérative le statut des personnes, la propriété et la transmission des biens : la grande famille patriarcale (*gerdastan*) et le système des classes (*karg*).

Au sein du *gerdastan* qui s'impose à toutes les couches de la société, le chef de famille administre les biens et les revenus qui appartiennent collectivement à l'ensemble de la maison. Il n'en est pas le propriétaire, mais uniquement le gardien responsable (*tēr* ou *tanutēr*), qui décide de toutes les dépenses ou transactions éventuelles. Une solidarité de sang unit entre eux tous les membres du *gerdastan* et ceux qui ont contracté une alliance avec eux. Ils ont notamment le devoir de venger les meurtres ou toute autre offense dont l'un d'entre eux serait victime. Plus particulièrement dans les familles princières, il est impossible de confisquer les biens inaliénables de la collectivité, sans exécuter tous les ayants droit, jusqu'aux nouveau-nés, car on a la certitude d'une inéluctable vendetta sanglante à la génération suivante.[10]

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6 Cf. BEDROSIAN 1984, 23, pour les références scripturaires ; pour l'institution de la gouvernante, cf. aussi *infra* n. 26.

7 GARSOÏAN 1989, 521 s.v. *dayeak*.

8 BEDROSIAN 1984, 25.

9 Cf. TOUMANOFF 1963, et la synthèse de MAHÉ 2000, 689-693.

10 GARSOÏAN 1985, 25-26 n. 48.

La grande famille ainsi constituée se répartit en trois classes sociales clairement différenciées. Les princes ou dynastes (*išxan* ou *naxarar*), les nobles (*azat*) et les paysans (*ṙamik* ou *šinakan*). Les princes représentent les membres des familles qui se partagent, à titre héréditaire, collectif et inaliénable, la maîtrise quasi-souveraine du territoire arménien. Chaque famille se trouve à la tête d'un *gawaṙ* ou canton dont le nom remontait à des origines très anciennes et dérivait fréquemment d'appellations pré-arméniennes. Conformément aux structures des familles larges, l'ensemble des membres jouit collectivement d'un droit imprescriptible sur le canton d'où ils sont originaires. Par conséquent, leur chef est uniquement le représentant autorisé de la totalité du clan. Il n'a aucunement le droit d'aliéner les biens collectifs, mais le devoir de les administrer et, le cas échéant, de les défendre en exerçant à l'intérieur de ses terres les prérogatives du clan et en prenant part à l'effort guerrier de tous les Arméniens.[11]

Il existait ainsi une " Liste militaire " – *Zōrnamak* – qui fixait le nombre de cavaliers que chaque famille princière devait fournir en cas de guerre.[12] Une seconde liste appelée " Livre des trônes " – *Gahnamak* – indiquait le rang protocolaire de chacun des chefs de clan à la cour royale, et pour les plus importants d'entre eux, l'office héréditaire qui revenait à sa famille.[13] Par exemple, les Mamikonean détenaient la charge de " général-en-chef " (*sparapet*), les Bagratouni celles de " maître de la cavalerie " (*aspet*) et de " couronneur du roi " (*tʻagadir*), les Grigorides celle de " patriarche et juge suprême " d'Arménie. Dans cette perspective, la royauté n'était que le plus prestigieux de ces offices dévolu héréditairement au clan des Arsacides, qui possédaient en propre la vaste province d'Ayrarat.

La deuxième classe de la société arménienne était celle des nobles (*azat*) – parfois traduit par " hommes libres " , plus précisément ceux qui font partie d'une lignée (*azn*, *azg*) – auxquels la coutume (*awrēnkʻ*) accorde l'immunité fiscale. Ils servent héréditairement dans la cavalerie qui constitue le " corps noble " par excellence (*azatagund*). Ils accompagnent le prince dans toutes les guerres. À la différence des princes et des dynastes, ils ne sont pas maîtres de la terre et, s'ils détiennent un domaine, c'est normalement à titre conditionnel, comme " engagement " (*xostak*), en échange des " services " (*caṙayutʻiwn*) qu'ils sont tenus de rendre à leur prince.[14]

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[11] Mahé 2000, 691-692.

[12] Texte édité par Adontz 1970 [traduction annotée par N. Garsoïan de l'ouvrage initialement paru en russe en 1908], 68*-70* (traduction 193-195) ; commentaire par Toumanoff 1963, 234-241.

[13] Adontz 1970, 68*-70* (traduction 193-195) ; il existe également un pseudo-Gahnamak, *ibid*., 70*-72*; commentaire par Toumanoff 1963, 229-231, 241-242, 251-252.

[14] Mahé 2000, 692-693.

La troisième classe regroupe précisément l'ensemble des individus non-nobles (*an-azat*) de la société. Elle se compose essentiellement des *ṙamik*, " populace ", et des *šinakan*, " villageois ". Ces derniers cultivaient une terre qu'ils ne possédaient pas, et étaient assujettis à l'impôt. On trouvait également en Arménie un petit nombre d'esclaves, dont la majeure partie était des prisonniers de guerre. Toutefois, l'esclavage n'a jamais été généralisé dans le pays, même à l'époque hellénistique. Enfin, il existait aussi un nombre restreint de citadins dont une part importante était composée de marchands juifs.[15]

Il ne faut pas confondre ce système dynastique particulièrement ancien avec la féodalité de l'Occident médiéval.[16] Le roi n'est pas le suzerain des princes et ceux-ci ne sont pas ses vassaux. Aucun lien d'allégeance personnelle ne les unit au roi – ainsi, les princes ne prêtent pas hommage au roi. Ce n'est pas de lui qu'ils tiennent leurs domaines, ni l'office héréditaire de leur clan. Tandis que la féodalité occidentale est parfois présentée comme issue du déclin d'un Empire – en l'occurrence carolingien[17] – centralisé, le système dynastique arménien constitue une étape intermédiaire entre la confédération tribale et la centralisation royale. Certes, les rois ont tenté de superposer aux liens purement ethniques et strictement paritaires qui les unissaient aux princes, des obligations plus étroites et hiérarchisées. Ainsi, en gratifiant certains de ceux-ci de bénéfices (*pargewakan*), concédés à titre personnel en échange d'une fonction spécifique (*gorcakalut'iwn*), ils ont cherché à transformer les princes souverains (*išxan*) en satrapes ou préfets (*naxarar*). Ces derniers n'étaient alors plus les pairs des rois, mais simplement leurs subordonnés. Mais, ce processus n'est jamais arrivé à son terme et l'ancien système, qui s'est largement maintenu, a survécu à l'abolition de la royauté en 428 et même aux invasions arabes. Toutefois, avec l'alternance des révoltes et des répressions qui marquent l'apogée de la dynastie abbasside aux VIII^{e}-IX^{e} siècles, leur nombre commencera à se réduire, ne laissant pratiquement plus que les grandes lignées d'où sortiront bientôt les dynasties royales arméniennes du Moyen Âge.[18]

On l'aura compris, le tutorat ne concernait a priori que la première classe, celle des princes, des *išxan* qui se trouvait au sommet du système dynastique. Si l'époque précise de l'apparition de l'institution du *dayekut'iwn* en Armé-

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15 Cf. Stone 2002 ; Stone & Amit 2004.

16 Poly & Bournazel 2004.

17 Parmi les diverses causes qui entraînèrent la dislocation de l'« État » carolingien, la prégnance du droit coutumier successoral germanique figure, selon nous, en bonne place. À l'issue de chaque règne, les fils du monarque défunt se partageaient invariablement le territoire de l'empire. L'explication est d'ailleurs également valable – *mutatis mutandis* – pour la royauté mérovingienne qui précéda ce dernier, cf. Sassier 2012, 189-255.

18 Dédéyan 2007, 213-241.

nie reste incertaine, elle précède très certainement l'installation de la royauté arsacide au tout début de notre ère. En revanche, l'une des principales causes de son émergence pourrait s'expliquer à la lumière des efforts produits par les dynasties royales successives depuis la fin du IV^e^ siècle av. J.-C. – précisément les Orontides et les Artaxiades qui précédèrent les Arsacides – pour tenter d'instaurer une monarchie centralisée.[19]

Ainsi, le *dayekut'iwn* pourrait initialement constituer une parade imaginée par ces dernières afin de pallier les conséquences les plus dommageables pour elles de la politique de centralisation monarchique. Mais sans surprise, le pouvoir royal ne resta pas à l'écart de l'institution du *dayekut'iwn*, puisqu'au plus tard à l'époque arsacide, l'héritier du trône et, plus généralement, les autres jeunes du clan royal sont également pris en charge par un *dayeak*. Cette intrusion de la royauté dans l'institution considérée ne se réalisera pas, là encore, sans dommage pour le système dynastique traditionnel. Nous envisagerons par conséquent l'institution du *dayekut'iwn* comme d'abord un moyen de préservation du système dynastique (I), puis, à l'inverse, comme une cause de son affaiblissement (II).

I. LE *DAYEKUT'IWN*, OUTIL DE PROTECTION DU SYSTÈME DYNASTIQUE

Pour tenter de mettre fin aux tendances centrifuges des grandes familles princières qui affaiblissaient de façon endémique le pouvoir royal, les Arsacides mirent en place diverses stratégies dont la plus extrême consistait à éliminer physiquement les clans particulièrement rétifs à tout compromis avec leurs objectifs politiques. Or, répétons-le, afin de pouvoir s'emparer du patrimoine et des possessions d'une famille princière tout en la liquidant sur le plan politique, le monarque était obligé de massacrer la totalité des membres de celle-ci. En effet, aussi longtemps qu'un seul enfant restait en vie, la norme coutumière (*awrēn-k'*) lui reconnaissait un droit de souveraineté imprescriptible sur le domaine et les biens de son clan.[20]

Confrontés aux violences royales, les dynastes prirent conscience que la meilleure précaution afin d'éviter un anéantissement total de leurs clans respectifs consistait à placer leurs jeunes garçons sous la protection du chef ou d'un des hommes importants d'une autre famille princière. L'enfant qui gran-

[19] Sur les dynasties royales orontide (300-188 av. J.-C.) et artaxiade (188-4 ap. J.-C.), cf. MAHÉ & MAHÉ 2012, 37-64.

[20] MARDIROSSIAN 2004, 216-218.

dissait ainsi sous la protection de son tuteur garantissait la survie de son clan, en cas d'attaque des terres de celui-ci.

Les sources arméniennes anciennes ont conservé la cause initiale de l'apparition du *dayekut'iwn*, sous les traits du *topos* de l'unique enfant rescapé du massacre de son clan par le preux prince d'une autre famille. Ainsi, le *Buzandaran* qui narre la geste des Mamikonean au IVe siècle évoque le sauvetage musclé par les deux chefs de ce clan – Artawazd et Vasak – de deux nourrissons appartenant l'un au clan des Ṙštuni, et l'autre à celui des Arcruni dont tous les membres sont massacrés par le roi Aršak II (350-367) qui, par ailleurs, est le pupille des deux princes Mamikonean ![21]

Une autre version de ce même épisode est donnée trois siècles plus tard par Movsēs Xorenac'i (Moïse de Khorène), « l'Hérodote arménien », auteur d'une immense fresque intitulée *Histoire de l'Arménie*.[22] Cet auteur, protégé du clan des Bagratuni occulte systématiquement le rôle de leurs grands rivaux, les Mamikonean.[23] En l'occurrence, le roi Tiran (338-350) – père et prédécesseur d'Aršak II – ordonne, à la demande de l'empereur romain Julien, le massacre du clan des Ṙštuni, dont un seul enfant " est sauvé par ses tuteurs " dont les noms ne sont pas précisés.[24]

Le *topos* de l'unique enfant sauvé pouvait concerner des familles encore plus illustres que les clans princiers. Tournons-nous un instant vers *Agathange* qui représente une source anonyme, dont l'auteur prétend avoir été, au tout début du IVe siècle, un secrétaire du roi Trdat le Grand écrivant en grec, mais qui, en réalité, a rédigé son texte – relatant la conversion du pays au christianisme – en arménien vers 451.[25] *Agathange* indique ainsi que le futur Trdat le Grand fut sauvé du massacre de sa famille emportant notamment son père, le roi Xosrov II, par " ses tuteurs " – dont il tait le nom – qui l'emmenèrent dans la *pars Orientis* où il sera éduqué dans la maison du comte Licinius.[26]

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[21] *Buzandaran*, *Histoire de l'Arménie* III, 18, éd. K. Patkanean, Saint-Pétersbourg 1883 [Réimpr., New York 1982, éd. révisée Venise 1933] ; trad. anglaise Garsoïan 1989, 92-93.

[22] Movsēs Xorenac'i, *Histoire des Arméniens*, éd. M. Abełyan, S. Yarut'iwnean, Tbilissi, 1913 [Réimpr. Delmar, New York 1981 et Érévan 1991 avec des compléments de A. B. Sargsyan] ; trad. française Mahé 1993.

[23] Movsēs qui prétend être un disciple de Maštoc' aurait écrit sa chronique peu après la mort de ce dernier en 439. Toutefois, la critique moderne émet de sérieux doutes sur ces données, et divers spécialistes estiment que le chef-d'œuvre considéré date plutôt de la seconde moitié du VIIIe siècle ; cf. la mise au point de Garsoïan 2003-2004. Quoi qu'il en soit, le débat reste ouvert et brûlant.

[24] Movsēs Xorenac'i, *Histoire des Arméniens* III, 15, pp. 260-261.

[25] *Agat'angełos*, *Histoire de l'Arménie*, éd. G. Mkrtč'ean & S. Kananyanc', Tbilissi, 1909 ; trad. anglaise R. W. Thomson, Albany NY 1976.

[26] *Agat'angełos*, *Histoire de l'Arménie* § 34-37, pp. 48-53. La même source (§ 156, 158, pp. 164-167) mentionne par ailleurs à deux reprises la « gouvernante » de la jeune moniale

Ici aussi, Movsēs Xorenac'i nous a conservé une version différente de cet épisode. Contrairement à *Agathange*, « l'Hérodote arménien » indique que c'est le général en chef Artawazd Mandakuni qui sauva son pupille, le jeune Trdat, avant de l'amener " à la cour de l'empereur (romain) ".[27] Mais on peut se demander ici si une fois encore aveuglé par sa haine des Mamikonean, le chroniqueur n'aurait pas substitué tendancieusement le nom d'un Mandakouni à celui d'un Mamikonean, dont le clan possédait alors de façon héréditaire la charge de général en chef des armées arméniennes.[28]

Dans le même temps, les princes arméniens massacrèrent l'assassin du roi Xosrov II, ainsi que toute sa parenté, à l'exception de deux petits enfants qui furent sauvés par leurs nourrices respectives – ici il ne s'agit pas de tuteurs, probablement en raison du très jeune âge des deux rescapés. L'un des deux nourrissons, qui sera emmené dans la *pars Orientis* pour être élevé dans la foi chrétienne, était le futur Grégoire l'Illuminateur, qui bientôt, selon la tradition, convertira le roi Trdat au christianisme.[29]

Dans les différents épisodes que nous venons d'évoquer, les chroniqueurs louent la grandeur d'âme des princes-tuteurs ou futurs tuteurs qui sauvent d'une mort certaine un nourrisson ou un jeune homme innocent. Mais les motifs humanitaires n'étaient peut-être pas toujours les seuls à guider les dynastes-sauveurs.

Ainsi, à la dimension « défensive » qui consistait à assurer la survie des clans et plus généralement du système dynastique traditionnel censé assurer l'autonomie originelle des grandes familles, s'ajouta bientôt une dimension plus « offensive »: le tuteur pouvait profiter de sa position privilégiée pour développer une stratégie matrimoniale destinée à renforcer les liens entre son clan et celui de son protégé en mariant ce dernier avec l'une de ses filles.

Ainsi, dans l'épisode archétypique du sauvetage des enfants Ṙštuni et Arcruni par les Mamikonean mentionné dans le *Buzandaran*, le chroniqueur précise que ces derniers donnèrent aux deux rescapés " leurs propres filles en mariage, de sorte que ces clans se multiplièrent une fois encore ".[30] Peu de temps après, la politique matrimoniale menée par les Mamikonean allait connaître un succès d'une bien plus grande ampleur. Après l'assassinat du roi

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Hṙip'simē, que le roi Trdat, une fois installé sur son trône, fera exécuter à la demande de son protecteur, l'empereur Dioclétien.

27 Movsēs Xorenac'i, *Histoire des Arméniens* II, 82, pp. 233-234.

28 Mahé 1993, 33-34.

29 Thomson 1963, XXVI-XXX.

30 *Buzandaran*, *Histoire de l'Arménie* III, 18, pp. 92-93.

Pap par les Romains en 374, suivi du bref règne de Varazdat, un cousin de ce dernier – sur lequel nous allons bientôt revenir –, le général en chef Manuēl Mamikonean s'empare de la régence du trône qu'il exerce au nom des deux fils du défunt monarque. Bientôt, il marie l'aîné, qui est l'héritier du trône, avec sa propre fille, tout en favorisant l'union du cadet avec la fille du chef du clan des Bagratuni.[31] Les dynastes prennent la main…

Le *dayekut'iwn* dut apparaître comme un instrument trop efficace pour que la royauté arménienne contre laquelle elle avait dû être créée puisse s'en tenir à l'écart. Mais une telle intrusion n'était pas sans risque pour l'institution elle-même, et plus généralement pour le système dynastique.

II. LE *DAYEKUT'IWN*, INSTRUMENT D'AFFAIBLISSEMENT DU SYSTÈME DYNASTIQUE

Comme nous venons de le voir avec les exemples des futurs roi Trdat le Grand et Aršak II, à l'époque arsacide, l'héritier du trône – mais aussi les autres jeunes du clan royal – étaient à l'instar des enfants des dynastes confiés à un tuteur. Plus précisément, la coutume voulait que le *dayeak* du futur monarque soit un membre de la famille des Mamikonean.[32] Un troisième cas mentionné dans le *Buzandaran* va nous permettre d'illustrer le danger que pouvait représenter pour le système dynastique traditionnel l'existence d'un tuteur royal.

Ainsi, Varazdat qui accéda au trône en 374 à la suite de l'assassinat du roi Pap avait pour " tuteur et père adoptif " le prince Bat Saharuni.[33] Le fait que ce dernier ne soit pas un Mamikonean comme cela semblait être la coutume pour l'héritier royal pourrait s'expliquer par le fait que Varazdat en tant que neveu de Pap n'était pas voué à lui succéder. De plus, les deux fils de Pap n'étaient que des enfants au moment de sa brutale disparition.[34] Varazdat appartenait donc au clan arsacide mais il n'était pas destiné au trône royal qui lui revint malgré tout, probablement en raison de la trop grande jeunesse d'Aršak, le fils aîné de Pap.[35] Dès lors, il n'est pas illégitime que le jeune Varazdat ait eu comme tuteur non pas un Mamikonean, mais le chef d'une autre grande famille princière, ici les Saharuni.

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31 *Ibid*., V, 44, p. 228.

32 *Buzandaran*, *Histoire de l'Arménie* III, 18, pp. 92-93 ; Movsēs Xorenac'i, *Histoire des Arméniens* II, 76, 82, 85, pp. 226, 233-234, 237-238 ; cf. N. Garsoïan 1989, 385 s.v. *Mamikonean*.

33 *Buzandaran*, *Histoire de l'Arménie* V, 35, 37, pp. 215-221.

34 *Ibid*., V, 37, p. 221.

35 Garsoïan 1989, 423-424 s.v. *Varazdat Aršakuni*.

Mais une fois roi, Varazdat aurait – d'après le *Buzandaran* qui ne l'apprécie guère –, subi l'influence néfaste de son tuteur. Tout à son ambition dévorante, ce dernier aurait fini par convaincre son influençable pupille d'éliminer le puissant général en chef Mušeł Mamikonean afin de prendre sa place à la tête des armées arméniennes. Pour cela, Bat Saharuni n'aurait pas hésité à accuser son rival de méditer des projets de trahison en vue de s'emparer du trône.[36] Si les données avancées par le *Buzandaran* ne doivent pas être d'emblée écartées, on peut penser que des motifs plus politiques pouvaient s'ajouter ou même primer sur des explications relevant uniquement d'ambitions personnelles.

L'Arménie depuis le I^er^ siècle avant notre ère était prise en tenailles entre les Romains et les Perses, et les monarques arsacides devaient en permanence maintenir un fragile équilibre entre ces deux grandes puissances afin de préserver au mieux la précaire autonomie de leur royaume.[37] Or, les Mamikonean étaient traditionnellement les promoteurs d'une politique pro-romaine.[38] Dès lors, Varazdat qui avait vu son oncle et prédécesseur assassiné par les Romains – qui profitèrent aussitôt de la situation pour couvrir le pays de leurs garnisons – tenta de réagir en faisant des ouvertures au roi des rois sassanide Šahpur II (309-379). La probable opposition de Mušeł Mamikonean à ce revirement politique pro-perse pourrait expliquer l'autorisation donnée par le roi à son tuteur Bat Saharuni de liquider le général en chef et de prendre sa place à la tête de l'armée.[39]

Un tel remplacement heurtait de front la norme coutumière selon laquelle la charge de général en chef – la plus prestigieuse après la royauté – appartenait de façon héréditaire au clan des Mamikonean.[40] Ici, le roi s'appuyait sur l'institution du tutorat, le *dayekut'iwn*, afin de mettre à mal le système dynastique traditionnel. Comme ses prédécesseurs, Varazdat souhaitait qu'à l'avenir, les grandes familles princières ne tiennent plus de façon automatique et héréditaire leurs charges respectives, mais que celles-ci se transforment en bénéfices que le roi pouvait accorder ou révoquer *ad nutum*. Comme ses prédécesseurs, Varazdat échoua à mener à bien sa tentative de renforcement du pouvoir royal.

Bientôt, Manuēl, le nouveau chef des Mamikonean, parvient avec l'aide des Romains à chasser Varazdat du trône d'Arménie tout en récupérant la

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36 *Buzandaran*, *Histoire de l'Arménie* V, 27, pp. 217-221.

37 Garsoïan 1985, III et IV.

38 Garsoïan 1989, 385 s.v. *Mamikonean*.

39 *Buzandaran*, *Histoire de l'Arménie* V, 35, pp. 215-217.

40 Cf. *supra*, p. 73.

charge de général en chef non sans tuer Bat Saharouni afin de venger son parent précédemment assassiné. Varazdat semble avoir eu plus de chance que son infortuné tuteur. J'ai essayé de montrer dans un précédent travail, qu'on retrouve probablement sa trace quelques années plus tard dans la *pars Occidentis*, et plus précisément en Gaule, où en échange de sa vie sauve, il mettait son talent militaire au service des aigles romaines.[41]

L'institution du tutorat connut un destin pour le moins particulier dans l'Arménie ancienne. Ainsi, dès le départ, le *dayekut'iwn* se dessine sous les traits d'un instrument politique de première importance. Ici, une quelconque distinction entre droit public et droit privé n'avait guère de pertinence. L'instrument ou même – osons la métaphore – l'arme forgée par les dynastes au cours de leur lutte contre la royauté possède dans un premier temps un aspect défensif : sauver les clans d'un anéantissement total en confiant leurs enfants à un tuteur appartenant à une autre famille. Mais très vite, les princes vont également lui conférer une dimension plus offensive : renforcer la solidarité entre leurs familles en mariant le pupille à l'une des filles du tuteur. Le troisième temps, le plus étonnant, voit la monarchie retourner l'arme pointée sur elle contre ses « utilisateurs » : le roi par l'intermédiaire de son propre tuteur tente de mettre à mal les fondements juridiques et institutionnels du système dynastique. L'éducation des enfants princiers était ici bien autre chose qu'une simple affaire d'ordre privé. Ceux-ci constituaient dès leur prime jeunesse un enjeu politique de la plus haute importance. D'eux dépendait la survie de tout un clan et, au-delà, du système dynastique, véritable clef de voûte de la société arménienne antique et médiévale dont seules les guerres et les invasions étrangères – turques et mongoles – du bas Moyen Âge finiront par venir à bout par l'élimination totale des familles princières.

[41] MARDIROSSIAN 2006.

BIBLIOGRAPHIE

ADONTZ 1970
N. ADONTZ, *Armenia in the Period of Justinian*, Lisbon.

BEDROSIAN 1984
R. BEDROSIAN, Dayeakut'iwn *in Ancient Armenia*, «Armenian Review» 37, 23-47.

DÉDÉYAN 2007
G. DÉDÉYAN (dir.), *Histoire du peuple arménien*, Toulouse [2e éd.].

GARSOÏAN 1985
N. GARSOÏAN, *Armenia between Byzantium and the Sasanians*, London.

GARSOÏAN 1989
N. GARSOÏAN, *The Epic Histories Attributed to P'awstos Buzand,* Cambridge (MA).

GARSOÏAN 2003-2004
N. GARSOÏAN, *L'Histoire attribuée à Movsēs Xorenac'i que reste-t-il à en dire ?*, «Revue des études arméniennes», n.s. 29, 29-48.

MAHÉ 1993
J.-P. MAHÉ, *Moïse de Khorène, Histoire de l'Arménie*, Paris.

MAHÉ 2000
J.-P. MAHÉ, *Norme écrite et droit coutumier en Arménie du Ve au XIIIe siècle*, «Travaux et Mémoires» 13, 683-705.

MAHÉ & MAHÉ 2012
A. MAHÉ & J.-P. MAHÉ, *Histoire de l'Arménie*, Paris.

MARDIROSSIAN 2000-2001
A. MARDIROSSIAN, *Le synode de Vałaršapat (491) et la date de la conversion du royaume de Grande Arménie (311)*, «Revue des études arméniennes» n.s. 28, 249-260.

MARDIROSSIAN 2004
A. MARDIROSSIAN, *Le Livre des canons arméniens (Kanonagirk' Hayoc') de Yovhannēs Awjnec'i. Église, droit et société en Arménie du IVe au VIIIe siècle*, Louvain.

MARDIROSSIAN 2006
A. MARDIROSSIAN, *'Fortune et Gloire': les Parthes arsacides de l'armée de Gaule à la fin de l'Empire*, «Droit et Cultures» 52, 47-64.

PÄTSCH 1975
G. PÄTSCH, *Die Bekehrung Georgiens. Mokcevay Kartlisay*, «Bedi Kartlisa» 33, 288-337.

POLY & BOURNAZEL 2004
J.-P. POLY & É. BOURNAZEL, *La mutation féodale, Xe-XIIe siècle*, Paris.

SASSIER 2012
Y. Sassier, *Royauté et idéologie. Bas-Empire, monde franc, France (IVe-XIIe siècle)*, Paris.

STONE 2002
M. STONE, *Recovering a Lost Jewish Community: The Jews of Medieval Armenia*, in: A. Strum (ed.), *Eshkolot. Essays in Memory of Rabbi Ronald Lubofsky*, Melbourne, 104-112.

STONE & AMIT 2004
M. STONE & D. AMIT, *A Jewish Cemetery in the Middle Ages in Eghegis in Southern Armenia*, «Peamim» 98-99, 67–119 [in Hebrew].

TOUMANOFF 1963
C. TOUMANOFF, *Studies in Christian Caucasian History*, Georgetown.

WIDENGREN 1969
G. WIDENGREN, *Der Feudalismus im alten Iran*, Köln.

Guardianship and Regnal Politics

Discussion of the Papers of K. Buraselis and A. Mardirossian

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ABSTRACT

Compared here are two distinct cases of dynastic guardianship, from Argead and Hellenistic Macedonia and from ancient and early medieval Armenia. The Armenian institution of dayekutʿiwn *nurtured the foundling princes of extinguished clans, effectively reproducing an equilibrium of power between kings and nobles. The Macedonian practice of appointing a royal* epitropos *structured succession, taking on added significance after 200 B.C.E. Alternative Macedonian models of kingship also cast guardianship as a metaphor for non-charismatic monarchy.*

Presented here are two views of guardianship as a dynastic strategy deployed by the ancient Armenian and Macedonian monarchies at distinctly different stages of development. The juxtaposition of the Armenian and Macedonian cases highlights divergent trajectories in state formation among monarchies participating in what we call the Hellenistic world, which sat poised between the Roman Mediterranean and ancient Iran. The clans, or princely houses (*išxan* or *naxarar*), of Arsacid Armenia used guardianship to strengthen themselves against the depredations of a centralizing monarchy, demonstrating a form of elite solidarity that Philip II of Macedon successfully dissolved in his domain. In Philip II's late Argead kingdom, Macedonian (and likely Thracian nobles) were rallying around a Pan-Macedonian identity, seated comfortably on sympotic couches around the banqueting halls of the palaces of Pella.[1] By contrast, the ancient Armenian centralizing monarchy never pulled off such a feat, and the clans survived into the medieval Abbasid period.

For the Armenian institution of *dayekut'iwn*, we possess a rich, etiological tale in the Buzandara epic. Two generals of the Mamikonean clan, Artawazad and Vasak, at the behest of King Aršak II (350-368), obliterate the clans of Ṙštuni and Arcruni. Yet, the generals ensure the survival of their own clans, and so it seems, of their entire social stratum, by rescuing a sole fledgling dynast from each of the extinguished clans and incorporating them into their own houses. Interestingly enough, King Aršak II, who ordered the massacre, had once been the ward of his Mamikonean generals Artawazad and Vasak! The clans of Ṙštuni and Arcruni are preserved by the same guardianship that binds the ever-powerful Mamikoneans to the Arsacid royal house. It is an awkward embrace, but the centrifugal effects of the *dayekut'iwn* guardianship are patent. By whatever strategies they employed, the noble houses of ancient Armenia seem to have been resilient in the face of centralizing power.

The interference of outside Roman, Byzantine, and Persian interests must have strengthened their position, but so did the centripetal tendencies of the *dayekut'iwn* guardianship. The institution guarded the rights of the legally incapacitated all too well. Far more than seems to have been the case in Macedonian contexts, the future legal capacity of the ward was respected. As long as the heir survived, the guardian could not alienate the canton (*gawaṙ*) from the control of its ancestral «owners». The consolidation of territory was impeded, and many clans held out. It seems that Justinian, too, was still trying to break their power, at least this is how Nicholas Adontz, in the classic history of Armenia in that period, understood Justinian's edict "Concerning the Or-

[1] Strabo echoes the discontents of Macedonian ethnogenesis: οἱ μὲν ἑκόντες οἱ δ᾽ ἄκοντες, μέρη καθέσταντο...Ὀρέσται δὲ καὶ Πελαγόνες καὶ Ἐλιμιῶται Μακεδόνων (9.5.11).

der of Inheritance among the Armenians", which has been seen to strengthen female rights of inheritance in an effort to fragment these great households.[2]

Both papers depict the translation of an institution of private law into the royal sphere. What exactly was borrowed and from where? And whatever was borrowed, how was it transformed in its new environment? If we take the example of Classical Macedonia, all the cases adduced down to the death of Alexander the Great, can we actually speak of a formal institution of *epitropeia*? Fine-grained institutional analysis of royal politics in Argead Macedonia is notoriously difficult, and Buraselis judiciously leaves aside the vexing question of the «constitutionality» of Macedonian kingship, but to press the sources further, in whose eyes were royals like Aeropos and the future Philip II *epitropoi*? Are our sources leading us into anachronism or guilty of inappropriately importing *a terminus technicus* from Athenian law? It seems significant that neither Perdikkas nor Krateros, the guardians of Alexander's would-be heirs, is ever called an *epitropos*. Indeed, little of the spirit of Athenian *epitropeia* is preserved in these cases. We replace this pervasive suspicion of the guardian who would usurp the rights of his ward with guardianship as a stepping stone to legitimate kingship. Multiple paths to legitimate kingship existed in Macedonia, and competent guardianship counted as one of them. Might it be that in some royal contexts, *epitropeia* should be understood as a kind of metaphor according to which figures of the court and royal family modeled their behavior, and according to which a person on the street made sense of it all?

Despite the hazards of entering into the traditions surrounding the death of Alexander the Great, the review of his case is salutary, the failed attempt to institute a collective guardianship, since the model of Alexander, on so many levels, permeates later performance of Hellenistic kingship. Indeed, collective guardianship later reemerges as a response to the challenge of maintaining continuity through succession, both in administering complex bureaucracies and navigating high-stakes foreign relations, without a mature king. The problem, full-blown, is on display in Polybius' account of the succession crisis of Ptolemy V Epiphanes. Why does collective guardianship come to the fore from ca. 200 BCE, both in the Ptolemaic and Seleukid kingdoms? Should we see here, at last, the classical Athenian model entering Hellenistic royal culture, reaching the court of Alexandria along with other fourth-century Athenian institutions? Or rather, is this a reaction to the complexities of dynastic succession in heterogeneous, confederative kingdoms? That the machinery of governance in Ptolemaic Egypt required a different kind of operator than that of Argead Macedonia is evident in the minting activity of a guardian like

[2] ADONTZ 1970, 142-154.

Sosibios II – Alorites, by contrast, had not coined. It need not be either/or. But in a royal context, behind the figure of various guardians may lie different interests, different bases of power. One recalls here that in the case of Alexander's death, Perdikkas is backed by the Companion Cavalry, Krateros, by the infantry. In the case of Ptolemy V, it is noteworthy that the soldier-turned-*epitropos* Tlepolemos survives the role of guardian and returns to his home in Lycia where, we assume, he still had a constituency.

Finally, Buraselis makes a series of fascinating connections, whereby he places guardianship at the center of the normative ideal of Hellenistic kingship. He does this by leading us through two different definitions of *basileia* (kingdom or kingship) in the 10th-century Byzantine lexicon the Suda, focusing on the Suda's second entry for this term, which is almost universally ignored in scholarly discussions of Hellenistic kingship – with no apparent philological justification. By the first definition, the monarch staked his right to rule on achievements and ability in war and diplomacy – the so-called personal monarchy; by the second, Buraselis suggests, the king is likened to the guardian of his kingdom. The kingdom is conceived of as public property, the people as the ward. One could call this non-charismatic monarchy. Here, the king is the slave steward of his master's – that is, his subjects' – property, in the conceit of the story of Aelian about the philosophically minded king Antigonos Gonatas.

Another reading of the Suda might find a strong conceptual distinction between the king's property and public property. "Since kingship entails the possession of *ta koina* ["the commons" or common funds], but the public's property does not belong to the monarchy, it follows that one must detest as the excesses of a tyrant royal interventions made with force and arrogance, but one must honor like a solemn duty requests for contributions made persuasively and humanely" (ὅτι ἡ βασιλεία κτῆμα τῶν κοινῶν, ἀλλ' οὐ τὰ δημόσια τῆς βασιλείας κτήματα. διὸ τὰς ἐξ ἀνάγκης καὶ μεθ' ὕβρεως εἰσπράξεις ὥσπερ τυραννικὰς ἀκολασίας μισεῖν δεῖ, τὰς δὲ σὺν λόγῳ καὶ φιλανθρωπίᾳ τῶν εἰσφορῶν ἀπαιτήσεις ὥσπερ κηδεμονίαν τιμᾶν). The role of the guardian in the text seems to be assumed by the public, which solemnly answers the king's call like an obligation of *kêdemonia*.

The existence of a category of public property beyond both the king's property and his guardianship appears to have been neatly inscribed, for example, on the roof tiles recovered in the excavations of the Macedonian capital Pella.[3] While certain roof tiles were marked "of Pella" (ΠΕΛΛΗΣ), others were tagged "of the king" (ΒΑΣΙΛΙΚΟΣ), implying a clear distinction in property rights that clashes with any an all-encompassing notion of royal guardianship.

[3] Akamatis 2011, 402.

BIBLIOGRAPHY

ADONTZ 1970
N. ADONTZ, *Armenia in the Period of Justinian: The Political Conditions Based on the Naxarar System*, trans. N. G. Garsoïan, Lisbon.

AKAMATIS 2011
I. M. AKAMATIS, *Pella*, in R. J. LANE FOX (ed.), *Brill's Companion to Ancient Macedonia: Studies in the Archaeology and History of Macedon, 650 BC – 350 AD*, Leiden-Boston, 393-409.

Section 4
The System at Work: Classical Greece

La tutela sugli orfani nella Grecia classica

ALBERTO MAFFI

ABSTRACT

This paper outlines the main features of the guardianship on male and female orphans in fourth century BCE Athenian law, as they can be found in the judicial speeches and in the Athenaion Politeia. *They are set in comparison with relevant provisions of the Gortyn Law Code and with a law from Ephesos. In the Appendix are discussed some new aspects of the discipline of guardianship which result from a fragment, recently found and published, of the judicial speech of Hyperides against Timandros.*

I. LA TUTELA SUGLI ORFANI

Fondamentali per la conoscenza della tutela sugli orfani nella Grecia classica sono, oltre ai testi delle orazioni giudiziarie attiche – in particolare le orazioni pronunciate da Demostene contro i propri tutori (27-31), le orazioni di Iseo, l'orazione 32 di Lisia – i testi dei lessicografi, il cap. 56.6-7 dell'*Athenaion Politeia* aristotelica (d'ora in poi AP) e alcuni paragrafi delle *Leggi* di Platone. Tra le fonti epigrafiche particolare importanza riveste l'iscrizione di Efeso relativa alla disciplina dei debiti (*Syll*.[3] 364 = *I.Ephesos* Ia 4).[1] Per quanto riguarda la dottrina, il testo classico di SCHULTHESS (1886) rimane di fatto l'unica monografia in materia, anche se in seguito molti studi specifici ne hanno arricchito ed eventualmente corretto i risultati. Un limite al lavoro di Schulthess è dato naturalmente dal fatto che esso è stato pubblicato prima che fosse resa nota l'AP, benché poi lo stesso autore sia ritornato sul tema. Un rinnovato interesse per la tutela sugli orfani si è manifestato in anni recenti grazie alla scoperta del frammento della *Contro Timandro* di Iperide (a cui è dedicata la relazione di Gerhard Thür in questo volume).[2]

Vi sono ovviamente elementi comuni alla tutela sugli orfani e a quella sulle orfane; tuttavia vi sono anche elementi di differenziazione legati soprattutto al destino matrimoniale riservato alle donne. Dal punto di vista terminologico si parla di *epitropos* quando ci si riferisce ai tutori degli orfani. La tutela sugli orfani ha una durata limitata: essa infatti cessa con il raggiungimento della maggiore età da parte del minore. Per orfani si intendono i minori, di entrambi i sessi, il cui padre sia morto, o, secondo Schulthess, sia stato colpito da *atimia*. La morte della madre era invece irrilevante per valutare se un figlio o una figlia fossero diventati orfani (è da notare, però, che nella *c. Timandro* del nuovo Iperide si sottolinea che è morta anche la madre dei pupilli: l. 22). C'è da chiedersi tuttavia che cosa accadeva se, essendo già in corso la tutela, moriva anche la madre: chi si sarebbe occupato dei beni materni, in cui erano destinati a subentrare come eredi i suoi figli? Forse lo stesso tutore già in carica per l'amministrazione dei beni paterni?[3]

Il tutore degli orfani poteva essere nominato dal testatore oppure essere designato dalla legge in base al rapporto di parentela. Un caso particolare è

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[1] Lascio da parte in questo scritto di carattere essenzialmente introduttivo altre fonti specifiche di grande importanza, sia relative ad Atene (come il c.d. decreto di Teozotide) sia provenienti da altre zone del mondo greco classico, come la stele di Taso (SEG 57.820). Per un quadro di tali fonti v. da ultimo indicazioni sintetiche in BEARZOT 2015.

[2] Se ne veda il testo in HORVATH 2014 con la traduzione di H. Maehler.

[3] LIPSIUS 1905-1915, 525 n. 22, riporta alcuni passi, tratti da orazioni giudiziarie attiche, in cui si fa riferimento alla tutela sui figli di una sorella.

quello di Pasione, il quale designa il proprio schiavo manomesso Formione, e non il figlio Apollodoro (Dem. 36.8), come tutore del figlio minore Pasicle. Non sappiamo però quando Pasione abbia fatto il suo testamento. Può darsi che nel momento della redazione Apollodoro fosse ancora minore. In ogni caso il tutore doveva registrarsi presso l'arconte eponimo (previa sentenza del tribunale in caso di pretese concorrenti a rivestire il ruolo da parte dei parenti del defunto). È discusso se ad Atene, in assenza di designazione da parte del padre e di parenti aventi diritto ab intestato, il tutore potesse essere nominato di sua iniziativa dall'arconte in forza del suo dovere di prendersi cura degli orfani sottolineato in AP 56.7. Vediamo che nella legge di Efeso (l. 57) si fa riferimento o a un tutore degli orfani di nomina paterna o a un tutore nominato dal *demos* (seguendo forse una procedura analoga a quella che nella XI col. del Codice di Gortina prevedeva che l'adozione fosse approvata dall'assemblea popolare [*IC* IV 72, X 34-39]), probabilmente su proposta di un magistrato: potrebbe trattarsi, quindi, o dell'investitura di un tutore legittimo scelto nell'ambito della parentela (eventualmente in base all'esito di una *diadikasia* qualora vi fossero più pretendenti) oppure della nomina di un tutore scelto dal magistrato in assenza di aventi diritto sulla base del rapporto di parentela.

Peculiare ad Atene è l'istituto della *misthosis oikou orphanikou*. Se il testatore non aveva lasciato indicazioni in proposito, il tutore poteva scegliere se amministrare personalmente i beni del pupillo oppure darli in locazione a un terzo. Nel primo caso il tutore era tenuto a mantenere il pupillo e a restituirgli, al termine della tutela, l'equivalente in denaro dei beni che aveva amministrato. Guadagni e perdite erano rispettivamente a favore e a carico del pupillo. Nel secondo caso, invece, colui che prendeva i beni del pupillo in locazione si impegnava a restituirne il valore in denaro (stabilito al momento della assegnazione dei beni) allorché la tutela fosse cessata. Era inoltre tenuto a versare periodicamente al minore una somma a titolo di interesse. Poteva invece incassare le eventuali eccedenze attive, assumendosi per contro la responsabilità per le eventuali perdite. Colui che assumeva i beni in locazione era tenuto a fornire una garanzia immobiliare, detta *apotimema*. Non è chiaro se anche il tutore che amministrava in proprio era tenuto a fornire garanzia. È discusso se la locazione riguardasse l'intero patrimonio, immobili compresi, oppure, soltanto i beni mobili, in particolare i beni produttivi, come denaro e manifatture.

La locazione non si configurava come un contratto privato fra il tutore e un terzo conduttore da lui liberamente scelto. Apposite leggi imponevano ad Atene che il patrimonio fosse dato in locazione al miglior offerente attraverso una procedura amministrativo-giudiziaria messa in moto dall'arconte che si con-

cludeva con un voto del tribunale popolare. In questa normativa si manifesta l'interesse che la città portava alla salvaguardia della persona e del patrimonio del pupillo, in quanto continuatore dell'*oikos* paterno.

Sappiamo che il capo famiglia poteva imporre per testamento al tutore da lui stesso nominato di dare in locazione il patrimonio spettante al pupillo. Il testo nel nuovo Iperide sembra confermare questo potere facendolo derivare addirittura da un testo di legge (ll. 8-17; v. Appendice). Non è chiaro come un simile ordine fosse fatto rispettare. Dalle testimonianze dei lessicografi e dal nuovo Iperide (l. 16) sembra che qualunque cittadino potesse intentare una *phasis*, ossia una denuncia alle autorità. Non sappiamo, invece, se il testatore potesse vietare al tutore di dare in locazione il patrimonio (v. *c. Timandro*, ll. 5-6), obbligandolo così ad amministrarlo personalmente. Dalla sesta orazione di Iseo sembra che gli stessi tutori potessero prendere in affitto il patrimonio (6.36 ss.). Ammesso che l'operazione narrata nell'orazione sia conforme all'ordinamento attico, ci si aspetterebbe che fosse il testatore ad autorizzare i tutori da lui stesso nominati a prendere in affitto il patrimonio pupillare. Infatti ciò avrebbe consentito al tutore di lucrare sui proventi dell'amministrazione, mentre, se non avesse assunto la veste di affittuario, avrebbe dovuto versarli al pupillo. E ciò non poteva certo risultare indifferente per il padre del pupillo. Nella legge di Efeso non troviamo riferimenti all'affitto del patrimonio del pupillo. Troviamo invece una clausola che recita: εἰ δέ τις ἐν τῆι ἐπ[ιτροπῆι] λαβὼν αὐτὸς ἔχει χρήματα τῶν τοῦ ὀρφανοῦ τρόπωι ὁτωιοῦν, τούτω[ι μὴ] εἶναι κοινὸν τὸν πόλεμον ("Se il tutore detiene in qualsiasi maniera somme appartenenti al pupillo, prelevate durante la tutela, non sarà incluso nelle (condizioni concesse per) la Guerra Sociale"; ll. 53-55; tr. Asheri). Secondo Walser si tratterebbe di una somma di denaro che il tutore ha preso a prestito dal patrimonio pupillare da lui amministrato (per la restituzione della quale non può richiedere le agevolazioni previste dalla legge a favore dei creditori danneggiati dalla guerra).[4] A me pare tuttavia – e in questo seguo l'opinione di THÜR 2008, 654 – che la presenza del verbo *echei* faccia pensare al momento del rendiconto al termine della tutela. Più precisamente alluda a quei proventi, derivanti dai beni produttivi di reddito, che il tutore deve appunto versare al pupillo in sede di rendiconto (a cui si estende, probabilmente anche ad Efeso, la garanzia reale chiamata ad Atene *apotimema*). Mi sembra che questa interpretazione trovi conforto nella precisazione τρόπωι ὁτωιοῦν, che non può riferirsi soltanto a un prestito prelevato sui beni del minore. Oltre tutto non si vede come il tutore avrebbe potuto concludere un contratto di prestito con il proprio pupillo, incapace di agire.

[4] WALSER 2008, 148-149.

Al termine della tutela il tutore era tenuto a presentare un rendiconto. Se non lo faceva o se il rendiconto era giudicato insoddisfacente dal pupillo divenuto maggiorenne, questi poteva intentare la *dike epitropes*. Se i tutori erano più di uno, ciascuno era responsabile per una quota. A proposito della *dike epitropes* è da notare che il pupillo, intentando l'azione, si esponeva al rischio di dover pagare l'*epobelia* (ossia 1/6 del valore della causa) qualora fosse stato condannato (forse solo nel caso in cui non raccogliesse almeno 1/5 dei voti).[5] Questa misura sembra contrastare con l'ampio uso dell'*eisangelia* a tutela non solo della persona ma anche del patrimonio del pupillo, che ci è attestato da AP 56. 6, dato che si trattava di un tipo di azione che non comportava alcuna conseguenza, in caso di sconfitta, per chi la intentava.

Sappiamo che anche il conduttore del patrimonio pupillare doveva riconsegnare al pupillo i beni ricevuti[6] (o eventualmente, in particolare secondo G. THÜR 2008, una somma di denaro pari alla valutazione complessiva del patrimonio pupillare che il tribunale aveva approvato nel momento in cui era stato concluso il contratto d'affitto). I rapporti fra pupillo, tutore e conduttore non sono del tutto chiari. Sembra di capire che il conduttore potesse rivendicare presso terzi beni che riteneva di proprietà del pupillo. Ma, ad es., verso chi era responsabile il conduttore che non avesse rispettato i termini del contratto? Verso il tutore o direttamente verso il pupillo? E con quale azione si sarebbe fatta valere la sua inadempienza? Poiché la *dike epitropes* appare rivolta solo contro i tutori, si potrebbe supporre che questi siano responsabili anche di abusi o danneggiamenti provocati da chi aveva avuto assegnato in affitto l'*oikos* (salvo un'eventuale azione di regresso?).[7]

Esaminiamo ora il complesso apparato amministrativo-giudiziario a tutela dei minori e delle donne in situazioni particolari, che l'Atene classica, stando ad AP 56.6-7, affidava alla competenza dell'arconte eponimo. Il maltrattamento degli orfani (*kakosis orphanon*), che dà luogo a un'azione contro i tutori; le azioni per maltrattamento delle ereditiere (di nuovo rivolte contro i tutori ma anche contro i mariti); la cattiva amministrazione del patrimonio dell'orfano (*kakosis oikou orphanikou*), che dà luogo anch'essa a un'azione contro il tutore; l'azione per la nomina del tutore, l'azione tendente ad individuare il tutore fra più candidati (*epitropes diadikasia*); l'azione per farsi iscrivere come tutore. Inoltre, aggiunge il testo all'inizio del § 7, l'arconte si prende cura degli orfani e delle ereditiere, e delle donne che, alla morte del marito, dichiarano di essere incinte; dà in affitto i patrimoni degli orfani

5 MACDOWELL 2008, 87-94.

6 LIPSIUS 1905-1915, 532.

7 Per un abbozzo di risposta v. in appendice l'opinione formulata da WOLFF 1953.

e delle ereditiere fino a quando non raggiungono l'età di 14 anni; riscuote le ipoteche pupillari; procede ad atti esecutivi contro i tutori che non passano ai fanciulli gli alimenti. Si direbbe quindi che questo paragrafo intenda descrivere interventi che l'arconte esercita in forza del suo potere magistratuale, senza che si dia luogo necessariamente a un processo; non viene però chiarito se, attraverso tali interventi, l'arconte esercitasse una funzione supplente qualora i parenti e gli amici, fino ad arrivare al cittadino benintenzionato (*ho boulomenos*), fossero rimasti inerti, senza avvalersi delle azioni previste in AP 56.7.

Rinviando alle pagine seguenti l'esame degli strumenti previsti in modo specifico a protezione delle ereditiere, esaminiamo più da vicino i poteri attribuiti all'arconte in AP 56.7. Prima di tutto l'arconte risulta competente per la nomina del tutore. Non è chiaro se si allude qui alla necessità di una registrazione presso l'arconte della designazione da parte del testatore o della qualifica derivante da legame di parentela in caso di tutela legittima, o, infine, della nomina da parte dell'arconte in assenza di un tutore testamentario o legittimo.[8] Di una *apographe* parlano Is. 6. 36 e ora il frammento della *c. Timandro* (ll. 10-11). In teoria avrebbe quindi dovuto esistere un apposito registro delle tutele conservato presso l'ufficio dell'arconte, o presso altri organismi in qualche modo preposti a registrare le vicende personali dei cittadini (come fratrie e demi). L'arconte era competente anche per istruire le controversie su chi avesse maggior titolo ad esercitare la tutela, controversie che assumevano l'aspetto della *diadikasia*. L'arconte era inoltre competente per l'affitto degli *oikoi* degli orfani e delle *epikleroi*. Il testo della *c. Timandro* è venuto ora a confermare il dato già fornito da Is. 6.36, secondo cui competente ad assegnare il patrimonio in affitto era il tribunale e non l'arconte di propria iniziativa (da questo punto di vista il testo dell'AP è così sintetico da lasciare incerta la competenza). Degno di nota è anche il fatto che non sia il tutore, bensì l'arconte, ad assumere le garanzie immobiliari (*apotimema*) che il conduttore è tenuto a fornire. All'arconte è infine affidato il compito di ottenere coattivamente dai tutori che forniscano gli alimenti ai pupilli. Non è chiaro se intervenga in forza dei propri poteri coercitivi (caso piuttosto eccezionale nel mondo greco); oppure se intervenga in sede di esecuzione a seguito di condanna dei tutori conseguente all'esercizio di una *dike sitou* (non è chiaro da chi intentata). Non è detto nemmeno come si eserciti questo potere coercitivo: se, per esempio, irrogando una multa al tutore,[9] o addirittura fornendo direttamente gli alimenti agli orfani a spese del tutore.

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[8] HARRISON 1968, 101-104.

[9] Così, per esempio, LIPSIUS 1905-1915, 530.

II. LA TUTELA SULLE ORFANE

Le fonti per lo studio della tutela sulle donne nella Grecia classica spaziano dalle orazioni giudiziarie alle epigrafi, dai testi di legge ai testi più prettamente letterari. Converrà distinguere qui la tutela esercitata sulle orfane, a cui limiteremo le nostre considerazioni, dalla nozione più generale di tutela sulle donne, che può essere esercitata da varie figure maschili all'interno del gruppo familiare.

Abbiamo visto che, alla pari dei maschi, le fanciulle orfane sono sottoposte a un *epitropos* fino a che sono minori. Ma anche una volta raggiunta la maggiore età, esse non godevano di una piena autonomia né dal punto di vista personale né da quello patrimoniale. Se erano state sottoposte a tutela in quanto minori prive di padre, è possibile che il medesimo tutore continuasse ad esercitare le sue funzioni anche dopo che avevano raggiunto la maggiore età, ossia l'età nubile (che ad Atene era fissata a 14 anni, come apprendiamo da AP 56.7, mentre a Gortina, stando alla col. XII, 17-19, del Codice, doveva essere 12 anni). In Is. 6 vediamo che un tutore poteva sposare la propria pupilla (probabilmente non un'*epikleros*), con la quale non era imparentato. È probabile che un matrimonio fra tutore e pupilla si verificasse più facilmente nel caso in cui ci fosse fra loro un legame di parentela, dato che tali matrimoni erano considerati vantaggiosi per mantenere la coesione familiare (come aveva disposto ad es. il padre di Demostene per sua figlia). Tuttavia nella maggior parte dei casi al tutore sarà toccato il compito, qualora il padre non avesse designato un marito alla figlia, di concludere il matrimonio della pupilla fornendole la dote (il cui ammontare veniva spesso stabilito dal padre tramite testamento). Nella citata legge di Efeso troviamo una clausola interessante da questo punto di vista. Alle ll. 55-64 leggiamo: ὅσοι δὲ φερνὰς ὀφείλουσι θυγατρίοις ἢ [ἀ]δελφαῖς ταῖς αὐτῶν μεμερικότες ἐκ τῆς πατρώιας οὐσίας, ἢ ἐπίτροποι | ὑπὸ πατρὸς καταλελειμμένοι ἢ ὑπὸ δήμου ἠιρημένοι ταῖς ὀρφαναῖς | ταῖς ὑπ' αὐτῶν ἐπιτροπευομέναις μὴ ἀποδεδώκασι τὰς φερνάς, ἃς οἱ πατέρες ἔταξαν, ἢ γήμαντες καὶ διαλυθέντες μὴ ἀποδεδώκασι τὰς φερνὰς οὔσας ἀποδότους κατὰ τὸν νόμον, τούτοις ἀποδιδόναι τὰς φερνὰς καὶ τοὺς τόκους κατὰ τὰς πράξεις καὶ μὴ εἶναι αὐτοῖς ὑπολογίζεσθαι τὸγ κοινὸμ πόλεμον, ἀλλὰ τὸ γενόμενον διάπτωμα ἀναπληρούτωσαν εἰς τὴν φερνὴν ταῖς ὀρφαναῖς οἱ ἐπίτροποι ἐκ τοῦ ἄλλου οἴκο[υ] οὗ ἂν ἐπιτροπεύωσι. ("I (padri) che devono la dote alle loro figlie; i (fratelli) che devono alle loro sorelle la parte assegnatale nell'eredità paterna; i tutori istituiti dal padre o eletti dal popolo, che non hanno consegnato la dote costituita dal padre alle pupille sotto la loro tutela; e gli sposi separati che non hanno restituito la dote restituibile secondo

la legge – tutti questi dovranno restituire dote e interessi secondo il contratto, e non potranno essere inclusi (nelle condizioni concesse per) la Guerra Sociale. L'eventuale somma mancante per assegnare la dote alle pupille dovrà essere coperta dal tutore col rimanente patrimonio da lui amministrato" (tr. Asheri).

È interessante qui osservare che la consegna della dote, quindi la conclusione del matrimonio, in mancanza del padre o di un fratello della donna, spetta appunto al tutore, che è quindi inteso dalla legge esclusivamente come tutore di un'orfana, non come tutore in generale delle donne, che, come sappiamo, non sarebbe definito *epitropos*. Non solo, ma il tutore appare anche colui che riceverà la dote, o agirà in giudizio per ottenerla, nel caso che il matrimonio si sciolga prima che almeno uno dei fratelli della donna divenga maggiorenne. L'ultima clausola delle disposizioni sopra riportate impone al tutore di integrare l'eventuale ammanco della dote mediante il resto del patrimonio che amministra (ll. 63-64: ἐκ τοῦ ἄλλου οἴκου οὗ ἂν ἐπιτροπεύωσι). Walser sostiene che l'integrazione sarà prelevata dal patrimonio personale del tutore. Ma la lettera della legge mi sembra chiara: la parte mancante dovrà essere prelevata dall'insieme del patrimonio amministrato dal tutore, riducendo quindi la quota spettante ai fratelli della donna, che, per ipotesi dovevano essere ancora minori.[10] Ciò evidentemente per rispettare la volontà del padre. Probabilmente l'opportunità di ricorrere a questa misura straordinaria si verificava allorché la donna divorziata poteva essere data nuovamente in moglie mentre il primo marito aveva restituito solo parzialmente (o addirittura per nulla) la dote ricevuta. Questa mi sembra l'ipotesi a cui pensa il legislatore efesino, data la posizione della clausola nel contesto e il connettivo ἀλλά che la collega a ciò che precede.[11]

Se però fra i pupilli si trovavano sia figli che figlie (come accade nel caso della *c. Timandro*), il fratello divenuto maggiorenne avrà assunto il ruolo di *kyrios* della sorella (anche se più anziana), sia per quanto riguardava l'amministrazione del patrimonio di lei sia per quanto riguardava la facoltà di darla in moglie costituendole la dote. A seguito del matrimonio era normalmente il marito ad esercitare la funzione di *kyrios*, anche se non si può parlare di un trasferimento formale del potere sulla donna dal padre, o dal tutore al marito, con conseguente perdita dei legami giuridici con la famiglia d'origine (come avveniva invece nel matrimonio *cum manu* a Roma fino ad età tardo-repubblicana). Che il matrimonio in Grecia non comportasse un distacco dalla fa-

[10] Mi pare quindi corretta la traduzione di THALHEIM 1895, 163: «… die Vormünder sollen den etwaigen Ausfall zur Mitgift den Mündeln aus dem andern Vermögen, das sie verwalten, zuschiessen».

[11] WALSER 2008, 151, pensa invece a interessi da pagare qualora il tutore avesse versato in ritardo la dote oppure a danni di guerra.

miglia d'origine sotto il profilo patrimoniale lo dimostra, fra l'altro, il Codice di Gortina, dove il diritto di succedere al padre e alla madre (sia pure in una quota ridotta) spettava ugualmente alle figlie sposate e a quelle non sposate (sempre che il dono eventualmente trasmesso o promesso loro dal padre in occasione delle nozze non esaurisse già la loro quota ereditaria sui beni paterni).

Ci si può quindi chiedere se l'*eisangelia epiklerou kakoseos*, che, secondo AP 56.6, era intentabile contro l'*epitropos* di una *epikleros*, fosse rivolta appunto contro un tutore che avesse abusato dei poteri che continuava ad esercitare anche dopo che l'ereditiera aveva raggiunto l'età nubile. In altre zone della Grecia, ed in periodi più risalenti, la tutela sull'ereditiera era improntata a criteri di maggior rigore, che prevedevano un controllo incrociato di parenti paterni e materni (si vedano in particolare la legge di Caronda riportata in Diod. 12.18.3 e le norme delle coll. VIII, IX e XII del Codice di Gortina). Non sappiamo però se, in base alla normativa vigente in questi luoghi (dove non sembrano ancora conosciuti tutori di nomina testamentaria), anche gli eventuali orfani maschi fossero sottoposti a un'analoga forma di tutela rafforzata. Questo è quel che prevede Platone nelle *Leggi*: ad esercitare la tutela legittima su maschi e femmine sono chiamati due fra i parenti prossimi in linea paterna, due in linea materna e un amico del defunto (924b).

Sembra di capire che ad Atene questa esigenza di protezione specifica dell'ereditiera fosse assicurata non dalla nomina di particolari figure di tutori, bensì dalla possibilità di ricorrere a strumenti giudiziari particolarmente rigorosi, come l'*eisangelia* nei confronti dell'*epitropos* (AP 56.6). Quanto all'*eisangelia* contro i mariti (i *synoikountes*), sempre stando ad AP 56.6, sembra evidente che riguardasse le donne che diventavano *epikleroi* dopo essersi sposate; non è chiaro, però, quali fossero i comportamenti presi di mira da tale strumento giudiziario: in ogni caso qui il tutore non era contemplato. A proposito degli strumenti di tutela previsti in AP 56.6, una questione difficile da risolvere riguarda la distinzione fra *kakosis orphanou* o *epiklerou* e la *kakosis oikou orphanikou*. La prima azione riguardava forse la protezione della persona (per es. in caso di maltrattamenti), mentre la seconda riguardava la cattiva amministrazione del patrimonio da parte del tutore prima che il pupillo (maschio o femmina) o l'ereditiera raggiungessero la maggiore età.[12]

Come va intesa la *misthosis* dell'*oikos* dell'*epikleros*? Perché viene contemplata dal testo dell'AP come un'ipotesi distinta rispetto all'affitto del patrimonio degli orfani in generale? Intanto lascia perplessi il fatto che l'AP specifichi che l'affitto del patrimonio dell'*epikleros* durerà fino a che questa ha raggiunto i 14 anni (l'integrazione comunemente accolta e il riferimen-

[12] V. ancora LIPSIUS 1905-1915, 344-345.

to esclusivo all'età della sola *epikleros* sembrano ormai dati acquisiti). Forse significa che, nel caso in cui sottoposta a tutela sia una figlia unica nella situazione di *epikleros*, l'affitto cesserà non appena la fanciulla si sposi, il che può accadere appunto a partire dai 14 anni. Ma che succede se la figlia unica diventa orfana, quindi *epikleros*, dopo aver superato i 14 anni? Fino a che non si sposava occorreva probabilmente nominarle un tutore e procedere eventualmente a una *misthosis oikou*. Poteva infatti trattarsi di un periodo di tempo abbastanza prolungato, se, per esempio, come ci mostra il Codice di Gortina, l'avente diritto, che ad Atene avesse visto riconosciuto tramite *epidikasia* il diritto a sposarla, era ancora minore.

Nel caso, poi, in cui ad essere sottoposti a tutela fossero insieme maschi e femmine, è possibile che si aspettasse fino a che il fratello più anziano raggiungesse la maggiore età, eventualmente allo scopo di ottenere dai tutori un unico rendiconto: è quanto sembra essere accaduto nel caso di Demostene e di sua sorella. In questo caso le funzioni del tutore cessavano anche nei confronti dei fratelli ancora minori e si procedeva al rendiconto nei confronti del fratello maggiore: questi assumeva quindi la tutela dei fratelli minori senza probabilmente la necessità di una nomina formale da parte dell'arconte. C'è inoltre da chiedersi, nel caso in cui il patrimonio fosse stato affittato, come si potesse scorporare la parte destinata a costituire la dote della sorella che, raggiungendo l'età nubile prima del fratello, poteva essere interessata a sposarsi prima che il fratello divenisse a sua volta maggiorenne. Si può supporre che occorresse aspettare la fine della tutela (quindi dell'affitto), allorché almeno uno dei fratelli, divenuto maggiorenne, fosse autorizzato a dare in moglie la sorella.

Se per le orfane nubili la tutela di un *epitropos* è attestata anche dopo il raggiungimento dell'età pubere, il marito non è mai definito *epitropos* della moglie. Questa constatazione ha indotto un'autorevole studiosa della famiglia greca classica a negare che la donna sposata fosse legalmente subordinata al marito, e a sostenere invece che solo per determinati atti fosse prevista l'assistenza, o l'assenso, del marito in qualità di *kyrios*.[13] Il marito non esercitava dunque un potere assoluto analogo alla *manus* del marito romano e la moglie, a differenza della *mulier in manu*, manteneva la titolarità dei propri beni, anche se non poteva disporne liberamente.

Si aprirebbe quindi l'ampio e spinoso discorso relativo alla tutela sulle donne in generale, che supera i limiti di questa introduzione dedicata prevalentemente alla tutela sugli orfani. Effettivamente le fonti sono spesso ambigue rispetto al ruolo di colui che in molti atti negoziali, soprattutto di età ellenistica, viene definito appunto *kyrios*. Per quanto riguarda in particolare

[13] VIAL c.d.s.

i coniugi, non si possono nemmeno distinguere in base a criteri certi i casi in cui il *kyrios* agiva da solo al posto della moglie, dai casi in cui si sarebbe limitato ad assistere la moglie nel compimento di determinati atti. In ogni caso, benché le fonti siano frammentarie e sparse, se c'è una materia in cui il modello ateniese appare ben lungi dal risultare dominante, questa è proprio la tutela muliebre.

Per l'età classica una certa quantità di informazioni (comunque di controversa interpretazione) ci proviene soprattutto dal Codice di Gortina. I commentatori del Codice sostengono infatti opinioni divergenti. Da un lato stanno coloro secondo cui la donna a Gortina (conformemente a un supposto modello dorico) era molto più libera e autonoma, quindi pienamente capace di agire, cosicché si giustifica il fatto che nel Codice e nelle iscrizioni cretesi coeve non si trova alcun termine per designare un eventuale tutore (non solo, in realtà, delle donne, ma neanche dei minori, maschi o femmine che siano).[14] Per altri studiosi questa assenza a livello terminologico non è sufficiente a negare l'esistenza di una tutela sulle donne.[15]

La discussione si concentra soprattutto sull'interpretazione della col. VI del Codice, da cui risulta che al padre, al marito e al figlio è fatto divieto di compiere atti di disposizione sui beni rispettivamente della figlia, della moglie e della madre. Non sembra che queste norme vadano interpretate nel senso che atti di disposizione possono essere compiuti rispettivamente da figlia, moglie e madre da sole o con l'approvazione del rispettivo padre, marito e figlio. L'unico a poter disporre dei beni materni sembra essere il padre, dopo la morte della madre, ma solo con il consenso dei figli dopo che tutti siano divenuti maggiorenni (col. VI, 31-36). Il fatto che il figlio svolga una funzione di controllo e di amministrazione dei beni materni presuppone che la madre, rimasta vedova, abbia preferito rimanere nella casa coniugale piuttosto che ritornare nella casa paterna (o fraterna). Sarà infine il fratello, dopo la morte del padre, ad amministrare la quota ereditaria della sorella fino a che quest'ultima non si sposa. Sembra insomma che nel Codice il *kyrios* svolga soprattutto compiti di amministratore dei beni della donna, salvo, in caso di necessità, poterne anche disporre (ad es. per pagare debiti della donna).[16] Per quanto riguarda la tutela dei minori, l'unica regola specifica contenuta nel Codice riguarda l'ereditiera impubere (col. XII 6-17): chiamati a esercitare una funzione analoga a quella

[14] Con sfumature diverse LINK 2003 e GAGARIN 2012.

[15] KRISTENSEN 2007; MAFFI 2012.

[16] L'unico caso in cui il Codice sembra prevedere un atto di disposizione compiuto individualmente da una donna si trova all'inizio di col. IX, là dove si dispone che l'ereditiera potrà pagare personalmente i debiti ereditari. Tuttavia questo passo presenta numerosi problemi di interpretazione, che, a mio parere, impediscono di ricavarne conclusioni di carattere generale (v. MAFFI 2012, 112-113).

dell'*epitropos* attico sono in primo luogo i misteriosi *orpanodikastai* (letteralmente "giudici degli orfani"); in mancanza di questi saranno, fino a che non si sposi, il parente in linea paterna e il parente in linea materna indicati dalla legge. Si tratta dunque di una tutela legale sui generis, la cui disciplina resta per noi ignota.

APPENDICE

A PROPOSITO DELLA *PHASIS E DELLA MISTHOSIS OIKOU ORFANIKOU* NELLA *C. TIMANDRO*

Stando alle affermazioni dell'oratore, basate sui testi di legge e sulle testimonianze, Timandro non ha fatto nulla di ciò che le leggi gli imponevano di fare in quanto tutore nominato nel testamento (l. 10): non ha denunciato la successione (come si direbbe oggi nell'italiano giuridico) al magistrato e non ha dato in affitto il patrimonio pupillare. Quanto alle testimonianze, esse sembrano indirizzate a confermare che Timandro non ha dato in affitto il patrimonio pupillare (ll. 15-16). Questo riferimento al contenuto delle testimonianze mi sembra confermare che l'obbligo di dare in affitto il patrimonio era stato imposto a Timandro dal testatore. Infatti è da escludere che il tutore, in assenza di una specifica disposizione testamentaria in tal senso, fosse tenuto a dare il patrimonio pupillare in affitto. In assenza di una dichiarazione di volontà esplicita del testatore, la scelta fra amministrare personalmente il patrimonio o darlo in affitto era rimessa alla libera decisione del tutore. (Mi pare perciò che la mia spiegazione sia da preferire a quella di THÜR 2008, 655, secondo cui i testimoni avrebbero affermato che Timandro non aveva messo in moto la procedura ad Atene, mentre in realtà aveva preso in affitto il patrimonio pupillare a Lemno. A meno che la competenza per l'affitto dell'intero patrimonio pupillare non fosse pacificamente ateniese per tutti i cittadini ateniesi ovunque residenti, un argomento del genere sarebbe stato facilmente demolito da Timandro: purtroppo il piccolo frammento in nostro possesso non permette nemmeno di capire se la questione della competenza fosse stata messa in campo).

Alla luce di quanto abbiamo fin qui affermato, possiamo valutare il ruolo della *phasis* a cui alludono rapidamente le ll. 15-17 della *c. Timandro*: τῶν μαρτύρων, ὅτι οὔτε ἐ|μίσθωσε τὸν οἶκον, ἑτέρου <τε> φήσαντ(ος), ἵν(α) μισθωι|θῇ, ἐκώλυσεν. Vediamo prima di tutto le traduzioni. Thür traduce: avete ascoltato "die Zeugen dafür, dass er sowohl das Vermögen nicht ver-

pachten liess und auch, als jemand anderer die *phasis* erhob, damit (es) verpachtet wurde, (diese) verhinderte". Maehler traduce: avete ascoltato "von den Zeugen, dass er den Besitz nicht verpachtet hat und auch, als jemand einen Antrag einbrachte, dass er verpachtet werden solle, dies verhindert hat".

La traduzione di Thür va compresa alla luce del ruolo che egli attribuisce alla *phasis*. Egli istituisce un collegamento fra l'*amphisbetein* delle ll. 5-6 e la *phasis* delle ll. 16-17, nel senso che chi promuove la *phasis* afferma che il patrimonio pupillare deve essere dato in affitto e al tempo stesso "erhebt selbst den Anspruch, das Vermögen zu pachten", mentre il tutore afferma che sia "meglio" che egli stesso amministri personalmente. (Osservo a margine che la ricostruzione del contenuto della *phasis* in questione, proposta da Thür, permette di intendere meglio la sua traduzione delle ll. 16-17: "affinché venga dato in affitto" sottintende, secondo Thür, in affitto all'autore stesso della *phasis*; secondo me, invece, la *phasis* mirava a costringere Timandro a dare in affitto il patrimonio a terzi, conformemente a quella che abbiamo supposto essere la volontà del testatore, padre dei pupilli). Sempre secondo Thür si avrebbe così una prima decisione del tribunale, relativa al fatto se si debba o meno dar luogo alla *misthosis*. In caso di sentenza favorevole alla *misthosis*, si passerebbe a una nuova votazione con cui sarebbe scelto l'affittuario (*ibid*. 657).

Ora, a parte i dubbi a cui può dar luogo una simile procedura articolata in due fasi (sarebbe più logico che una volta presa la decisione di imporre l'affitto del patrimonio pupillare, si aprisse una nuova procedura, permettendo così ad altri eventuali candidati di presentare la propria domanda di attribuzione in affitto del patrimonio), resta l'obiezione che ho già sollevato: non risulta da alcuna fonte che, in assenza di apposita disposizione testamentaria, il tutore sia tenuto a dare in affitto il patrimonio pupillare. Quindi la *phasis* si giustifica soltanto in due casi: qualora il tutore non abbia nemmeno denunciato l'apertura della successione (ciò di cui viene appunto accusato Timandro alle ll. 10-11), oppure quando abbia iniziato in proprio l'amministrazione del patrimonio pupillare ignorando la disposizione del testatore che gli imponeva di darlo in affitto (secondo Harp. s.v. φάσις, anche quando ha dato in affitto a meno del valore del patrimonio; ma se l'affitto è il risultato di una procedura pubblica, appare ben difficile che possa verificarsi un caso del genere, e comunque responsabile non sarebbe il tutore). Possiamo quindi affermare che la *phasis* presenta anche in questo caso le caratteristiche abituali di denuncia di un comportamento illegale che ha di solito (mentre nella interpretazione di Thür si tratterebbe di investire il tribunale di un giudizio di mera opportunità, a mio parere improbabile in un ordinamento come quello attico, comunque

ancorato a un principio di legalità).

Di conseguenza non mi persuadono le proposte di ricostruzione della legge in materia di *phasis oikou orphanikou* presentate sia da MACDOWELL 1989, 262 (riportata da THÜR 2008, 656 n. 49) sia da THÜR (*ibid*. p. 658). Entrambe fanno leva infatti sulla possibilità di rimettere al giudizio del tribunale "ciò che sia meglio" per il minore, e non il giudizio su un comportamento imposto o vietato da una norma. Certo un elemento di opportunità è insito nella decisione del tribunale, perché il tutore non si difende negando l'affermazione di chi intenta la *phasis*, quindi sostenendo di aver rispettato la volontà del testatore: oppone invece che si tratta di decidere in base ad elementi di fatto, non di diritto, quale soluzione sia più vantaggiosa per il minore. Però, se si accetta il mio punto di vista, al tribunale è devoluto un compito squisitamente giuridico: interpretare un testamento. Infatti la *phasis* intendeva colpire un inadempimento del tutore nei confronti della volontà del testatore, che aveva ordinato di dare il patrimonio in affitto. In subordine la *phasis* poteva servire per accusare il tutore di aver violato la disposizione di legge, riguardante gli orfani, che imponeva al tutore di denunciare la successione in capo all'orfano, presupposto necessario per assicurargli la tutela delle autorità pubbliche.

Quanto al significato di *koluein ton phenanta*, penso che abbia ragione WHITEHEAD 2009: deve essersi trattato di una manovra poco pulita per impedire a un possibile avversario di disturbare od ostacolare la sua gestione del patrimonio pupillare.

Se quel che abbiamo affermato qui sopra corrisponde al contenuto di una legge in vigore ad Atene nel IV sec. a.C., allora anche l'orazione demostenica, in cui viene menzionata una *phasis* con funzione analoga, andrà interpretata in modo coerente con l'interpretazione che qui propongo. Mi riferisco a Dem. 38.23 (v. THÜR 2008, 657). Gli avversari sostengono che il loro patrimonio (quando erano appunto minori) non è stato dato in affitto. Anche qui si fa riferimento a una *phasis* da parte di un certo Nikidas. Ora, se vogliamo essere coerenti, dobbiamo supporre che anche in questo caso ricorressero le due condizioni che abbiamo supposto nel caso di Timandro: che i tutori fossero stati nominati per testamento e che il testatore avesse loro imposto di dare in affitto il patrimonio. La *phasis* mirava dunque ad ottenere il rispetto di tale clausola testamentaria. Lo zio Xenopite, che "convinse il tribunale a consentirgli di amministrare il patrimonio", era probabilmente uno dei tutori (forse perché, essendo fra i tutori l'unico parente del defunto, era quello contro cui era stata rivolta la *phasis*?). Egli riuscì quindi ad ottenere quello che la legge avrebbe consentito anche a Timandro: cioè di ottenere dal tribunale di non essere costretto a rispettare la disposizione testamentaria che imponeva ai tutori di dare

in affitto il patrimonio. Quindi dobbiamo supporre che, grazie alla sentenza, nel caso prospettato nell'orazione di Iseo l'amministrazione fu continuata personalmente da parte di tutti i tutori (Is. 6.36 ss.).

Gran parte di quel che ho sostenuto qui era già stato esposto da H.J. Wolff nel suo breve ma succoso articolo nella *Festschrift Lewald* del 1953. Mi riferisco in particolare alla proposizione con cui riassume l'opinione dominante (WOLFF 1953, 201 n. 3, 206), a cui sembra che egli aderisse: spettava al tutore stabilire se intendeva concludere il contratto di affitto, a meno che nel testamento ciò non fosse esplicitamente prescritto o vietato. Tuttavia Wolff introduce un'importante precisazione: poiché l'affitto non era un negozio privato, ma «eine amtliche Verfügung des Archon innerhalb des Bereichs der ihm obliegenden Weisenfürsorge» (204), il contratto era congegnato in modo da permettere al pupillo, divenuto maggiorenne, di attuare la *praxis* nei confronti dell'affittuario allo scopo di recuperare i beni ed eventualmente gli interessi. Nel § IV (206 ss.) Wolff si interroga però sulla effettiva libertà di scelta del tutore. E precisamente si chiede se l'arconte potesse ordinare al tutore la *misthosis* del patrimonio pupillare o quando il testatore non lo avesse richiesto, oppure quando, nonostante la richiesta del testatore di procedere all'affitto, il tutore non vi avesse dato corso. La soluzione che Wolff propone è la seguente: «Die *phasis oikou orfanikou* war eine jedem Bürger freistehende Anzeige über einen nicht verpachteten *oikos*…, aufgrund deren der Archon bzw. das Gericht nach Ermessen darüber befand, ob unter den obwaltenden Umständen das Verpachtungsverfahren zu eröffnen war» (207).

Questa definizione permette di spiegare Dem. 38.23, unico passo degli oratori in cui appare tale *phasis*. La soluzione, riferita da Demostene, mostra che l'obiettivo della *phasis* non era la punizione del tutore, ma la scelta tra affitto e amministrazione in proprio. A me pare di capire che questa soluzione, in cui la *phasis* serve a investire il tribunale della decisione sulla soluzione migliore, dipenda dal fatto che la *misthosis* viene vista come un procedimento amministrativo, che ogni cittadino ha il potere di mettere in moto qualora il tutore non ne faccia richiesta di propria iniziativa; e ciò indipendentemente dal fatto che il testatore abbia dato o meno disposizioni in proposito.

Insomma, è come se per Wolff la tutela rafforzata del patrimonio del minore – assicurata appunto dalla *misthosis* – dipendesse dalla sollecitudine dei cittadini, mentre l'arconte in quanto tale non sarebbe autorizzato ad imporre la soluzione *misthosis* in forza del suo potere di sorveglianza sugli orfani. Wolff si basa essenzialmente sulla voce *phasis* di Arpocrazione, secondo cui qualunque cittadino poteva intentare una *phasis* contro i tutori che non davano in affitto il patrimonio pupillare per costringerli ad affittare (ἵνα μισθωθῇ sono le stesse parole che leggiamo alle ll. 16-17 della *c. Timandro* nel nuo-

vo Iperide). Ma, come abbiamo visto, solo il testatore può imporre al tutore di affittare il patrimonio pupillare. L'enunciato di Arpocrazione è basato sul materiale derivante dalle orazioni, ma l'applicazione della *phasis* che il lessicografo descrive manca di un presupposto essenziale, cioè che tale strumento processuale serviva a chiamare il tutore in giudizio per rispondere di non aver dato in affitto il patrimonio pupillare in violazione di una precisa disposizione testamentaria.

BIBLIOGRAFIA

ASHERI 1969
D. ASHERI, *Leggi greche sul problema dei debiti*, «SCO» 18, 5-122.

BEARZOT 2015
C. BEARZOT, *La città e gli orfani*, in U. ROBERTO & P.A. TUCI (a cura di), *Tra marginalità e integrazione. Aspetti dell'assistenza sociale nel mondo greco e romano* (Quaderni di Erga/Logoi 4), Milano, 9-31

GAGARIN 2012
M. GAGARIN, *Women's Property at Gortyn*, «Dike» 15, 73-92.

HARRISON 1968
A.R.W. HARRISON, *The Law of Athens*, I: *The Family and Property*, Oxford.

HORVÁTH 2014
L. HORVÁTH, *Der "Neue Hypereides"*, Berlin.

KRISTENSEN 2007
K.R. KRISTENSEN, *Inheritance, Property and Management: Gortynian Family Law Revisited*, in: E. CANTARELLA (ed.), *Symposion 2005*: *Vorträge zur griechischen und hellenistischen Rechtsgeschichte,* Wien, 89-100

LINK 2003
S. LINK, *Zur frühgriechischen kyrieia*, «ZRG RA» 121, 44-93.

LIPSIUS1905-1915
J.H. LIPSIUS, *Das attische Recht und Rechtsverfahren*, Leipzig.

MACDOWELL 1989
D.M. MACDOWELL, *The Authenticity of Demosthenes 29*, in: G. THÜR (ed.), *Symposion 1985*: *Vorträge zur griechischen und hellenistischen Rechtsgeschichte*, Köln, 253-262.

MACDOWELL 1990
D.M. MACDOWELL, *The Athenian Procedure of Phasis*, in: M. GAGARIN (ed.), *Symposion 1990*: *Vorträge zur griechischen und hellenistischen Rechtsgeschichte*, Köln, 187-198.

MACDOWELL 2008
D.M. MACDOWELL, *The Athenian Penalty of* Epobelia, in E.M. HARRIS & G. THÜR (eds.), *Symposion 2007: Vorträge zur griechischen und hellenistischen Rechtsgeschichte*, Wien, 87-94.

MAEHLER 2014
H. MAEHLER, Übersetzung der Rede gegen *Timandros*, in: L. HORVÁTH, *Der "Neue Hypereides". Textedition, Studien und Erläuterungen*, Berlin, 187-188.

MAFFI 2012
A. MAFFI, *Ancora sulla condizione giuridica della donna nel Codice di Gortina*, «Dike» 15, 93-124.

SCHAPS 1979
D. SCHAPS, *Economic Rights of Women in Ancient Greece*, Edinburgh.

SCHULTHESS 1886
O. SCHULTHESS, *Vormundschaft nach attischem Recht*, Bonn.

THALHEIM 1895
Th. THALHEIM, *Lehrbuch der griechischen Rechtsaltertümer*[4], Freiburg.

THÜR 2008
G. THÜR, *Zur phasis in der neu entdeckten Rede Hypereides' gegen Timandros*, «ZRG RA» 125, 645-663.

VIAL (c.d.s.)
Cl. VIAL, *Family, Inheritance and Marriage Law in the Ancient Greek World*, in corso di stampa in: M. CANEVARO & E.M. HARRIS (eds.), *Oxford Handbook of Greek Law*, Oxford.

WALSER 2008
A.V. WALSER, *Bauern und Zinsnehmer. Politik, Recht und Wirtschaft im frühhellenistischen Ephesos*, München.

WHITEHEAD 2009
D. WHITEHEAD, *Hypereides' Timandros: Observations and Suggestions*, «BICS» 52, 135-148.

WOLFF 1953
H.J. WOLFF, *Verpachtung von Mündelvermögen in Attika*, in: *Festschrift Lewald*, Basel, 201-208.

Guardianship in Athenian Law: New Evidence

(Dem. 27–29, Lys. 32, Hyperid. Against Timandros)

GERHARD THÜR

ABSTRACT

The paper focuses on three guardianship cases from 4th century Athens: the well known one of young Demosthenes (or. 27–29), and those presented in Lysias or. 32 and in the recently published fragment of Hyperides' speech Against Timandros held for a former ward Akadēmos. In all of them former guardians are called to account through dikē epitropēs. *They are liable for "holding in their hands" (*echein*) the value of the wards' assets. From Hyperides one gets new information about* misthōsis oikou, *leasing out the ward's estate, whereby the guardian can avoid rendering account. In all three speeches the wards' mothers are players in the background, and the speechwriters use the rhetorical technique of 'isolating the facts.'*

I will focus on two topics: first on the administration of the wards' inherited properties and the methods to safeguard them;[1] second on the rhetorical techniques the wards used in their court speeches when calling their former guardians to account. Both I will do in three case studies: (I) the case of young Demosthenes, his speeches no. 27–29; (II) that of the young plaintiff in Lysias 32, and finally (III) the case Akadēmos *vs*. Timandros preserved in a quite recently published fragment of Hyperides.

I.

My first example is the young Demosthenes' lawsuit against one of his former guardians, Aphobos (from 364/3 B.C.), well preserved since antiquity and discussed in scholarship for centuries. The claim was a *dikē epitropēs* for the value of Demosthenes' father's assets, of which Aphobos had assumed liability for one-third. Despite his youth, Demosthenes addressed the court in person. As his bill of complaint and a statute demonstrate, in Athenian law the guardian is presumed to "have in his hands" (ἔχειν)[2] the value of the assets he took over at the beginning of his function less expenditures and losses.[3] By his will Demosthenes' father, also named Demosthenes, appointed three guardians: his sister's son Aphobos, his brother's son Demophon and an old friend of him, Therippides; and he left behind two workshops with over 30 slaves, money lent at interest and considerable movable goods to a total value of about 14 talents. After ten years of guardianship Demosthenes numbered the value "in the guardians' hands" including accumulated income 30 talents whereof he charged Aphobos ten. Demosthenes won his case; I think, not because of his exact calculation, but rather due to his excellent speeches. It was quite impossible for the 401 Athenian citizens sitting at court to check all the figures of the account without inspection of a written record; they had to rely on the speaker's words and on witness depositions. Furthermore, even if some of the judges doubted about one or the other figure they only could choose between

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[1] Generally on guardianship see, e.g., HARRISON 1968, 99–121.

[2] Dem. 29.31: ἔστιν οὖν τοῦ μὲν ἐγκλήματος ἀρχή 'τάδ' ἐγκαλεῖ Δημοσθένης Ἀφόβῳ· ἔχει μου χρήματ' Ἄφοβος ἀπ' ἐπιτροπῆς ἐχόμενα, ὀγδοήκοντα μὲν μνᾶς, ἣν ἔλαβεν προῖκα τῆς μητρὸς κατὰ τὴν διαθήκην τοῦ πατρός.' ("So this is the beginning of the charges: 'Demosthenes makes the following charges against Aphobos. Aphobos has money of mine which he held as a guardian: 80 minas, which he received as a dowry for my mother in accordance with my father's will.'")
Dem. 29.36: περὶ μὲν γὰρ ὧν καθυφεῖκας, νόμος ἔστιν, διαρρήδην ὃς κελεύει σ' ὁμοίως ὀφλισκάνειν ὥσπερ ἂν αὐτὸς ἔχῃς· ("With regard to what you allowed to be misappropriated, there is a law which explicitly states that you owe it just as if you had kept it yourself.").
All Demosthenes translations from MACDOWELL 2004)

[3] BECKER 1968, 68–78.

either party's estimate: the plaintiff, Demosthenes, successfully estimated ten talents and the defendant, Aphobos, counter-estimated only one talent. So it makes no sense re-calculating the items listed in the speech 27.18–39, carefully tabulated by MacDowell (2004: 20) in his Austin translation.

The model chosen by the guardians, administering young Demosthenes' estate by themselves, held both chances and risks for the ward. On the one hand all returns produced by the guardians would have devolved on the ward; on the other hand—and this was Aphobos' argument—also the loss fell on the ward; and we do not know how the economic situation of the business had developed during the ten years, especially wanting its efficient boss. Therefore, when guardians administered the estate by themselves disputes concerning their accounts frequently followed.

To avoid this situation, Demosthenes senior—unavailingly—had ordered another model shortly mentioned in Dem. 27.58: leasing out the business.[4] In this case the leaseholder had to pay annual interest to sustain the wards and, after their coming of age, deliver the capital he had taken over. The consequences of this option were: with the value of the enterprise fixed, on the one hand the ward had the guarantee to get his money—not the objects—when coming of age. (Demosthenes only speaks of paying money, not of returning the enterprises.) On the other hand, the leaseholder had the chance to make much more profit than the modest interest he had to pay to sustain the ward. But the leaseholder also took the full risk of any loss, with his property encumbered to the ward. After leasing the estate out to a third person—sometimes the guardian was allowed to be leaseholder himself—, the guardian did not have any problems of being called to account. In Athens the general view was that letting an enterprise was the safer option for the wards. Later I will return to the questions how the leasing took place and how—according to Demosthenes 27.59—the capital could have been doubled in six years.

In addition to the few words generally spoken about the two models of administering the wards' estate the speeches *Against Aphobos* also give some information about guardianship in the broader sense, about three more persons legally depending from other ones: the slave—or freedman—Milyas, Demosthenes' mother Kleoboule, and his sister, two years younger than him. Dealing with these three persons I will examine the—successful—rhetorical tactics used by young Demosthenes.

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[4] Dem. 27.58: τούτῳ γὰρ ἐξῆν μηδὲν ἔχειν τούτων τῶν πραγμάτων, μισθώσαντι τὸν οἶκον κατὰ τουτουσὶ τοὺς νόμους. ("He could have avoided all this trouble if he'd leased the estate in accordance with these laws.")

I will start with the dispute about Milyas, the foreman of the knife-workshop, inherited from Demosthenes senior.[5] Previous to the lawsuit, through a challenge (*proklēsis*) Aphobos, the defendant, had demanded this man from Demosthenes junior to be questioned under torture first about the income of the workshop of 30 minas (27.19–23, 28.12, 29.50), and then about the assertion that Demosthenes had already obtained ten talents, the whole amount he was claiming (27.50–52, in 29.30 only indirectly referred to). Milyas was requested to confirm or deny that Demosthenes had received all the money. Such challenges for torturing slaves by *basanos* were, as far as we know, tactic maneuvers.[6] In no way Demosthenes would have agreed to torturing, mainly with uncertain outcome, the man faithfully serving the family for years. However, declining the challenge gave the opponent a strong argument that his statement was true. So Demosthenes replied that Milyas was no more a slave but rather a free man and therefore no more subjected to torture. And he produced a witness deposition that Aphobos himself by *homologia* "had acknowledged that Milyas was a free man set free by Demosthenes' father" (quoted in Dem. 29.31;[7] most probably Demosthenes had produced this witness deposition in 27.22). However, in Athens testamentary manumissions were not valid unless an act of publicity occurred, which apparently had not yet happened.

How did Demosthenes handle this delicate situation? By «isolating the facts». Through this rhetorical technique speechwriters disjoined facts that belonged together and, by using psychological links, combined individual aspects of an issue that were true *per se*. Thereby, out of a set of true facts the logographers shaped an overall impression that was falsified, but met the needs of their clients' cases.[8] In his first speech *Against Aphobos* young Demosthenes did so in the following way: in section 9 he seems to be uncertain about the figure of 32 or 33 knife-maker (slaves)—a feigned uncertainty regarding Milyas. In 19 he first introduces Milyas by name and as "our freedman" and depicted him as manager with full authority. In 22, eventually, without saying a single word about Aphobos' *proklēsis*, he most probably produces the witness testimony about Aphobos' *homologia*. Independently, in section 50 he refers to an "unreliable" *proklēsis*, this time without mentioning the name of Milyas. In this way the plaintiff undermined foreseeable conclusions from the *proklēsis* he had rejected, without saying a single word about the *basanos*,

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5 For details see THÜR 1972 = 1987.

6 THÜR 1977, 233–261.

7 Dem. 29.31: μαρτυροῦσιν παραγενέσθαι … ὅτε Ἄφοβος ὡμολόγει Μιλύαν ἐλεύθερον εἶναι ἀφεθέντα ὑπὸ τοῦ Δημοσθένους πατρός.

8 THÜR 1977, 256.

which the defendant had demanded. From Demosthenes' first speech on, over the whole *dikē epitropēs* the judges would have remembered Milyas as a free man, not to be subjected to torture.

Another topic of this speech is the case of Kleoboule, Demosthenes' mother; as usual when publicly alluding to honest ladies, in none of the five speeches concerning guardianship she is called by her name. On his deadbed her husband, Demosthenes senior, gave her in marriage to Aphobos—in Athens a usual provision in wills—with a dowry of 80 minas and granted his post mortem son-in-law the house for residence (27.4). Aphobos took up residence and, allegedly, received the full dowry (27.16) but "refused" to marry Kleoboule. In this sense the audience must have understood the words: μὴ γήμαντος δ᾽αὐτοῦ τὴν μητέρα τὴν ἐμήν (27.17). Since Demochares, the husband of Kleoboule's sister Philia, was involved in the case we might come to the contrary result. As MacDowell in his Austin translation correctly notes,[9] Kleoboule left her marital home and moved—with her children—to the house of her sister. Did she, Kleoboule, refuse to marry Aphobos? We should think so. Anyway, in court Demosthenes concedes that "a little disagreement" had taken place between Aphobos and Kleoboule (27.15). Due to the fact that Demochares, being only Kleoboule's brother-in-law, was not her *kyrios* and her son Demosthenes was underage, there was no close relative to administer her legal interests. Therefore Aphobos, constantly pretending that he was willing to marry the widow, had good arguments for living in Demosthenes' house keeping Kleoboule's dowry and not providing her with maintenance, at least until he finally had married another woman (27.15). So we may ask: did Kleoboule incite her son to bring Aphobos to trial first, before trying the other two guardians? Most probably she did. Foxhall, for example, calls Kleoboule the «real heroine of this social drama».[10] Surprisingly, in his *dikē epitropēs* against Aphobos, the speeches 27 and 28, Demosthenes does not dare praising his mother that "she passed her life in widowhood for her children." He does not do so until his speech held in defense of his witness Phanos (Dem. 29) charged for perjury in a following trial, the *dikē pseudomartyriōn*.[11] Here he addressed another law court, whose judges were not aware of the speeches held in the prior trial. Assumingly, Aphobos might have violently slandered Kleobule in his defense against Demosthenes' *dikē epitropēs*—in vain as it turned out.

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9 MacDowell 2004, 25 n. 24, concerning 27.14.

10 Foxhall 1996, 144.

11 Dem. 29.26: ... οἳ μόνοι παῖδές ἐσμεν αὐτῇ, δι᾽ οὓς κατεχήρευσε τὸν βίον ("... being her only children, for whom she passed her life in widowhood").

In the first speech against Aphobos there is also another instance of «isolating the facts»: emotionally the whole speech is structured around Kleoboule's dowry of 80 minas. From this point Demosthenes started his account of Aphobos' misdeeds (27.13–18), and about this dowry the last words were spoken (27.69). Imploring the judges for pity, Demosthenes complained about another dowry too: if Aphobos was not condemned in this trial he, Demosthenes, would never be able to spend the 120 minas his father had bequeathed as dowry (*proix*) to his, the younger Demosthenes', sister (27.65, 29.43). Eventually the judges must have forgotten that the co-guardian Demophon, who was provided to marry the girl when she came of age, had cashed the sum in advance (mentioned just at the beginning of the speech, 27.5). Nevertheless Demophon refused to marry her. However, does this item concern Aphobos? If the sister's dowry really was thus important, why did Demosthenes not bring Demophon to trial first? Demosthenes may have trapped the judges by the fact that usually the mother's *proix* passed to her daughter.[12] *Proix* was an ideal emotional topic to frame sober business accounts. And Demosthenes' teacher Isaios knew how to deal with inheritance cases.

II.

My second case is the *dikē epitropēs* of another young man against his former guardian, Lysias 32, *Against Diogeiton* (a bit earlier, from 400/399 B.C., but only partly preserved). Being called up to serve as a hoplite Diodotos appointed his brother Diogeiton by will to be guardian of his three children, two sons and one daughter. Diodotos died in battle and eight years after the elder son came of age. The young man charged Diogeiton six talents and 20 minas. Because of his own inexperience his brother-in-law spoke for him as *synēgoros* (supporter); their names are not preserved. Again, I will omit recalculating the items listed in the speech. One may check the table inserted by Todd in his Austin translation.[13] Also this claim is based on the allegation that the former guardian "has in his hands" the wards' property (ἔχειν, Lys. 32.2, 20 and 28).[14] Diogeiton had agreed (*hōmologēsen*) having taken over the value but he deducted huge expenses on the children and probably also financial losses.

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[12] THÜR 1992, 127.

[13] TODD 2000, 320.

[14] Lys. 32.2: Διογείτων ἃ φανερῶς ἔχων ἐξηλέγχετο; 20: τὰ δὲ τελευτῶν ὁμολογήσας ἔχειν, and 28: ὅσα τελευτῶν ὡμολόγησεν ἔχειν αὐτὸς χρήματα.

Parallel to Dem. 27.58[15] we find the suggestion that the guardian should have rented out the property, thereby ridding himself of many troubles.[16] The speaker continues advising the alternative purchase of land in order to get steady income for bringing up the orphans; thereby the guardian might also maintain the value of the estate. From this text one can infer that *misthōsis oikou* does not mean renting out the "dwelling house" or agricultural land or the whole estate, but rather a commercial enterprise with all its chances and risks. In Demosthenes' case the two factories were meant. Therefore his calculating the profit at a fixed rate per annum seems to be economically inadequate.

Diodotos' ran the highly risky business of maritime trade (*emporia*, 32.4) and like Aphobos and his co-guardians also Diogeiton administered the children's estate by himself. However, in this case the plaintiff calculated the value of the property in a different way, claiming nothing in interest payments. The speaker relies on an account book (*biblion*, 32.14) the children's mother allegedly came across by chance. And out of the statement the speaker arbitrarily picks up the guardian's debits and credits fitting best his arguments. Like Demosthenes later on, the speaker had to prove every debit and refute every credit by witness depositions. This was the consequence of the Athenian administration of justice. A panel of several hundreds of lay judges was not able to scrutinize documents. So the result of a case lastly depended on rhetorical devices; for the debits Diogeiton's very own acknowledgment (*homologia*, 32.20, 28)[17] was essential, only the expenses and losses, the guardian's credits, were in dispute.

I think the plaintiff used the method of picking up isolated facts also for accounts kept by third persons. In his defense Diogeiton claimed to have contributed 48 minas in a joint trierarchy with a certain Alexis, whereof he charged half of the sum, 24 minas, to the boys (32.24). After continuing with a different story the speaker returns to the trierarchy in 32.26: in the records of the *syntriērarchos* Alexis he found an entry that Diogeiton contributed only 24 minas and, therefore he inferred, Diogeiton has charged the costs of his whole trierarchy to the boys. Could there not have been two different entries at different positions, each of 24 minas, one concerning the boys and the other one the guardian? Bearing testimony to only one of them (32.27) was not perjury, and nobody was allowed to question or cross-examine the witnesses. Only the defendant could object to them within his speech, but he must have penetrated the trick before.

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[15] See above, n. 4.

[16] Lys. 32.23: … μισθῶσαι τὸν οἶκον ἀπηλλαγμένον πολλῶν πραγμάτων.

[17] See above, n. 14.

As indirect contribution to Legal Document Studies the speech allows some insight into the practice of record keeping of an Athenian businessman. When dealing with Diogeiton's accounts the speaker referred to a sophisticated way of defrauding the wards (32.25): Diogeiton invested two talents in cargo to be shipped to the notoriously dangerous Adriatic. When it was leaving he told the boys' mother that the risk (*kindynos*) was theirs. But the goods purchased in return got to Athens safely and doubled in value; so immediately he declared the cargo was his own.[18] From the high profit rate one can infer that Diogeiton invested the children's or his own assets directly in return sea trading and not in granting a sea loan[19]—even the high interest of such a loan would not have doubled the principal. Technically Diogeiton kept at least two accounts, one for his own business and another one for that of the wards. He waited for entering the expense until the outcome of the risky job was clear.[20] In this way he easily could shift the profit to his own account and the loss to that of the wards.

Up to now the children's mother, Diodotos' widow—as usual never called by her name—has been mentioned sometimes. Like Kleoboule in Demosthenes' case she played a central role in the story.[21] Diodotos had married his niece, the daughter of his brother Diogeiton. So Diogeiton, the guardian, in one person was the children's uncle from their father's side and their maternal grandfather; and Diodotos' widow in one person was the children's mother and the guardian's daughter. Since her father, Diogeiton, had married a second time she—daughter out of his first marriage and Diodotos' widow (also remarried now)—could not bear that her (probably young) stepmother's children in the new family of her wealthy father were much better off than her own ones (32.17). By isolating the facts Lysias concealed the central role of the children's mother: on the one hand, he most effectively placed the part of the speech slandering the unfaithful guardian Diogeiton in the mouth of Diogeiton's own daughter (32.12–17); on the other hand, he excused her for not being accustomed to speak in front of men (32.11); so her appearance seemed to be an exceptional one. Later, in 32.14, we hear the implausible sto-

[18] Lys. 32.25: καὶ ἀποπέμψας εἰς τὸν Ἀδρίαν ὁλκάδα δυοῖν ταλάντοιν, ὅτε μὲν ἀπέστελλεν, ἔλεγε πρὸς τὴν μητέρα αὐτῶν ὅτι τῶν παίδων ὁ κίνδυνος εἴη, ἐπεὶ δὲ ἐσώθη καὶ ἐδιπλασίασεν, αὑτοῦ τὴν ἐμπορίαν ἔφασκεν εἶναι. ("He also sent to the Adriatic a merchant ship with cargo valued at two talents. When it was leaving, he told their mother that the ride was the boys' responsibility, but when it arrived and doubled in value, he claimed that the cargo was his own." — Translation TODD 2000).

[19] So ISAGER & HANSEN 1975, 27.

[20] JAKAB 2007, 113.

[21] TODD 1993, 202–206.

ry that the children by chance came across the account book allegedly thrown away. Eventually, in 32.25, the audience is told that Diogeiton did inform his daughter about the risky Adriatic business. Putting all these facts together one can infer that the children's mother, maybe differently from Kleoboule, all the time over kept an eye on the administration of the property.

III.

The third case, finally, is a *dikē epitropēs* of a young man Akadēmos against his former guardian Timandros, Hyperides *against Timandros* (second half of 4th century B.C.). Recently a fragment of 64 lines of this speech otherwise lost has been deciphered in the famous Archimedes Palimpsest.[22] From this speech we get some new evidence, foremost on leasing out the wards' property and how to control the guardian's administration.[23] The facts are: an Athenian couple died and left behind four orphans, two boys and two girls. Surprisingly a guardian living in Lemnos was appointed, Timandros. He was an Athenian citizen and most probably *klērouchos*, in possession of public land there. Timandros took the younger of the two girls with him, allegedly by "dragging her away" (l. 25). I think for the other three children who stayed in Athens a co-guardian was appointed, as usual by their father's will like the three guardians of Demosthenes and his sister. Maybe, in his will, the father also gave the younger daughter to the co-tutor Timandros in marriage.

After 13 years and coming of age, Akadēmos charged Timandros more than five talents; a probably elder *synēgoros* spoke for him. The kind of legal action is not clear: from the words "he did the same man's sister a wrong worthy of capital punishment" (ll. 19–20) Whitehead infers that it was an *eisangelia*, a public prosecution of an ex-orphan desiring for revenge.[24] However, in my opinion the *timēma* was not death penalty[25] but rather financial compensation through a private *dikē epitropēs*. To be specific, in line 62 we read the crucial word ἔχειν used in the same way as in the other guardianship speeches: "… while now *holding* assets from his estate worth more than five talents, as I shall demonstrate to you."[26] The following list of assets is lost.

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[22] Text now in HORVÁTH 2014, 184–188 (with a German translation by H. Maehler); for the new Hyperides fragments see also ENGELS 2014 (*Against Timandros*: 244–245).

[23] THÜR 2010 with further references.

[24] WHITEHEAD 2009, 142–145.

[25] WHITEHEAD 2009, 148.

[26] *Against Timandros*, ll. 61–62: … ἐκ τῶν τούτου πλέον ἢ πέντε ταλάντων οὐσίαν ἔχει, ὡς ὑμῖν ἐπιδείξω·

The main accusation against Timandros was that he conducted the guardianship completely contrary to the laws (ll. 10-17). In detail: 1) he did not register the guardianship with the *archōn*; 2) he did not have the property leased out, and 3) he prevented a denunciation (*phasis*) to let the property from being filed with the *archōn*. From Isae. 6.36 we know the duties of guardians on the one hand and the competence of the *archōn*, the magistrate responsible for family, inheritance and guardianship, on the other. The Isaeus text runs: "They registered these two boys with the *archōn* as being adopted by Euktemon's two sons who had passed away putting themselves down as their guardians, and they asked the *archōn* to lease out the estates as belonging to orphans…and that they themselves might become lessees and obtain the income".[27] After registration, a guardian may request that the magistrate assembles a law court for publicly leasing out the property in a kind of auction. Until now the question was: could the guardian himself apply for leasing the assets? Tchernetska, the first editor of the fragment, denied the question and translated αὐτοῖς[28] in l. 3 "to lease for their own profit".[29] With Wolff[30] I would take Isaeus seriously and translate αὐτοῖς "on their own authority", meaning: the laws forbid the guardian to lease by himself, without the *archōn* and the *dikastērion*. So the plaintiff Akadēmos argues that Timandros did not lease at all, the guardian Timandros replies that he did. Akadēmos claims the principal and all the returns Timandros had apparently made administering the estate for 13 years, the five talents mentioned in line 61; Timandros counters to be liable only up to the much lesser value of the estate at that time when he took it over as tenant.

Nevertheless, in line 12 the speaker produced witnesses for the fact that Timandros "did not lease" the estate. I believe that this is another instance of "isolating the facts". The witness deposition might have been correct for Athens. However, Timandros could reply that he fulfilled all his duties correctly with the magistrates of his *klērouchia* at Lemnos. There he might have registered the guardianship and obtained in lease a principal and slaves probably for trading with grain; the island of Lemnos is located on the main route from the Black Sea to Athens. But Timandros' reply could have got missed in face of the emotions Hyperides was able to excite.

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[27] Isae. 6.36: Ἀπογράφουσι τὼ παῖδε τούτω πρὸς τὸν ἄρχοντα ὡς εἰσποιήτω τοῖς τοῦ Εὐκτήμονος ὑέσι τοῖς τετελευτηκόσιν, ἐπιγράψαντες σφᾶς αὐτοὺς ἐπιτρόπους, καὶ μισθοῦν ἐκέλευον τὸν ἄρχοντα τοὺς οἴκους ὡς ὀρφανῶν ὄντων ... μισθωταὶ δὲ αὐτοὶ γενόμενοι τὰς προσόδους λαμβάνοιεν.

[28] *Against Timandros*, ll. 3–5: <u>αὐτοῖς</u> δὲ τοὺς ἐπιτρόπους ἀπαγορεύουσιν οἱ νόμοι μὴ ἐξεῖναι τὸν οἶκον μισθώσασθαι.

[29] TCHERNETSKA 2005, 3, following WYSE 1904, 526–527.

[30] WOLFF 1953, 202–205.

Leaving aside the emotional tendency of the fragment, its first twelve lines now make much clearer how leasing out a commercial enterprise, an *oikos*, did work. First, it was not the *archōn*, who concluded the contract, but rather the *dikastērion*, the law court, had the last word by casting votes (ll. 7–8). Second: if there was more than one person interested in leasing the enterprise a kind of auction took place. This, in general, has been well known before. However, it was not clear what the highest bid was. It was conjectured that the person who offered the highest rate of interest obtained acceptance.[31] But no source tells us about interest rates at all. Probably the rate was fixed by law or by custom. From a possible restoration of the first sentence of the fragment[32] one may infer that the auction was carried out to obtain the highest assessment of the capital, not the highest rate of interest on an unknown amount of capital. The person who offered the highest assessment of the substance received the enterprise to lease. The only reasonable way of securing a ward's property, which consists in a producing firm, is assessing its value. And now we can understand Demosthenes saying in 27.58–59 that the value of an *oikos* could be doubled and tripled during a guardianship: not by the principal's interest only, but rather by comparing the value when the auction had started with the highest bid and interest thereof.

Finally, the fragment throws new light on the *phasis oikou*, a "denunciation" to control the guardian administrating the enterprise. Formerly the *phasis* was thought to be a public action brought by a *boulomenos*, but not mentioned by Aristotle in his catalogue of remedies in *Ath. Pol.* 56.6. Wolff held that it was nothing other than a report to the *archōn* that there was an orphan's *oikos* to be let.[33] Now, from the word ἀμφισβητεῖν ("oppose", ll. 5–6) one can infer to opposing claims about a ward's enterprise: the claim of the denunciator that the enterprise should be leased to him, and the counter-claim of the guardian, who intends to carry on administering the business by himself. Thus the *phasis* resulted in a public auction, which had the character of a *diadikasia*, a competition between two or more parties.[34]

One may ask how Timandros could "prevent" such a *phasis*, which someone had brought forward in Athens (ll. 16–17). As said before about isolating the facts, if Timandros had correctly fulfilled his duties at Lemnos, the *archōn* in Athens evidently had had no reason to suspect that something was wrong with the guardianship.

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31 HARRISON 1968, 106.

32 THÜR 2010, 8 n. 4.

33 WOLFF 1953, 207.

34 THÜR 2010, 16–17.

In the fragment the role of the children's mother is only indirectly touched. Since the mother also had passed away she could not interfere with the administration. Nevertheless she is mentioned, strikingly only in connection with her daughters (l. 22): "When there were left these two brothers and two sisters, the girls being orphans without mother or father, and all of them small children…" This concerns only personal custody and meets the line of argumentation in this part of the speech. Only in special situations the speakers refer to economic activities of women also within the family.

Bibliography

Becker 1968
D. Becker, *Die attische dike epitropes*,«ZRG RA» 85, 30-93.

Engels 2014
J. Engels, *Zur Diskussion um die im 'Archimedes-Palimpsest' neu gefundenen Texte aus zwei Reden des Hypereides*, in: G. Ueding & G. Kalivoda (eds.), *Wege der modernen Rhetorikforschung*, Berlin, 237-252.

Foxhall 1996
L. Foxhall, *The Law and the Lady: Women and Legal Proceedings in Classical Athens*, in: L. Foxhall & A.D.E. Lewis (eds.), *Greek Law in its Political Setting: Justification not Justice,* Oxford, 133-152.

Harrison 1968
A.R.W. Harrison, *The Law of Athens I. The Family and Property*, Oxford.

Horváth 2014
L. Horváth, *Der "Neue Hypereides"*, Berlin.

Isager & Hansen 1975
S. Isager & M.H. Hansen, *Aspects of Athenian Society in Fourth Century B.C.*, Odense.

Jakab 2007
E. Jakab, *SEG XLVIII 96: Steuergesetz oder Frachtvertrag?*, in: E. Cantarella (ed.), *Symposion 2005*: *Vorträge zur griechischen und hellenistischen Rechtsgeschichte*, Vienna, 105-121.

MacDowell 2004
D.M. MacDowell, *Demosthenes, Speeches 27-38*, Austin.

Tchernetska 2005
N. Tchernetska, *New Fragments of Hyperides from the Archimedes Palimpsest*, «ZPE» 154, 1-6.

Todd 1993
S.C. Todd, *The Shape of Athenian Law*, Oxford.

Todd 2000
S.C. Todd, *Lysias*, Austin.

Thür 1972
G. Thür, *Der Streit über den Status des Werkstättenleiters Milyas (Dem., or. 29)*, «RIDA» 19, 151-177 = U. Schindler (ed.), *Demosthenes*, Darmstadt 1987, 403-430.

Thür 1977
G. Thür, *Beweisführung vor den Schwurgerichtshöfen Athens: Die Proklesis zur Basanos,* Vienna.

Thür 1992
G. Thür, *Armut. Gedanken zu Ehegüterrecht und Familienvermögen in der griechischen Polis,* in: D. Simon (ed.), *Eherecht und Familiengut in Antike und Mittelalter*, Munich, 121-132.

Thür 2010
G. Thür, *How to Lease an Orphan's Estate in Classical Athens*, «Annals of the Faculty of Law in Belgrade / Belgrade Law Review» 58/3, 7-19.

Whitehead 2009
D. Whitehead, *Hypereides' Timandros: Observations and Suggestions*, «BICS» 52, 135-148.

Wolff 1953
H.J.Wolff, *Verpachtung von Mündelvermögen in Attika,* in: *Festschrift Hans Lewald, bei Vollendung des 40. Amtsjahres als ordentlicher Professor im Oktober 1953*, Basel, 201-208.

Wyse 1904
W. Wyse, *The Speeches of Isaeus*, Cambridge.

Overcoming Legal Incapacities at Athens

Juridical Adaptations Facilitating the Business Activity of Slaves

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ABSTRACT

This chapter discusses (1) slaves' independent operation of businesses at Athens, (2) the use of representatives, «agents», to permit enslaved businessmen to accomplish through third parties undertakings that were otherwise impossible, and (3) in the context of the history of «agency» law, Athenian legal adaptations that largely resolved commercial difficulties arising from limitations on the legal capacity of unfree businessmen.

The juridical acceptance of representatives – permitting businessmen lacking legal capacity to effectuate through third parties acts and practices that would otherwise have been legally impossible – constituted for Athens a remarkable innovation, responsive to the economic and social needs of fourth-century Attic enterprise. This Athenian adaptation should not, however, anachronistically be confused with legal mechanisms conceived hundreds of years later by Roman imperial practitioners and scholars, nor should it be juridically enmeshed with Anglo-American concepts of legal «agency» developed thousands of years later.

Scholars have long recognized the «leading role» of slaves in the commercial activity of fourth-century BCE Athens, at that time the preeminent entrepôt of the eastern Mediterranean.[1] Because traditional Athenian concepts of manliness (*andreia*) valorized only cultural, military and political pursuits, condemned all commerce as inherently servile, and insisted that farming alone provided a proper economic arena for the "free man" (*anêr eleutheros*), Athenian society was highly receptive to slave enterprise.[2] The Athenian institution of "slaves living independently" (*douloi khôris oikountes*) permitted unfree persons to conduct their own businesses, establish their own households, and sometimes even to own their own slaves – with little contact with, and most importantly, virtually without supervision from their owners.[3] But only minimal academic attention has been directed to the paradox of an Athenian economy dependent on slave entrepreneurs operating within a legal system that supposedly deprived slaves of all legal capacity, a system absolutely closed to slave participation (except perhaps as witnesses through torture).[4] Extensive evidence and multiple studies, however, have demonstrated that legal systems invariably develop mechanisms to close significant gaps that may arise between changed societal reality and traditional juridical principles.[5] Athens was no exception. Some years ago, in *Athenian Economy and Society: A Banking Perspective*, I set forth briefly certain legal «adaptations» seemingly developed to accommodate commercial needs arising from the new reality of fourth-century Athenian businesses (*ergasiai*) operated by slaves with little if any involvement by their masters.[6] These adaptations included recognition of slaves' responsibility for

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[1] Maffi 2008, 207: «in Grecia il ruolo degli schiavi è indubbiamente primario nel mondo degli scambi commerciali». Cf. Garlan 1988, 60-69; Gernet [1950] 1955, 164. On the significance of the Athenian emporion: Vélissaropoulos 1980, 31-32; Gofas 1993, 199-200.

[2] See Cohen 2003; Hanson 1995, 214-219. Cf. Bitros & Karayiannis 2008; Thompson 1983. Contempt for business activity was so high that legislation had to be passed to protect citizens from insult based on the mere fact of their working in the Agora market. Dem. 57.30: τοὺς νόμους, οἳ κελεύουσιν ἔνοχον εἶναι τῇ κακηγορίᾳ τὸν τὴν ἐργασίαν τὴν ἐν τῇ ἀγορᾷ ἢ τῶν πολιτῶν ἢ τῶν πολιτίδων ὀνειδίζοντά τινι. Cf. Wallace 1994, 116.

[3] See Cohen 2000, 145-154; Hervagault & Mactoux 1974; Perotti 1974; Partsch 1909, 135 ff. The overwhelming majority of scholars identify the *khôris oikountes* as slaves (Kamen 2011, 44), but a few (most recently Zelnick-Abramovitz 2005 and Fisher 2006 and 2008) believe that the term (depending on context) can refer to both present slaves (*douloi*) and freed slaves (*apeleutheroi*). Cf. Klees 2000, 15-17.

[4] Slaves' lack of legal rights: Harrison 1968-71, I, 163-172; Ferrucci 2012, 99; Rihll 2011, 51-52; Klees 1998, 176-217. On the admissibility of slave testimony obtained through torture, see Thür 1977; Humphreys 1985.

[5] See recently the *Introduction* and various essays in Black & Bell 2011. Cf. R. Grillo et al. 2009.

[6] On the transformation of Athenian economy and society between the late sixth and early fourth centuries BCE, see Schaps 2004, 111-123; 2008, 42-43; Cohen 1992, 3-25, 87.

their own business debts,[7] court acceptance of slaves and free non-citizens as parties and witnesses in commercial litigation (in contravention of the general rules allowing access to *polis* courts only to citizens of the *polis*), and acceptance of mercantile «agency» as a mechanism to overcome remaining legal incapacities.[8] I proceed to consider in detail the evidence confirming (1) slaves' independent operation of businesses at Athens and (2) the use of representatives, «agents», to permit domestic slaves and free foreign businessmen to accomplish through third parties undertakings that were otherwise legally impossible. Finally, I will discuss, in the context of the history of «agency» law, the juridical significance of Athenian adaptations intended to overcome the legal incapacity of unfree businessmen.

1. SLAVES' INDEPENDENT OPERATION OF BUSINESSES AT ATHENS

While innumerable Athenian slaves undoubtedly toiled under harsh and exploitative conditions – at best performing routine and repetitive domestic and agricultural labor for the benefit of their masters – many *douloi* (albeit in all probability a small minority of the unfree inhabitants of Attica) were able to acquire skills,[9] to obtain business knowledge,[10] to develop valuable contacts[11] – and to prosper, at the expense of free males in thrall to *andreia*. But the slaves' very importance entailed for their owners financial danger and/or financial accommodation. Overseers and managers often had detailed knowledge of household finance and sometimes controlled substantial assets: the slave Moskhiôn, for example, enriched himself through his complete knowledge of Komôn's household affairs (Dem. 48.14-15); another *doulos* ("slave"), Kittos,

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7 For recent discussions on the legal implications of credit extended to unfree persons, see COHEN 2012; DIMOPOULOU 2012; MAFFI 2008; TALAMANCA 2008.

8 COHEN 1992, 90-101.

9 Xenophon contrasts the vocationally useless "liberal education" of free persons with slaves' training in crafts or trades requiring knowledge and skill: ὁ μὲν τεχνίτας τρέφει, ἐγὼ δ' ἐλευθερίως πεπαιδευμένους (*Mem*. 2.7.4).

10 Dem. 45.72 (on the business education of the great *trapezitês* Phormiôn who entered banking as a slave): ἐπειδὴ δ' ὁ πατὴρ ὁ ἡμέτερος τραπεζίτης ὢν ἐκτήσατ' αὐτὸν καὶ γράμματ' ἐπαίδευσεν καὶ τὴν τέχνην ἐδίδαξεν.

11 See, for example, the relationship of the enslaved bank functionary Kittos with Menexenos and the son of Sopaios, resulting in a problematic advance of six talents to the latter duo (Isocr. 17.12). The possibility of purloined customers and independent business relationships is confirmed by Pasiôn's insistence on a «noncompetition» covenant even in leasing his bank to Phormiôn, his own former slave and trusted assistant (μὴ ἐξεῖναι δὲ τραπεζιτεῦσαι χωρὶς Φορμίωνι, ἐὰν μὴ πείσῃ τοὺς παῖδας τοὺς Πασίωνος: Dem. 45.31). Cf. §34.

supposedly appropriated for himself and his confederates some 36,000 *drachmas* (Isocr. 17.11-12). To avoid the possibility of such losses (and for other reasons: COHEN 1998), masters sometimes chose to enter into arrangements under which slaves maintained their own households and operated their own businesses, while paying their owners fixed sums periodically (*apophora*). These *douloi khôris oikountes* often enjoyed – in the words of an Athenian observer – considerable prosperity, and some even "lived magnificently" (*megaloprepôs*).[12] Thus, for example, the *douloi* Xenôn, Euphrôn, Euphraios and Kallistratos – while still enslaved – as principals operated the largest bank (*trapeza*) in Athens, that of Pasiôn. Only upon completion of the lease term did their owners "set them free" (*eleutherous apheisan*), "being quite satisfied" with how they (the owners) had been treated.[13] During the ten years in which the leasing arrangement had been in force (Dem. 36.37), the slaves' only involvement with their owners appears to have been annual payment of a sizeable fixed rental (an entire talent per year) in return for the slaves' retention of the net income resulting from operation of the bank. Pasiôn himself – while still unfree – had played a major role in his owners' bank (Dem. 36.43; cf. 46, 48), and thereafter in his own *trapeza*. In fact, bankers often sought to ensure continuation of their banks (*trapezai*) by providing, on their deaths, for marriage of their widows to their chief slaves to whom control of the banking business frequently devolved (Dem. 36.28-29). Phormiôn (who ultimately succeeded Pasiôn as Athens' most important financier)[14] – while still unfree – had been a partner in a maritime trading business.[15] Similarly the slave Lampis was the owner/operator (*nauklêros*) of a substantial commercial vessel: he entered into contracts with free persons (Dem. 34.5-10), lent substantial sums to customers (Dem. 34.6), received repayment of large amounts on behalf of other lenders (Dem. 34.23, 31), even received the special exemption from taxes (*ateleia*) provided by Pairisadês of Bosporos on the export of grain to Athens,[16] and provided a deposition in the arbitration proceedings relating to an Athenian legal action (Dem. 34.18-19). Likewise

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[12] [Xen.] *Ath. Pol.* 1.11: ἐῶσι τοὺς δούλους τρυφᾶν αὐτόθι καὶ μεγαλοπρεπῶς διαιτᾶσθαι ἐνίους.

[13] Dem. 36.13-14: ἐμίσθωσεν Ξένωνι καὶ Εὐφραίῳ καὶ Εὔφρονι καὶ Καλλιστράτῳ,… τὰς παρακαταθήκας καὶ τὴν ἀπὸ τούτων ἐργασίαν ἐμισθώσαντο. . . καὶ ἐλευθέρους ἀφεῖσαν ὡς μεγάλ᾽ εὖ πεπονθότες.

[14] Dem. 36.57: τοσαῦτα γάρ… χρήμαθ᾽ ὑμῖν ἀνεγνώσθη προσηυποργκώς, ὅσ᾽ οὔθ᾽ οὗτος οὔτ᾽ ἄλλος οὐδεὶς κέκτηται. Πίστις μέντοι Φορμίωνι παρὰ τοῖς εἰδόσι καὶ τοσούτων καὶ πολλῷ πλειόνων χρημάτων, δι᾽ ἧς καὶ αὐτὸς αὐτῷ καὶ ὑμῖν χρήσιμός ἐστιν.

[15] See Dem. 49.31, where Timosthenês, active in overseas commerce, is characterized as Phormiôn's κοινωνός at a time when Phormiôn was still a *doulos*.

[16] Cf. HERVAGAULT & MACTOUX 1974, 90-91; PEROTTI 1974, 52-54.

Zênothemis, identified as a slave in Demosthenes 32, was actively engaged in maritime commerce and lending: allegedly the owner of a substantial commercial cargo, he litigated in his own name as a principal in the Athenian courts.[17] (He is explicitly described as one of the *khôris oikountes* residing at Athens with his wife and children [Dem. 34.37].) We also know, for further examples, of the charcoal-burner in Menander's *Epitrepontes*, a slave who lives outside the city with his wife and provides his owner with a portion of his earnings (see lines 378-380); the slave Aristarkhos, a leather-worker who is listed on the Attic *stelai* with an assortment of chattels that – in defiance of modern conceptualization – are described as belonging to the slave rather than to his master Adeimantos;[18] a group of nine or ten unfree leather-workers, whose leader paid their owner three obols for himself per day, two for each of the other slaves, and kept any remaining revenues (Aesch. 1.97); a *doulos* who operated his master's business for a fixed payment and was free to retain any additional income after expenses (Milyas in Dem. 27); the slave in Hypereidês, *Against Athênogenês* who operated a perfume business with substantial financing but whose only contact with his master was to provide him with a monthly accounting;[19] slaves operating their own businesses in the Agora and personally liable for legal transgressions without reference to their master (Stroud 1974: 181-182, lines 30-32); and numerous other slaves operating in similarly autonomous arrangements.[20]

But a business system utilizing slave entrepreneurs would have foundered on the Athenian legal system which – in the absence of juridical adaptation – would have denied juridical capacity to all but Athenian male citizens (a small minority of the total population).[21]

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[17] Dem. 32.4: ὑπηρέτης Ἡγεστράτου. A Massilian, he borrowed money at Syracuse, claimed to have lent the funds against the security of maritime cargo, and litigated with other claimants to the collateral upon its arrival at Athens (32.9).

[18] Stele 6.21, 31-46 (Pritchett, Amyx & Pippin 1953 = *IG* I^3 426).

[19] The considerable scale of the business is suggested by the colossal amount of debts incurred in its operation: five talents composed of both conventional (*khrea*) and *eranos* loans (Hyp. *Ath*. 5.7, 14, 19 Jensen).

[20] In addition to the testimonia cited in the text, see, e.g., Andoc. 1.38; Telês fr. 4.b (pp. 46-47 Hense); Theophr. *Char*. 30.15; [Xen.] *Ath*. *Pol*. 1.10-11 («sans doute»: Perotti 1974, 55 n. 15); and the activities of slaves identified as μισθοφοροῦντα, many of whom may have maintained their own *oikoi* ([Xen.] *Ath*. *Pol*. 1.17; Xen. *Vect*. 4.14-15, 19, 23; Isae. 8.35; Dem. 53.21; Dem. 27.20-21; 28.12; Theophr. *Char*. 30.17. [Dem.] 59.31, although preserved in Athenian context, *stricto sensu* refers to a non-Athenian situation.

[21] Composition of Attic population: Scheidel 1998, 197-198; Oliver 2007, 79-83; Moreno 2007, 28-31; Jones 2008, 34; Whitby 1998, 109-114.

2. LEGAL ADAPTATIONS FACILITATING SLAVES' BUSINESS ACTIVITY

Athenian laws did present substantial barriers to the functioning of businesses operated by slaves independently of their masters. Banking is instructive. In the Athenian *trapeza*, as in other fields,[22] slaves worked at menial tasks and as middling functionaries – guarding collateral, serving as clerks, providing muscular labor.[23] But, as we have seen, some slaves actually operated independent banking businesses (including the largest in Athens),[24] merely providing their owners with a portion of their profits in the form of rental payments. However – since Athenian law did not recognize businesses as artificial persons («corporations») [25] – legal incapacity would have denied unfree persons the power to perform a number of functions critical to independent operation of a *trapeza*. Legal adaptation surmounted such incapacity.

Because only Athenian citizens had the capacity to own land in Attica,[26] a slave-banker would have been prevented by that proscription from foreclos-

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[22] Numerous opportunities for self-employment of free persons in craft or trade (cf. SCHAPS 2004, 150-159) and the wide availability of remuneration for public pursuits ([Arist.] *Ath. Pol.* 49.4) left only slaves (and family members) as potential employees for the many Athenian businesses that needed the labor of individuals over a continuing period of time. «Nowhere in the sources do we hear of private establishments employing a staff of hired workers as their normal operation» (FINLEY 1981, 262-263 n. 6). At Kolonôs Agoraios, the site of Athens' incipient version of a labor market, *douloi* constituted virtually all of those standing for hire: Pherekratês fr. 142 (K-A). See FUKS 1951, 171-173; GARLAN 1980, 8-9; BISCARDI 1989.

[23] Demosthenes 49, detailing the functioning of the Bank of Pasiôn, illustrates the routine tasks performed by slaves. When funds are to be advanced on behalf of a prominent borrower, the bank owner (himself a former slave) orders the slave on duty to make the disbursement, and the slave proceeds to count out the funds and to write-up a memorandum detailing the relevant aspects of the transaction: ἐκέλευσε δοῦναι Φορμίωνα… χιλίας ἑπτακοσίας πεντήκοντα. Καὶ ἠρίθμησε τὸ ἀργύριον Φορμίων · καὶ ἐγράψατο μὲν ὀφείλοντα Τιμόθεον… ὑπόμνημα δ᾽ ἐγράψατο τήν τε χρείαν εἰς ἣν ἐλήφθη τὸ ἀργύριον καὶ τὸ ὄνομα τοῦ λαβόντος (29-30). Deposits of valuable goods were received and disbursed by unfree persons: ὁ παῖς ταύτας τὰς φιάλας, οὐκ εἰδὼς ὅτι ἀλλότριαι ἦσαν, δίδωσι τῷ Αἰσχρίωνι τῷ ἀκολούθῳ τούτου (31). When collateral security is delivered to a bank, its receipt by slave (rather than free) employees is assumed: τίς ὁ παραλαβὼν τῶν οἰκετῶν τῶν ἡμετέρων; (51).

[24] Even Thompson, who sees banks as «insignificant» in the Athenian economy, recognizes the significance of «the lendable deposits (and) private resources of a tycoon like Pasion» (1979, 240).

[25] USTINOVA 2005, 178-179; JONES 1999, 12-13; FINLEY 1951 [1985], 275 n. 5. Associations, however, seem to have achieved a «responsabilité collective» (ISMARD 2007, 81), a «quasi legal» status (ARNAOUTOGLOU 2003, 119, 142).

[26] A specific and special act of the Assembly (*ekklêsia*) was required to grant a non-Athenian the capacity to become the owner of Attic land, the so-called right of *enktêsis*. On such grants, and their rarity, see generally PEČIRKA 1966; STELTZER 1971. A resolution of the Assembly (or other constituent body) also might grant a non-citizen the right to lease mines or agricultural land, or at least to share in the proceeds of new mines that might be delineated by that non-citizen. See *SEG*

ing on real property in Attica, a disabling incapacity in a land where *horoi* (mortgage stones) were pervasive – sprinkled over the landscape, attesting to loans secured by real-estate.[27] But at Athens inability to foreclose on land and buildings would not have affected only "landed loans": real estate was provided at Athens as security for a wide variety of credit extensions, giving the lender «recourse to that property in the event that the debtor defaults.»[28] Maritime trade, for example, is known to have been financed through loans to persons who owned real estate at Athens[29] or who provided as guarantors owners of such real property.[30] In the sole surviving ancient contract for maritime financing,[31] explicit provision is made for execution against the borrowers' real property in the event of a deficiency (*ekdeia*) after sale of the underlying maritime collateral.[32] Such maritime financing might properly be characterized as a loan with a right of collection "against land and dwellings" (*epi gêi kai synoikiais*). But this right of collection against real property would not have been available to a lender lacking the capacity to own real estate. Yet through the mechanism of a formalistic intermediate loan, the utilization of Athenian citizens as agents effectively permitted noncitizens operating banks to engage freely in real-estate lending. Thus when the noncitizen Phormiôn, on undertaking operation of a bank pursuant to a lease, wanted to be able

37.77 (new ed. of *IG* II^2 411= B. PALME, «Tyche» 2 [1987], 113-139), now republished as *IG* II^3 433. Cf. LAMBERT 2012, 188-189; THÜR 2002.

[27] SHIPTON 2000, 25-28, 117-128 ("Horoi Database"). The numerous Athenian *horoi* «maintain almost complete silence about the reasons for the indebtedness they publicized» (FINLEY 1981, 70).

[28] SUNDAHL 2014, 223. For the Athenians, all loans were either "landed" (*engeia*) or "maritime" (*nautika*). Usage in Hellenistic Egypt confirms that this division between "landed" and "maritime" goods was perceived as an all-encompassing categorical partition. There the stereotypical Classical Greek phrase ἔγγαια καὶ ναυτικά was replaced by a new verbal formula permitting «plus brièvement la saisie de 'tous les biens' de la partie coupable, sans comporter de précision sur la nature de ces biens» (GAUTHIER 1980, 205).

[29] See, for example, Pasiôn's bank's loans to Menexenos (Isocr. 17.12) whose family owned substantial real property and was deeply involved in the litigation over the assets of Dikaiogenês, a large estate consisting primarily of realty (Isae. 5.43), much of it subject to creditors (5.21).

[30] In the maritime financing described at Dem. 33.7, for example, the bank of Hêrakleidês obtains the guarantee of the unnamed speaker who is clearly an Athenian citizen (HANSEN 1984, 82; ERXLEBEN 1974, 476). Since he was himself a financier, although self-described as committing only "moderate" assets to maritime trade (Dem. 33.4), his ownership of at least his own residence seems likely. Dem. 32.29 also envisions the possible involvement of citizen guarantors in maritime-finance disputes.

[31] Preserved at Dem. 35.10-14. Despite early attacks by SCHUCHT (1892; 1919, 1120 ff.), this document is now generally accepted as genuine. See BRESSON 2008, 67-71; LANNI 2006, 156, n. 41; PURPURA 1987, 203 ff.

[32] Dem. 35.12: καὶ ἐάν τι ἐλλείπῃ τοῦ ἀργυρίου, ὃ δεῖ γενέσθαι τοῖς δανείσασι κατὰ τὴν συγγραφήν, παρὰ Ἀρτέμωνος καὶ Ἀπολλοδώρου ἔστω ἡ πρᾶξις τοῖς δανείσασι καὶ ἐκ τῶν τούτων ἁπάντων, καὶ ἐγγείων καὶ ναυτικῶν, πανταχοῦ ὅπου ἂν ὦσι.

to execute on those loans which the bank had extended "against land and dwellings" (*epi gêi kai synoikiais*), he arranged for the bank owner, his former master, to retain nominal ownership of these receivables, in form as a debtor of the bank, so that "he might be able to execute" against such real property.[33]

Similarly, only citizens could provide a bond for dealings with *polis* authorities – a potentially lucrative area of profit for banks. Yet when Pasiôn wanted to employ bank funds to provide a bond of seven talents for a client (Isocr. 17.42-43), neither the bank (not a cognizable «person» for legal purposes) nor he himself (since not a citizen) could effectuate the bail directly. But the problem was surmountable by agency: the banker utilized the citizen Arkhestratos to accomplish the pledge, and the court accepted this representation.[34]

Contractual arrangements with slave businessmen would have had meaning (because legally enforceable) only if slaves could be parties to commercial litigation. In general, however, in the absence of special arrangements (such as those arising from interstate treaty or connected with residence rights obtained by foreigners), the Hellenic cities allowed access to their courts only to their own citizens.[35] But in mercantile matters there is significant evidence that the Athenian courts substantially disregarded incapacity because of personal status – and allowed slaves full court access, as parties and as witnesses. This acceptance is best attested in the important "commercial maritime" cases and courts (*dikai emporikai*), where «standing» was accorded without regard to the personal status of litigants.[36] In the case of slaves, this represented a unique accommodation, for (with the exception of testimony in cases of murder, perhaps only against the alleged murderer of their master) slaves were otherwise absolutely deprived of the right even to be witnesses in legal proceedings.[37] "Commercial maritime" disputes, however, were not the only cases encompassed in the special procedural category of "monthly cases" (*dikai emmênoi*). "Banking cases" (*dikai trapezitikai*) are also denominated by Aristotle as among these "monthly cases" (*Ath. Pol.* 52.2). Although little is known with certainty as

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[33] Dem. 36.6: οἱός τ᾽ ἔσοιτο εἰσπράττειν ὅσα Πασίων ἐπὶ γῇ καὶ συνοικίαις δεδανεικὼς ἦν.

[34] Isocr. 17.43: Πασίων δ᾽ Ἀρχέστρατόν μοι τὸν ἀπὸ τῆς τραπέζης ἑπτὰ ταλάντων ἐγγυητὴν παρέσχεν. On the requirement that providers of bonds be citizens, see WHITEHEAD 1977, 93; GAUTHIER 1972, 139-140.

[35] See COHEN 1973, 59-62; GERNET [1938] 1955, 181-182; GAUTHIER 1972, 149-156. Even the right to reside at Athens may have been granted initially through a procedure in which the foreigner did not directly participate: LEVY 1987, 60.

[36] COHEN 1973, 69-74, 121; GERNET [1938] 1955, 159-164; MCKECHNIE 1989, 185. Specifically regarding *douloi*, GARLAN notes: «Surtout à partir du IV^e^ siècle, il fallut enfin adapter empiriquement ses capacités juridiques aux fonctions économiques qui lui étaient confiées» (1982, 55). Cf. PAOLI [1930] 1974, 106-109.

[37] See above n. 4.

to the nature of "banking cases",[38] there is no reason to assume criteria of standing or evidence substantially different from those of the «allied sphere» (HARRISON 1968-1971, I, 176) of commercial maritime cases. Strikingly, the clearest example of a slave having the right to testify and participate in an Athenian court, that of Lampis the *nauklêros* in Demosthenes 34, involves a *doulos* who provided credit to a borrower who was the recipient of a number of other loans – some of which may have been provided by bankers.[39] And Pankleôn, engaged in commercial pursuits in a fuller's shop, seeks to avoid a court action (Lys. 23) on the grounds that he is a Plataian, only to be met by the plaintiff's introduction of evidence that he is in fact a slave. Of course, the plaintiff's presentation of proofs of servitude would justify pendency of the case only if slaves actually could be parties to business-oriented lawsuits.

Yet there remained a barrier to slaves' participation in court proceedings: a fundamental Athenian legal principle that a party to an action must personally present his case in court.[40] Since many slaves did not speak Greek as their native language, linguistic ineptitude would often have prevented them from competently representing themselves in litigation, effectively depriving them of access to juridical process. Here too, Athenian law adapted to the needs of commerce and allowed slaves and former slaves (and even free non-Greeks) to be represented by speakers fluent in Greek.[41] Thus the banker (and ex-slave) Phormiôn, whose Greek was poor, was permitted to use Demosthenes to speak for him in an important commercial matter in which he was a defendant.[42] In Demosthenes 34, where the slave Lampis, a ship-owner and financier, is prominently involved as a principal (see above), with the court's acquiescence the plaintiff receives forensic support from at least one, and possibly two "friends".[43] In another commercial maritime case, Demosthenes 56,

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[38] On the *dikai trapezitikai*, see GERNET [1938] 1955, 176-177.

[39] For Lampis's advance of 1,000 *dr.*, see Dem. 34.6 and THOMPSON 1980, 144-145. At Dem. 34.5 Lampis is termed the οἰκέτης of Diôn, at 34.10 the παῖς of Diôn. For his clear testimonial capacity, see 34.31.

[40] «Das attische Recht… verlangte darüber hinaus grundsätzlich, daß jeder Litigant seine Sache auch rednerisch in eigener Person verfocht», WOLFF 1968, 111-112. Cf. RUBINSTEIN 2000: 18 : «The assumption that an Athenian litigant was expected not only to plead his own case but also to plead it alone, at least in principle, has been fundamental to most recent scholarship on Athenian legal proceedings.» In agreement: BAUMAN 1990, 7; CHRIST 1998, 37.

[41] BLASS asserts that in commercial cases Athenian courts commonly permitted presentations by representatives (rather than by parties), since many tradespersons were not Greek by birth (1893, 584).

[42] The orator opened his presentation by noting Phormiôn's ἀπειρίαν τοῦ λέγειν, καὶ ὡς ἀδυνάτως ἔχει Φορμίων (Dem. 36.1).

[43] Dem. 34.52: καλῶ δὲ καὶ ἄλλον τινὰ τῶν φίλων, ἐὰν κελεύητε.

the court permits Dareios to speak on behalf of Pamphilos who was unable to present his own case (BLASS 1893, 584).

Agents were employed sometimes merely for the principal's convenience.[44] Stephanos was dispatched to represent a banker's interests at Byzantion (Dem. 45.64), and the money-lending Dêmôn sent Aristophôn to Kephallênia to resolve a commercial maritime dispute (Dem. 32.10-12). Timotheos «appointed Philondas as his agent to sail to Macedon» (MORENO 2007, 281) to handle a timber transaction (Dem. 49.26). But because Athenian law sharply restricted the rights and privileges of even free non-citizens, slave businessmen would have had frequent need of «representatives» or «agents» in the conduct of their businesses. Thus Pasiôn is attested as retaining the citizen Agyrrhios of Kollytos as a confidential representative in litigational matters (Isocr. 17.31 ff.). Phormiôn, before obtaining his freedom, used the citizen Timosthenês in the conduct of his maritime operations (above, n. 15). During his early years of banking activity, before obtaining citizenship, perhaps while still a slave,[45] Pasiôn utilized the citizen Pythôdoros "to do and say all things" for him.[46] Similarly, the son of Sopaios (a plutocratic and free, but foreign businessman visiting Athens) used the citizen Menexenos, scion of one of the «wealthiest and most distinguished» Athenian families (DAVIES 1971, 145), to overcome various legal incapacities: Menexenos deals with the provision of surety required of non-citizens in the polemarch's court (Isocr. 17.12, 14) and appears to have represented this foreigner generally in legal and business matters.[47]

3. LEGAL SIGNIFICANCE OF ATHENIAN JURIDICAL ADAPTATIONS

This free use of representatives – permitting businessmen lacking juridical capacity to effectuate through third parties acts and practices that would otherwise have been legally impossible – constituted for Athens a remarkable legal innovation, responsive to the economic and social needs of fourth-century

[44] A number of individuals carried out tasks with which their principals did not wish to be openly connected. See LOFBERG 1917, 48-59.

[45] Pasiôn played an important role in the banking business of his masters (Dem. 36.43, 48). JONES (1956, 186) has even suggested that Pasiôn, while still a slave, was entirely responsible for the operation of the bank. Although it is always assumed that he was manumitted prior to the events described in Isocr. 17 (cf. DAVIES 1971, 429-430), in fact we do not know when he obtained his freedom.

[46] Isocr. 17.33: ὑπὲρ Πασίωνος ἅπαντα λέγει καὶ πράττει.

[47] Cf. Isocr. 17.9: βουλόμενος εἰδέναι σαφῶς τὸ πρᾶγμα προσπέμπω Φιλόμηλον αὐτῷ καὶ Μενέξενον; 12: λέγει… ὡς ἐγὼ καὶ Μενέξενος… ἓξ τάλαντ᾽ ἀργυρίου λάβοιμεν παρ᾽ αὐτοῦ.

Attic enterprise. This Athenian adaptation should not, however, anachronistically be confused with legal mechanisms conceived hundreds of years later by Roman imperial practitioners and scholars, nor should it be juridically enmeshed with Anglo-American concepts of «agency» developed thousands of years later. Such metachronism permeates a recent essay by Edward Harris who searches in vain for the Greek word for «business agent».[48] Since slaves operating businesses independently at Athens could incur debt for which they (and not their masters) were personally responsible (COHEN 2012), and could directly enter into legally enforceable contracts, *douloi* at Athens had no need for the type of artificial and highly complex «agent» ultimately created by the modern Common Law system in which «*B*, authorized by *A*, may go through a transaction on behalf of *A*, with *C*, with the result that all the effects of the transaction, all the rights and liabilities created by it, will take effect between *A* and *C*, *B* having no concern whatever with them and acting merely as a conduit pipe».[49] Nor should we expect to find in Athens the modernistic «business manager» that Harris purports to identify at Rome.[50] Similarly, we should not search for the «mandate» and «commercial agency» conceptualizations adopted in modern times by jurisdictions that have «received» the Civil Law – adaptations intended to ameliorate the absence in Roman Law of the Anglo-American conception of «agency», a relatively recent Common Law innovation intended to expedite the conduct of commerce in the modern world.[51] But Athenian law, precisely because it had not developed rigorous systems of juridical requirements for the creation of obligations,[52] was able

[48] HARRIS 2013, 107. Harris even attempts proleptically to inflict on the Athenians a contractual system analogous to the «elaborate classification of contracts» ultimately devised by Roman Law (HARRIS 2013, 105).

[49] BUCKLAND & MCNAIR 1965, 217.

[50] Even Harris recognizes that these alleged «business managers» were «not agents in the modern sense» (2013, 106). Harris, however, erroneously asserts that «the *actio institoria* permitted free business managers to carry out various transactions» (2013, 106 n. 9). In fact, «most of the ancient evidence suggests that, in the early history of the *actio institoria*, only dependent people (slaves and persons-in-power) could be appointed as business managers… (at all times) the overwhelming majority of business managers were slaves» (AUBERT 1994, 417). On the Roman *gestores* and *institores*, slave businessmen often operating largely independently of their masters, see MAFFI 2008, 206-207; PETRUCCI 2002, 105-114, 118-127; CERAMI, DI PORTO & PETRUCCI 2002.

[51] See NORTH 1997; HOLMES & SYMEONIDES 1999. Roman law, however, even in antiquity struggled to produce adaptations to meet through representational innovations the business requirements of a far-flung empire with considerable overseas commerce. The *praetor* introduced various *actiones* – alien to Roman conceptualization but essential to commerce – viz. the *actio de peculio*, the *actio institoria*, and the *actio exercitoria*. See *Dig*. 14.1.3 and 7; 14.3.5.11; 14.3.13 pr.). Cf. MICELLI 2001, 205 ff. and n. 38; WACKE 1994; PUGLIESE 1957.

[52] «The basis of Athenian contractual commitment was agreement» (DIMOPOULOU 2014, 265). In concurrence: AVILES 2011, 26-27; PHILLIPS 2009, 105. For the fullest documentation of this

easily to give legal effect through representatives even to commitments that might not be undertaken directly by principals – provided that the representatives themselves had the capacity to effectuate those undertakings. A person whom another has appointed (*synistê*: Dem. 49.26) in Athenian context to perform a task may in English, for reasons of clarity, be denominated an «agent», but that term must be understood in Athenian context – not as an analogue to the homonymous «free agent» of 21st-century sports or the «talent agent» of 21st-century Bollywood – or any other «agent» of an alien system.

paradigm see GAGLIARDI 2014. Some scholars believe that such consensual arrangements were legally binding only if buttressed by the presence of witnesses or by the swearing of oaths: see THÜR 2013.

Bibliography

Arnaoutoglou 2003
I. Arnaoutoglou, Thusias heneka kai sunousias. *Private Religious Associations in Hellenistic Athens*, Athens.

Aubert 1994
J. Aubert, *Business Managers in Ancient Rome: A Social and Economic Study of Institores, 200 BC- AD 250*, Leiden.

Aviles 2011
D. Aviles, *'Arguing against the law'. Non-literal Interpretation in Attic Forensic Oratory*, «Dike» 14, 19-42.

Bauman 1990
R. Bauman, *Political Trials in Ancient Greece*, London.

Biscardi 1989
A. Biscardi, *Contratto di lavoro e 'misthosis' nella civiltà greca del diritto*, «RIDA» 36, 75-97.

Bitros & Karayannis 2008
G. Bitros & A. Karayannis, *Values and Institutions as Determinants of Entrepreneurship in Ancient Athens*, «Journal of Institutional Economics» 4, 205-230.

Black & Bell 2011
A. Black & G. Bell (eds.), *Law and Legal Institutions of Asia: Traditions, Adaptations and Innovations*, Cambridge.

Blass 1893
F. Blass, *Die attische Beredsamkeit* III.1: *Demosthenes*, Leipzig.

Bresson 2008
A. Bresson, *L'économie de la Grèce des cités*, II: *Les espaces de l'échange*, Paris.

Buckland & McNair 1965
W. Buckland & A. McNair, *Roman Law and Common Law*, 2nd edition revised by F. Lawson, Cambridge.

Cerami, Di Porto & Petrucci 2002
P. Cerami, A. Di Porto & A. Petrucci, *Diritto commerciale romano*, Torino.

Christ 1998
M. Christ, *The Litigious Athenian*, Baltimore.

Cohen 1973
E. Cohen, *Ancient Athenian Maritime Courts*, Princeton.

Cohen 1992
E. Cohen, *Athenian Economy and Society: A Banking Perspective*, Princeton.

Cohen 1998
E. Cohen, *The Wealthy Slaves of Athens: Legal Rights, Economic Obligations*, in: H. Jones (ed.), *Le monde antique et les droits de l'homme*, Brussels, 105-129.

Cohen 2000
E. Cohen, *The Athenian Nation*, Princeton.

Cohen 2003
E. Cohen, *The High Cost of* Andreia *at Athens*, in: I. Sluiter & R. Rosen (eds.), Andreia *and Ancient Constructs of 'Manly Courage'*, Leiden, 145-165.

Cohen 2012
E. Cohen, *Juridical Implications of Athenian Slaves' Commercial Activity*, in: B. Legras & G. Thür (eds.), *Symposion 2011: Vorträge zur griechischen und hellenistischen Rechtsgeschichte*, Vienna, 213-223.

Davies 1971
J. K. Davies, *Athenian Propertied Families, 600-300 B.C.*, Oxford.

DIMOPOULOU 2012
A. DIMOPOULOU, *Le rôle des esclaves dans l'économie athénienne: réponse à Edward Cohen*, in: B. LEGRAS & G. THÜR (eds.), *Symposion 2011: Vorträge zur griechischen und hellenistischen Rechtsgeschichte*, Vienna, 225-236.

DIMOPOULOU 2014
A. DIMOPOULOU, Ἄκυρον ἔστω: *Legal Incapacity in Greek Inscriptions*, in: M. GAGARIN & A. LANNI (eds.), *Symposion 2013: Vorträge zur griechischen und hellenistischen Rechtsgeschichte*, Vienna, 249-275.

ERXLEBEN 1974
E. ERXLEBEN, *Das Kapital der Bank des Pasion und das Privatvermögen des Trapeziten*, «Klio» 55, 117-134.

FERRUCCI 2012
S. FERRUCCI, *Schiavi banchieri: identità e status nell'Atene democratica*, in: A. DI NARDO & G. LUCCHETTA (eds.), *Nuove e antiche schiavitù*, Pescara, 98-109.

FINLEY 1951 [1985]
M. FINLEY, *Studies in Land and Credit in Ancient Athens*. With new introduction by P. Millett (1985), New Brunswick.

FINLEY 1981
M. FINLEY [B. SHAW & R. SALLER (eds.)], *Economy and Society in Ancient Greece*, London.

FISHER 2006
N. FISHER, *Citizens, Foreigners, Slaves*, in: K. KINZL (ed.), *A Companion to the Classical Greek World*, Malden, 327-349.

FISHER 2008
N. FISHER, *'Independent' Slaves in Classical Athens and the Ideology of Slavery*, in: C. KATSARI & E. DAL LAGO (eds.), *From Captivity to Freedom*, Leicester, 121-146.

FUKS 1951
A. FUKS, Kolonos misthios*: Labour Exchange in Classical Athens*, «Eranos» 49, 171-173.

GAGLIARDI 2014
L. GAGLIARDI, *La legge sulla* ὁμολογία *e i vizi della volontà nei contratti in diritto ateniese*, in M. GAGARIN & A. LANNI (eds.), *Symposion 2013: Vorträge zur griechischen und hellenistischen Rechtsgeschichte*, Vienna, 177-214.

GARLAN 1980
Y. GARLAN, *Le travail libre en Grèce ancienne*, in: P. GARNSEY (ed.), *Non-Slave Labour in the Greco-Roman World*, Cambridge, 6-22.

GARLAN 1988
Y. GARLAN, *Slavery in Ancient Greece*, Ithaca (originally published as *Les esclaves en Grèce ancienne*, Paris 1982).

GAUTHIER 1972
PH. GAUTHIER, *Symbola. Les étrangers et la justice dans les cités grecques*, Nancy.

GAUTHIER 1980
PH. GAUTHIER, *Études sur des inscriptions d'Amorgos*, I: *Biens 'terrestres' et biens 'maritimes'*, «BCH» 104, 197-205.

GERNET [1938] 1955
L. GERNET, *Sur les actions commerciales en droit athénien*, «REG» 51, 1-44 (reprinted in *Droit et société dans la Grèce ancienne*, Paris 1955, 173-200).

GERNET [1950] 1955
L. GERNET, *Aspects du droit athênien de l'esclavage*, «Archives d'histoire du droit oriental» 1950, 159-187 (reprinted *in Droit et société dans la Grèce ancienne*, Paris 1955, 151-172).

GOFAS 1993
D. GOFAS, Μελέτες ιστορίας του ελληνικού δικαίου των συναλλαγών, Athens.

GRILLO ET AL.
R. GRILLO ET AL. (eds.), *Legal Practice and Cultural Diversity*, Farnham.

HANSEN 1984
M. V. HANSEN, *Athenian Maritime Trade in the 4th Century B.C.: Operation and Finance*, «C&M» 35, 71-92.

HANSON 1995
V. HANSON, *The Other Greeks: The Family Farm and the Agrarian Roots of Western Civilization*, New York.

HARRIS 2013
E. M. HARRIS, *Were there Business Agents in Classical Greece? The Evidence of Some Lead Letters*, in: U. YIFTACH-FIRANKO (ed.), *The Letter: Law, State, Society and the Epistolary Format in the Ancient World*, Wiesbaden, 105-124.

HARRISON 1968-1971
A. R. W. HARRISON, *The Law of Athens*, I-II, Oxford.

HERVAGAULT & MACTOUX 1974
M.-P. HERVAGAULT & M.-M. MACTOUX, *Esclaves et société d'après Démosthène*, in: *Actes du colloque 1972 sur l'esclavage*, Paris, 57-102.

HOLMES & SYMEONIDES 1999
W.H. HOLMES & S.C. SYMEONIDES, *Representation, Mandate, and Agency: A Kommentar on Louisiana's New Law*, «Tulane Law Review» 73, 1097-1159.

HUMPHREYS 1985
S. HUMPHREYS, *Social Relations on Stage: Witnesses in Classical Athens*, «History and Anthropology» 1, 313-373.

ISMARD 2007
P. ISMARD, *La construction du fait associatif en droit athénien et les limites de la notion de personnalité juridique*, «Dike» 10, 57-83.

JONES 1956
J. JONES, *The Law and Legal Theory of the Greeks*, Oxford.

JONES 1999
N. F. JONES, *The Associations of Classical Athens*, Oxford.

JONES 2008
N. F. JONES, *Politics and Society in Ancient Greece*, Westport.

KAMEN 2011
D. KAMEN, *Reconsidering the Status of* Khôris Oikountes, «Dike» 14, 43-53.

KLEES 1998
U. KLEES, *Sklavenleben im klassischen Griechenland*, Stuttgart.

KLEES 2000
U. KLEES, *Die rechtliche und gesellschaftliche Stellung der Freigelassenen im klassischen Griechenland*, «Laverna» 11, 1-43.

LAMBERT 2012
S. D. LAMBERT, *Inscribed Athenian Laws and Decrees 352/1-322/1 BC: Epigraphical Essays*, Leiden.

LANNI 2006
A. LANNI, *Law and Justice in the Courts of Classical Athens*, Cambridge.

LÉVY 1987
ED. LÉVY, *Métèques et droit de residence*, in: R. LONIS (ed.), *L'Étranger dans le monde grec*, Nancy, 47-67.

LOFBERG 1917
J. LOFBERG, *Sycophancy in Athens*, Chicago.

LURSSEN 2008
O. A. M. LURSSEN, *Comparative Study on Agency*, PhD Diss., University of Arizona.

MAFFI 2008
A. MAFFI, *Economia e diritto nell'Atene del IV secolo*, in: E. M. HARRIS & G. THÜR (eds.), *Symposion 2007: Vorträge zur griechischen und hellenistischen Rechtsgeschichte*, Vienna, 203-222.

MCKECHNIE 1989
P. MCKECHNIE, *Outsiders in the Greek Cities in the Fourth Century BC*, London.

MICELLI 2001
M. MICELLI, *Sulla struttura formulare delle "actiones adiecticiae qualitatis"*, Torino.

MORENO 2007
A. MORENO, *Feeding the Democracy: The Athenian Grain Supply in the Fifth and Fourth Centuries BC*, Oxford.

NORTH 1997
M. NORTH, *Qui Facit per Alium, Facit per Se: Representation, Mandate, and Principles of Agency in Louisiana at the turn of the Twenty-First Century*, «Tulane Law Review» 72, 279-326.

OLIVER 2007
G. J. OLIVER, *War, Food, and Politics in Early Hellenistic Athens*, Oxford.

PAOLI [1930] 1974
U. E. PAOLI, *Studi di diritto attico*, Milano.

PARTSCH 1909
J. PARTSCH, *Griechisches Bürgschaftsrecht*, Leipzig.

PEČIRKA 1966
J. PEČIRKA, *The Formula for the Grant of Enktesis in Attic Inscriptions*, Prague.

PEROTTI 1974
E. PEROTTI, *Esclaves* χωρὶς οἰκοῦντες, in *Actes du colloque 1972 sur l'esclavage*, Paris, 47-56 (translation of *Una categoria particolare di schiavi attici, i* χωρὶς οἰκοῦντες, «RIL» 106 [1972], 375-388).

PETRUCCI 2002
A. PETRUCCI, *Profili giuridici delle attività e dell'organizzazione delle banche romane*, Torino.

PHILLIPS 2009
D. PHILLIPS, *Hypereides 3 and the Athenian Law of Contracts*, «TAPhA» 139, 89-122.

PRITCHETT, AMYX & PIPPIN 1953
W. K. PRITCHETT, D. AMYX & A. PIPPIN, *The Attic Stelai. Part 1*, «Hesperia» 22, 225-299.

PUGLIESE 1957
G. PUGLIESE, *In tema di* actio exercitoria, «Labeo» 3, 308-343.

PURPURA 1987
G. PURPURA, *Ricerche in tema di prestito marittimo*, «Annali del Seminario Giuridico dell'Università di Palermo» 39, 189-337.

RIHLL 2011
T. E. RIHLL, *Classical Athens*, in: K. BRADLEY & P. CARTLEDGE, *The Cambridge World History of Slavery*, I: *The Ancient Mediterranean World*, Cambridge, 48-73.

RUBINSTEIN 2000
L. RUBINSTEIN, *Litigation and Cooperation: Supporting Speakers in the Courts of Classical Athens*, Stuttgart.

SCHAPS 2004
D. SCHAPS, *The Invention of Coinage and the Monetization of Ancient Greece*, Ann Arbor.

SCHAPS 2008
D. SCHAPS, *What Was Money in Ancient Greece?*, in: W.V. HARRIS (ed.), *The Monetary Systems of the Greeks and Romans*, Oxford, 38-48.

SCHEIDEL 1998
W. SCHEIDEL, *Addendum*, in: P. GARNSEY (ed.), *Cities, Peasants and Food in Classical Antiquity*, Cambridge, 195-200.

SCHEIDEL 2007
W. SCHEIDEL, *Demography*, in: W. SCHEIDEL, I. MORRIS & R. SALLER (eds.), *The Cambridge Economic History of the Greco-Roman World*, Cambridge, 38-86.

SCHUCHT 1892
H. SCHUCHT, *De documentis orationibus Atticis insertis et de litis instrumentis prioris adversus Stephanum orationis Demosthenicae*, Diss. Königsberg.

SCHUCHT 1919
H. SCHUCHT, *Ueber die Echtheit attischer Rednerurkunden*, «Philologische Wochenschrift» 39, 1120-1128, 1143-1151.

SHIPTON 2000
K. SHIPTON, *Leasing and Lending: The Cash Economy in Fourth-Century B.C. Athens*, London.

STELZER 1971
E. STELZER, *Untersuchungen zur Enktesis im attischen Recht*, Diss. Munich.

STROUD 1974
R. S. STROUD, *An Athenian Law on Silver Coinage*, «Hesperia» 43, 157-188.

SUNDAHL 2014
M. SUNDAHL, *Secured Credit in Athens: Reopening the Debate*, in: M. GAGARIN & A. LANNI (eds.), *Symposion 2013: Vorträge zur griechischen und hellenistischen Rechtsgeschichte*, Vienna, 223-238.

TALAMANCA 2008
M. TALAMANCA, *Risposta a A. Maffi: Economia e diritto nell'Atene del IV secolo*, in: E.M. HARRIS & G. THÜR (eds.), *Symposion 2007: Vorträge zur griechischen und hellenistischen Rechtsgeschichte*, Vienna, 223-228.

THOMPSON 1979
W. THOMPSON, *A View of Athenian Banking*, «MH» 36, 224-241.

THOMPSON 1980
W. THOMPSON, *An Athenian Commercial Case: Demosthenes 34*, «Tidjschrift voor Rechtsgeschiedenis» 48, 137-149.

THOMPSON 1983
W. THOMPSON, *The Athenian Entrepreneur*, «AC» 51, 53-85.

THÜR 1977
G. THÜR, *Beweisführung von den Schwurgerichtshöfen: Die Proklesis zur Basanos*, Vienna.

THÜR 2002
G. THÜR, IG II^2 *411: Pacht- oder Werkvertrag?*, in: M. SCHERMAIER, J. RAINER & L. WINKEL (eds.), *Iurisprudentia universalis, Festschrift für Theo Mayer-Maly zum 70. Geburtstag*, Cologne, 779-784.

THÜR, FORTHCOMING
G. THÜR, *Misuse of the Statutes on homologein, Ancient and Modern,* in: *Use and Abuse of Law in the Athenian Courts', UCL, 16-8 april 2013*.

USTINOVA 2005
Y. USTINOVA, *'Lege et consuetudine': Voluntary Cult Associations in the Greek Law*, in: V. DASEN & M. PIÉRART (eds.), Ἰδίᾳ καὶ δημοσίᾳ. *Les cadres "privés" et "publics" de la religion grecque antique*, Liège, 177-190.

VÉLISSAROPOULOS 1980
J. VÉLISSAROPOULOS, *Les nauclères grecs*, Geneva.

WACKE 1994
A. WACKE, *Die adjektizischen Klagen im Überblick. Erster Teil: Von der Reeder- und Betriebsleiterklage zur direkten Stellvertretung*, «ZRG RA» 111, 280-362.

WALLACE 1994
R.W. WALLACE, *The Athenian Laws of Slander*, in: G. THÜR (ed.), *Symposion 1993: Vorträge zur griechischen und hellenistischen Rechtsgeschichte*, Cologne, 109-124.

WHITBY 1998
M. WHITBY, *Athenian Grain Trade in the Fourth Century B.C.*, in: H. PARKINS & C. SMITH (eds.), *Trade, Traders*

and the Ancient City, London, 102-128.

WHITEHEAD 1977
D. WHITEHEAD, *The Ideology of the Athenian Metic*, Cambridge.

WOLFF 1968
H.J. WOLFF, *Demosthenes als Advokat. Funktionen und Methoden des Prozeßpraktikers im klassischen Athen*, Berlin.

ZELNICK-ABRAMOVITZ 2005
R. ZELNICK-ABRAMOVITZ, *Not Wholly Free: The Concept of Manumission and the Status of Manumitted Slaves in the Ancient Greek World*, Leiden-Boston.

Section 5
Protecting our Women

The False Guardian: An Interpretation of P.Eleph.Wagner 1

DEMOKRITOS KALTSAS

ABSTRACT

The paper examines a third-century BCE papyrus recording the conviction of a man who had somehow usurped the guardianship of a woman. A new interpretation is offered for a key phrase in the text; this leads to a modified view both of the case under consideration (possibly that of a marriage contracted without the consent of the bride's proper guardian, her father) and of an otherwise unknown regulation invoked by the judges in their ruling (possibly to be seen as an attempt by the Ptolemies to combat undesirable innovations in marriage customs).

P.Eleph.Wagner 1 is an excerpt from a judgement[1] by Ptolemaic judges, Chrematists, given most probably in the seventh year of Ptolemy III Euergetes, i.e., 241/240 BCE.[2] Apart from the officials involved, the two Chrematists themselves and a certain Ainesidemos,[3] three persons are named: a woman, Biote, and two men, Musaios and Nikias, son of Nikanor, a man of Macedonian descent. The particulars of the case have been left out of the excerpt preserved to us; all it contains is the judgement itself, introduced by a formula of recapitulation, ἐκ πάντων οὖν τούτων | κρίνομεν (ll. 4–5), "on the basis of all this we deem ...". The two men are then condemned to hard labour with these words: "On the basis of all this, we deem that Musaios should be transported to the labour camp; and further, that Nikias, son of Nikanor, of Macedonian descent, who cannot at present be found, should also be transported thither, etc."

Making allowance for any changes to the original wording of the text brought about by the excerptor for his purposes (see n. 6), I think we can be certain from the fact that the two men are mentioned one after the other that they were not found guilty of precisely the same offence. Since Musaios is the first one to be named, he will have been the main defendant, so to speak, Nikias an accessory. The reason for Musaios' name being included in our excerpt need be nothing more meaningful than that it stood in the sentence containing the verb κρίνομεν, without which the following made no sense.

It is with Nikias, son of Nikanor, that our excerpt is primarily concerned: We are told that he had absconded (ll. 9–10: ὃς οὐκ ἔστιν ἐμφανὲς [*l.* ἐμφανής] | ἐπὶ τοῦ παρόντος); the last sentence contains an appeal for his arrest, ἀνάγειν δὲ αὐτὸν τὸν | βουλόμενον ἐπ᾽ Αἰνησίδημον (ll. 20–22 with BL XI 76). The excerpt may have been made with a view to setting in motion the search after him through the posting of public notices and the like; or conceivably, if the quarries he was condemned to labour in were in the neighbourhood of Elephantine, where the papyrus was found, for the information of the authorities there.[4]

The Chrematists clearly state what the offence was that had such dire consequences for Nikias. The Greek text of ll. 10–19 is as follows: ὅτι | ἐπεγράφη κύριος Βιότης | τοῦ πατρὸς αὐτῆς ζῶν|τος, οὐ λαβὼν πρόσταγμα | παρὰ τοῦ βασιλέως οὐδὲ | παρὰ χρηματιστῶν, | ἀλλ᾽ εἰς ταῦτα ἐπιδοὺς

[1] L. 1: γνώσεως μέρος.

[2] See for the redating of the papyrus COWEY & KALTSAS 1998 (BL XI 76); accepted by BAGNALL & DEROW 2004 on no. 128 (see further BL XII 66).

[3] The names of all three officials were misinterpreted by the editor; see BL XI 76.

[4] The relation between Elephantine, the location of the trial, and Ainesidemos' seat of office is not clear to me.

| ἑαυτὸν παρὰ τοὺς νόμους, | ‹ἐν›[5] οἷς ἐστιν πρόγραμμα | παρ᾽ ὧν χρὴ γαμεῖν. Apart from the last clause, this is relatively straightforward: "for the reason that he caused himself to be registered as guardian (κύριος) of Biote while her father is (or: was) living, without having obtained a decree from the King or from Chrematists, but rather choosing this course of action in defiance of the laws, among which is contained a proclamation, παρ᾽ ὧν χρὴ γαμεῖν."

From the manner the woman Biote is spoken of, it is fair to assume that she had already been mentioned in the part that once preceded our extract; she will thus have been somehow involved in the offence for which Musaios was on trial.[6] She may have been the accuser or a third party. It is in any case certain that the improper assumption of the role of *kyrios* by Nikias had not occurred in the course of this trial itself;[7] rather, it concerned some past transaction, in which Musaios too must have been a party.

My main concern is with the exact meaning of ll. 16–19. I find the clearest attempt at an interpretation in BAGNALL & DEROW 2004, no. 128; they translate or paraphrase ll. 17–19 with "... contrary to the laws which contain a royal proclamation concerning the requirements for marriage" and note ad loc.: "As it is not claimed that Nikias married Biote, we may suppose that the proclamation in question described as normative the assumption of the role of *kyrios* by the husband." According to their understanding, the Chrematists are making a reference to the laws concerning marriage; these, Bagnall and Derow infer, contained the provision that a married woman should enjoy the guardianship, the κυριεία, of her husband; not being married to Biote, Nikias, who had appeared as her κύριος, was in transgression of these laws. (That Nikias was not the husband of Biote is nowhere stated in the text preserved to us, but it will have been known to the court and in no way a matter of dispute.) Similarly Bärbel Kramer.[8] This interpretation goes back, at least in part, to the editor of the text, Guy Wagner, who was the first to infer from ll. 17–19 that Biote and Nikias were not married and that Nikias was thus breaking "the laws"; it is

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5 This emendation appears to me to be necessary.

6 One is, on the other hand, tempted to assume that ll. 7–8 were the first mention of Nikias, as the name of his father and his *ethnikon* might be expected to have been given only at his very first appearance in the text. However it is perfectly possible that they were inserted here for the purposes of the excerpt.

7 Women needed a κύριος in order to appear before the Chrematists, see P.Heid. VIII 415, 3 comm. (but perhaps only under special circumstances, see WOLFF 1970, 135–136 n. 42); for ἐπιγράφεσθαι κύριον in this context see P.Mert. II 59 (n. 20). But Nikias cannot have been the κύριος of Biote in the trial, since it is stated in ll. 9–10 that his current whereabouts are unknown.

8 KRAMER 1999, 222: «Nikias hat sich ohne Erlaubnis durch ein königliches Prostagma oder einen Spruch der Chrematisten als κύριος der Biote eintragen lassen, obwohl ihr Vater noch lebt und er nicht mit ihr verheiratet ist. Damit verstößt er gegen die Heiratsgesetze.»

not entirely clear to me from his comments what he thought the content of the laws was (see n. 11).[9] Adam Łukaszewicz follows Wagner.[10]

That husbands appeared as κύριοι of their wives when needed is indeed well attested in the Ptolemaic papyri and would in any case have been expected to be the norm; consequently, the marital status of Biote and Nikias was of some importance in the affair. Thus far the current interpretation appears in no way implausible. One might perhaps object that the Chrematists have chosen a remarkably oblique way of saying what they mean: not "he appeared as her κύριος, although (a) her father is still alive and (b) he is not married to her", but rather "he appeared as her κύριος, although (a) her father is still alive, (b) acting in opposition to the laws concerning marriage". More generally, and considering the ubiquity of the institution in Ptolemaic Egypt, it appears slightly surprising that the most authoritative regulation on κυριεία available was a relatively incidental reference within the marriage laws, rather than special legislation (which would also have dealt, e.g., with the category of unmarried women who had lost their father). But neither objection is fatal.

When one, however, turns back to the Greek text itself, Wagner's and his followers' interpretation appears most problematic. In παρὰ τοὺς νόμους | οἷς ἐστιν πρόγραμμα | παρ᾽ ὧν χρὴ γαμεῖν Wagner takes the last words for a relative clause referring back to νόμους: παρ᾽ ὧν (νόμων) χρὴ γαμεῖν is interpreted as "the laws, according to which one must marry".[11] Wagner implies in his commentary that one might have expected παρ᾽ οὗ χρὴ γαμεῖν, referring to the immediately preceding word πρόγραμμα (see n. 9); Łukaszewicz, who accepts Wagner's interpretation and translation, speaks of an error.[12] I see a second and far greater problem in Wagner's acceptance of παρ᾽ ὧν: I cannot see how παρὰ + genitive can in this context possibly mean

[9] In his commentary WAGNER paraphrases the case as follows: «il [Nikias] a illégalement usurpé le statut de tuteur légal d'une femme dont il n'est pas l'époux et dont le père, vivant, aurait dû avoir ce statut, sauf dérogation royale sanctionnée par une ordonnance», and notes on ll. 12–19: «Les lois sont amendées par des décrets royaux ou législatifs émanant, comme on voit, du roi lui-même ou des juges, ici, les Chrematistes. Le génitif pluriel ὧν renvoie à l'évidence aux «lois», même si le plus important est le programma, le décret législatif des juges: on ne peut être le tuteur légal d'une femme avec laquelle on n'est pas marié, tant que son père est encore en vie.» For his translation see n. 11.

[10] ŁUKASZEWICZ 2003, 440–441.

[11] His translation for ll. 16–19: "mais en s'y faisant inscrire contrairement aux lois qui comportent un règlement, en vertu desquelles il faut se marier." (It is not clear to me whether this is supposed to mean "the laws - - - according to which marriages are regulated" or, conceivably, "the laws - - - according to which one must be married [*sc*. in order to obtain the guardianship]". The elegant paraphrase by Bagnall and Derow quoted above presupposes the first interpretation.)

[12] ŁUKASZEWICZ 2003, 440: «Dans l'expression παρ᾽ ὧν χρὴ γαμεῖν, l'usage de ὧν est erroné. Au lieu de παρ᾽ὧν, on s'attendrait à παρ᾽οὗ se référant au πρόγραμμα. L'erreur implique une référence à τοὺς νόμους».

"en vertu de", "in accordance with".[13] Unless one supposes some graver error in the text,[14] Wagner's understanding of the passage must on philological grounds alone be discarded.

I believe the Greek allows—and, indeed, imposes—a different interpretation: The clause παρ᾽ ὧν χρὴ γαμεῖν need not necessarily be relative; the alternative possibility, well supported by Ptolemaic parallels, is that of an indirect interrogative clause, παρ᾽ ὧν being in this case equivalent to παρὰ τίνων, "from whom"; the question must then depend on the preceding πρόγραμμα.[15] Γαμεῖν παρά τινος means "to receive a woman in marriage from someone"; examples given in the dictionaries include Plato, *Plt*. 310c–d: Οἱ μέν που κόσμιοι τὸ σφέτερον αὐτῶν ἦθος ζητοῦσι, καὶ κατὰ δύναμιν γαμοῦσί τε παρὰ τούτων καὶ τὰς ἐκδιδομένας παρ᾽ αὐτῶν εἰς τοιούτους ἐκπέμπουσι πάλιν ("orderly [decorous, moderate] people search for their own character and as far as they are able take their wives from such people, and when they themselves have girls to find a husband for, they give them to such men,

[13] See the Greek grammars for the uses of παρά with the genitive. A search in the *TLG* for the phrases παρὰ τῶν νόμων and παρὰ τοῦ νόμου turned up no example supporting Wagner's understanding of the passage in question (all cases found fall under one or another of the categories distinguished in the grammars: combinations with λαμβάνειν, ἔχειν etc., αἰτεῖν etc.; with ἀκούειν; with εἶναι, γίγνεσθαι, ὑπάρχειν (τινί); with passive verbs; with nouns, e.g., ἡ παρὰ τῶν νόμων τιμωρία). The only instance that might be adduced is Maximos the Confessor, *Quaestiones et dubia* [ed. J.H. DECLERCK, Corpus Christianorum, Series Graeca, 10, Turnhout 1982], Qu. I 79, 1–2: Τί δήποτε ἐν μέρει λεπρὸς ἀκάθαρτός ἐστιν παρὰ τοῦ νόμου, ὁ δὲ ὁλόλεπρος ὢν καθαρός ἐστιν; according to the apparatus, however, only one of the primary codices, Z (Vaticanus Gr. 2020), has the genitive, the others (C OBLD) offering τῷ νόμῳ; the dative is used in the same phrase in Qu. 23, 3–4: ἀλλὰ καὶ τὰ ἥμερα τὰ παρὰ τῷ νόμῳ ἀκάθαρτα; and Qu. 37, 1–2: τὰ παρὰ τῷ νόμῳ ἀκάθαρτα ὄρνεά τε καὶ χερσαῖα καὶ ἔνυδρα; ibid. 10–11. For other mistakes in Z (in Qu. I 79, among others) see DECLERCK's introduction, CXX–CXXI, for his general appraisal of Z ibid. and CCLII.

[14] It is certainly not entirely correct, cf. ἐμφανές for ἐμφανής in l. 9; οἷς for ἐν οἷς (?) in l. 18 (see n. 5); and perhaps Πασιστράτου for Παυσιστράτου in l. 3, see NACHTERGAEL 1998, 116–117 (cf. BL XI 76; accepted by BAGNALL–DEROW 2004, no. 128, doubted by ŁUKASZEWICZ 2003, 439).

[15] For relative pronouns in indirect questions see MAYSER 1926, 79; 1934, 52 (e.g., γράψας, παρ᾽ οὗ κομούμεθα). For indirect questions depending on substantives see, e.g., SB XIV 12034, 6–8: [Καλ]ῶς ποιήσεις πέμψας μοι | [φάσ]ιν πόθεν δύνομαι τὴν κιθάλ[ραν] σου λαβεῖν, and the case mentioned by MAYSER 1934, 52 n. 2 (UPZ I 68, 4–5; depending on ἐπισ|τόλιον ἔχων᾽τα΄ [*l*. ἔχοντα], not on ἀπόστιλον ἐπιστόλιον; and for a somewhat comparable usage [infinitive depending on a noun] see MAYSER 1926, 317–318, 321–322); further Dio Chrys. *Or*. 49.3 (vol. II p. 94.14–15 VON ARNIM): καὶ τοῖς ἄλλοις προστάττοντες αὐτοὶ παρ᾽ ἐκείνων προστάγματα λαμβάνουσιν (for the passive) ἃ δεῖ πράττειν καὶ τίνων ἀπέχεσθαι; Dion. Hal. *Ant. Rom*. 5.52.3: ἐκάλουν τοὺς συνέδρους εἰς ἀπόφασιν γνώμης, τίνα χρὴ πολεμεῖν Ῥωμαίοις τρόπον; Simpl., *In Aristotelis Categorias commentarium* (CAG VIII, *ed*. C. KALBFLEISCH, Berlin 1907), p. 184.18–19: ἐν ᾧ καὶ μέθοδον παραδέδωκεν, πῶς δεῖ λαμβάνειν τὰ ἐξισάζοντα καὶ ἀντακολουθοῦντα (FLEET 2002, 40, translates: "In doing so he introduced a way in which we can understand things that are co-extensive and correspond"). I cannot tell whether J. Mélèze Modrzejewski's translation "a regulation (*programma*) on how to get married" (in KEENAN et al. 2014, p. 473) is partly based on a similar understanding of the syntax of our text.

too"); and Plutarch, *Quaest.conv.* IV 3.1 (666e): λέγει δὲ τοὺς ἀγομένους γυναῖκας πολλοὺς παρακαλεῖν ἐπὶ τὴν ἑστίασιν, ἵνα πολλοὶ συνειδῶσι καὶ μαρτυρῶσιν ἐλευθέροις οὖσι καὶ παρ᾽ ἐλευθέρων γαμοῦσι (= 73 A 5 Diels and Kranz; *FGrHist* III A, no. 264, F 17: "he says that men marrying invite large numbers to the wedding feast, in order that many may be well-informed witnesses that they themselves are free and are taking their wife from free people"). In these two examples—as in all others adduced in the main dictionaries[16]—the context of use is that of "taking one's wife from (among) a certain family or group"; and this is also the case with the majority of parallels a search in the *TLG* brought together. But I see no reason whatsoever why the phrase could not also be applied to "taking one's wife from a person", which is the nuance needed in our text (see in following);[17] cf. these passages from Greek literature: Aesch. *Suppl.* 227–228 (WEST): πῶς δ᾽ ἂν γαμῶν ἄκουσαν ἄκοντος πάρα / ἀγνὸς γένοιτ᾽ ἄν; "How could a man marry the unwilling daughter of an unwilling father, and not become unclean?" (tr. SOMMERSTEIN 2008) (and see FRIIS JOHANSEN and WHITTLE 1980, ad loc., p. 183); and Lib. *Decl.* 42.42 (vol. VII 423.1–3 Foerster): καὶ παρὰ τίνος ἔγημεν ἂν ὕστερον, πῶς δ᾽ ἂν παῖδας ἐνουθέτησε, τίνος δ᾽ ἂν ἐκοινώνησεν ἑορτῆς, ποίων ἀγώνων, ποίων θυσιῶν; ("and from what man would he have taken a wife afterwards, how would he have admonished his sons, in what feast would he have partaken, what games, what sacrifices?" of a youth who, having been the παιδικά of a tyrant, would return to his hometown).

Thus the lines in our papyrus can be translated as follows: "against the laws, which contain a proclamation [on the subject], from whom one ought to take a woman for a wife".

Let us now try to comprehend the exact bearing of this on the interpretation of the case: As we saw, Nikias was condemned for usurping the role of guardian of Biote in some unclear past transaction most likely involving Musaios.

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[16] See *TGL* III, s.v. γαμέω, cols. 509–510; *LSJ* s.v. I.1; *DGE* IV, s.v. I.1 («c. gen. partit. para indicar el origen de la mujer Ἀδρήστοιο δ᾽ ἔγημε θυγατρῶν *se casó con una de las hijas de Adrasto*, *Il.* 14.121, o más frec. c. giro prep. de gen. ἐκ κακοῦ ... ἔγημεν *tomó esposa de baja condición* Thgn. 189, φίλων μὲν ἂν γήμαιμ᾽ ἀπ᾽ ἀνδρῶν E. *Andr.* 975, γαμεῖν ... ἐκ γενναίων χρεών E. *Andr.* 1279, παρ᾽ ἐλευθέρων γαμοῦσι *se casan con mujeres de condición libre* Plu. 2.666e, cf. Pl. *Plt.* 310c, ἐκ μειόνων γαμεῖν X. *Hier.* 1.28»). Cf. also Isocr., 19.9: Μετὰ δὲ ταῦτ᾽ ἔγημεν ἐκ Σερίφου παρ᾽ ἀνθρώπων πολὺ πλείονος ἀξίων ἢ κατὰ τὴν αὑτῶν πόλιν, "after this he took a wife from Seriphos, of a family of far greater worth than one would expect in their city".

[17] I understand γαμεῖν παρά τινος as synonymous with λαμβάνειν γυναῖκα παρά τινος; cf. Isocr., 19.46: Καίτοι τίσιν ἂν θᾶττον τὴν αὑτοῦ θυγατέρ᾽ ἐξέδωκεν ἢ τούτοις παρ᾽ ὥνπερ αὐτὸς λαμβάνειν ἠξίωσεν; and from the papyri P.Eleph. 1, 2–4 (with BL V 27): Λαμβάνει Ἡρακλείδης <Τημνίτης> | Δημητρίαν Κώιαν γυναῖκα γνησίαν παρὰ τοῦ πατρὸς Λεπτίνου Κώιου καὶ τῆς μητρὸς Φιλωτίδος ἐλεύθερος | ἐλευθέραν («[this] represents the *ekdosis* as seen from the husband's side», WOLFF 1939, 16).

In doing this he broke a law concerning, according to our interpretation, the people entitled to give a woman in marriage. There is only one transaction in which the false κύριος of a woman would at the same time be guilty of disobeying such a provision: her marriage.

I thus reconstruct the case as follows: Musaios and Biote wished to marry; to effect this, they had Nikias appear as the bride's κύριος. Since her father was alive and no legitimate reasons for his exclusion from this role existed (such as would have allowed Nikias to obtain the requisite decree, cf. ll. 13–15), it is a fair inference that he was actively opposed to the marriage. Nikias may very well have been a relative of the bride, but certainly not one whom the law allowed to take precedence of her father in this case. It may have been the father who asked for his unwanted son-in-law and the false guardian of his daughter to be punished for their actions. It is then perfectly understandable that we hear nothing of the fate of Biote herself: she will have had to go back to her father's house, to mend her—presumably—broken heart as best she could.

The next point to be elucidated is the concrete way Nikias "appeared" as the guardian of Biote, i.e., the exact meaning of the phrase ἐπεγράφη κύριος Βιότης. As with other compounds of γράφω, we find the verb ἐπιγράφω used in our documentary papyri both in its original sense of "writing down upon" and in a number of derived technical significances, denoting in each case a practical administrative outcome of such "writing down": for example, ἐπιγράφειν τινὶ ζημίαν means "to impose a fine on someone", since this was brought about by some sort of written notice or command. It is in many cases unclear whether we have the original or a derived meaning. Now, one finds the combination ἐπιγράφεσθαι κύριον often translated with "to be appointed guardian", i.e., in a derived sense. I think that in most instances the simpler interpretation "to be written in / recorded as guardian" is equally adequate and perhaps to be preferred; this is certainly the case in the not very numerous attestations from Ptolemaic times.[18] In the text studied here it would

[18] I thus take back what I wrote in P.Heid. VIII, p. 103. The *terminus technicus* for "appointing a guardian" apparently was διδόναι κύριον, see P.Enteux. 22, 7, and contrast the use of ἐπιγράφεσθαι in the same text, l. 4 (and the equivalent phrase in l. 5–6: [μὴ ἐχούσης] μου κύριον | μεθ' οὗ τὰς περὶ τούτων οἰκονομίας θήσομαι; see Guéraud on l. 4). Cf., too, the very similar use of ἐπιγράφεσθαι in cases where there is no question of formal appointment, that of contract witnesses (μάρτυς: P.Heid. VIII 414, 5–6, and the parallels listed in the comm.; BGU XIV 2367, 14–16 with BL XII 25), sureties (ἔγγυος: P.Col. IV 83, 3–4; P.Ryl. IV 588, 16–17 with BL XII 169), guarantors in a sale (βεβαιωτής – βεβαιώτρια: P.Gen.^{2} I 21, 6–7). (Also perhaps of identity witnesses [γνωστήρ: SB VI 8974, 57–58]; the exact form the γνωστεία mentioned in P.Cair.Zen. I 59019, 8–10 would have taken is unclear—some sort of written declaration?) In some of these attestations the concrete meaning "written in the contract" is emphasized by the addition of ἐπὶ τῆς συγγραφῆς and the like. A further example of ἐπιγράφεσθαι μάρτυρα is perhaps to be found in P.Lips. inv. 1452 recto, published by Scholl 2006, ll. 3–8: Διονύσιον, ὃς | [- - -]αὐτὸν ἀπογράφεσθαι Θρᾷκα | [- - -]

in any case be false to translate "he was appointed", since it is expressly stated that Nikias had bypassed the two appointing authorities, the King[19] and the Chrematists; it is obvious that what is meant is that he "was recorded, written in" as Biote's guardian, the most likely place for him to have been thus recorded being, as in most parallels for this use of the verb, a contract, the marriage contract of Musaios and Biote.[20]

There were in Ptolemaic times two types of Greek marriage contracts: One of them began with a formal declaration of the act of the *ekdosis*, the "handing over" of the bride to her new husband; the other, far better attested, took the form of a receipt for the dowry directed by the groom to the person who was giving it.[21] The bride was not always an active partner in such contracts: the ἔκδοσις could (should, really) be performed (or, more precisely: recorded in the contract as having been performed) by her father or another relative;[22] and the dowry could be (recorded in the contract as having been) paid by the father, the mother or, again, another relative.[23] In other cases—obviously

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υς κυνηγῶν σύνταγμα καθὰ δὲ | [- - -]γραφῆς ἐπεγράφη (ἐπεγράφης in SCHOLL 2006 is a typo) τῶν Μενελάου | [- - -]ἀπολογήσατο ἐπιγεγράφθαι | [- - - σ]υγγραφῆς τῆς τεθείσης etc. Setting aside all other textual problems, which I intend to treat separately, I note that ll. 7–8 could be supplemented with ἐπιγεγράφθαι | [μάρτυς ἐπὶ τῆς σ]υγγραφῆς, cf. P.Heid. VIII 414, 5–6 comm. (pp. 102–103), ll. 5–6 with καθὰ δὲ | [ἐπὶ τῆς συγ]γραφῆς ἐπεγράφη, cf. HAGEDORN & KRAMER 2010, 224, for the related phrase καθὰ συνήλλαξε and variants. However we are to understand the remarkable variation between ἀπογράφεσθαι in l. 4 and ἐπιγράφεσθαι, it is clear that the second verb is here being used in the concrete sense.

[19] Directly (?) or through the *strategos*, as in P.Enteux. 22; cf. WOLFF 1970, 76–77 with n. 48 and 142 with n. 69.

[20] The recording of the κύριος in a contract is meant in P.Enteux. 49, 7 and P.Tebt. III.1 815, fr. 4 recto I 28–29. Less clear-cut is the case of P.Mert. II 59, 7–10 (with BL IV 49): [ἀναγ]ορευθείσης κρίσεως Ἀσκλάπωνος τοῦ Διζαπ[ό]ρεως πρὸς Ἀντιγόναν Ἀλκέτου, | [κατ]αστάντες ἐπιγραφέντος τῆς Ἀντιγόνας κυρίου Ἀλκέτου τοῦ Μενάνδρου, | [πρὸ] τοῦ δικαιολογεῖσθαι ἔδωκαν ἡμῖν συγχώρησιν, ἧς ἐστιν ἀντίγραφον τὸ ὑπο|[τετ]αγμένον: Alketas does indeed appear as his daughter's guardian in the συγχώρησις appended (ll. 11–12), but l. 8 seems to refer not to this "recording", but to one that took place immediately after the appearance of the two parties in court, before the presentation of the document. Perhaps what is meant is that his name was written down in the internal records or log of the court (in addition to those of Asklapon and Antigona, who were already known to the court before their appearance on that day). (The συγχώρησις was most probably drawn up in court, but presumably before the beginning of the trial. Alketas' subscription in l. 31 [Ἀλκέτας ἐπι[γέγ]ραμμαι κύριος Ἀντιγόνας συγχωρούσης κατὰ τὰ προγεγραμμένα] could refer to either manifestation of his role as guardian [for the possibility that this and the other subscriptions record statements by the parties before the judges see WOLFF 1978, 94 n. 63].) We have no reason to assume anything similar in connection with marriage.

[21] See YIFTACH-FIRANKO 2003, 14–15 (also on the material from Roman Egypt) and 22–23.

[22] P.Eleph. 1 (the father and the mother; see n. 17). As has often been pointed out, the piece is too early to be reckoned a true part of Ptolemaic *Urkundenwesen*; still, it is important as a remnant of the legal traditions that shaped it. See MODRZEJEWSKI 1983, 53–56 (55 n. 75, on the participation of the girl's mother; see also, more generally, 68).

[23] Cf., e.g., P.Hib. II 208 (probably; the contracting party Ebruzelmis must be a relative of the bride,

depending on the age of the bride and perhaps other societal factors—she did have active participation: Either in being the one paying her own dowry (thus in dowry receipts); or, curiously enough, in performing her *ekdosis* herself in *ekdosis*-documents.[24] In both these cases, she of course needed a κύριος, as she did for any other transaction—e.g., a loan, a lease of land, etc. Since Nikias is explicitly called the recorded κύριος of Biote, it follows that her marriage contract was of the latter form, with Musaios and herself as the parties; its precise type, *ekdosis* or dowry receipt, cannot be determined.

Having arrived at this (to my mind plausible, if highly hypothetical) reconstruction of the concrete case of Musaios, Biote and Nikias, we may now proceed to a closer examination of the regulation invoked by the Chrematists in condemning the last-named man. Although its contents are not made explicit in P.Eleph.Wagner 1, its use in the context renders it practically certain that it sanctioned the traditional rights of the father; after him, other relatives will have been named, or, I suppose, the legal guardian of an orphan. A very remarkable and, I think, significant aspect of the affair is to be seen in the typology of this legislative text: it is expressly stated to have the form of a πρόγραμμα, a proclamation to the public. In this official judicial context the word must have its precise technical meaning: That of a distinct text type in use in the Ptolemaic administration, written with a primary view to publication through public posting and distinguished by the lack of a prescript and, in Ulrich Wilcken's often quoted phrase, «[einen] lapidaren Polizeistil» (the jussive infinitive being a favourite syntax).[25] Such proclamations could be is-

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see the introduction); CPR XVIII 6 (the father); XVIII 12 (the mother). P.Tebt. III.1 815, Fr. 4 recto I 2–11 (the mother); BGU VI 1283 (the father). In these cases the bride is mostly referred to by name only, without the other elements of the *Nomenklaturregel* (father's name and *ethnikon*), which would have been obligatory otherwise; in the extracts in CPR XVIII no physical description (signalement) is added for her under the contract (both aspects noted by B. Kramer, CPR XVIII, p. 81). The bride in P.Tebt. III.1 815, on the other hand, was present and is described on verso, ll. 4–6; could this have anything to do with the strange fact that her mother was without a κύριος at the time the abstract was taken down, a blank space being left in l. 4 of the recto where the guardian's name should have stood? Was the agreement left incomplete?

[24] Dowry receipts made out directly to the bride: CPR XVIII 8; 13; 17; 20 (see B. Kramer's introduction, 182–183); 28 (here with the bride's father as her κύριος) (description of the bride appended, contrast n. 23); very probably P.Freib. III 26, 29 and 31; P.Tebt. I 104. Self-*ekdosis*: P.Giss. 2 I 8–11: Ἐξέδοτο ἑαυτὴν Ὀλυ[μ]πιὰς Διονυσίου | Μα[κ]έτα μετὰ κυρίου τοῦ ἑαυτῆς πατρὸς Διονυσίου Μακεδόνος τῆς δευτέρας ἱππαρχίας ἑκατονταρούρου Ἀνταίωι Ἀθηναίωι τῶν Κινέου τῆς δευ|τέρ[α]ς ἱππαρχίας ἑκατοντ[α]ρούρωι [εἶναι] γυναῖκα γαμετήν (see the introduction by E. Kornemann, further MODRZEJEWSKI 1983, 57–60, and his text quoted in n. 41 with new material [cf. the addenda to the reprint of MODRZEJEWSKI 1983, 5]; YIFTACH-FIRANKO 2003, 43–44).

[25] WILCKEN 1921, 130–131. (For the lack of the prescript cf. BIKERMANN 1946–1948, 68–69 n. 7 [= BIKERMANN 1980, 87 n. 9], with an example from Athens of such a proclamation with prescript, IG II^2 1362.) WILCKEN insisted that the πρόγραμμα is a distinct text type; see WILCKEN 1921, 129 (also, e.g., UPZ I, p. 458; see, too, his remarks on BGU VI 1212 in BGU VI, p. 192). Others

sued at all levels of administrative hierarchy, including the very highest one in Alexandria; this must of course have been the case with our πρόγραμμα that regulated a matter of Pan-Egyptian concern.[26]

Now, in the third century, from which our papyrus comes, Ptolemaic legislation was usually codified in διαγράμματα, more or less extensive and systematic collections of ordinances on fundamental aspects of life in the Kingdom;[27] this is the text type we should expect to have been used if our regulation παρ᾽ ὧν χρὴ γαμεῖν had been part of a whole series touching on various aspects of marriage, possibly divorce, inheritance, etc.;[28] or concerning the proper form of contracts—in this case, marriage contracts; we do possess

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have correctly stressed that the main unifying feature of all Ptolemaic προγράμματα is mode of publication rather than content, which can vary from a simple invitation to an actual ordinance (see above); see SCHÄFER 1933, 612–613; LENGER 1944, 115–116, and C.Ord.Ptol., p. XXI; but this does not, I think, entail that it was not a recognizable text type in each context it was used in. I thus do not agree with WÖRRLE 2010, 372 with n. 59, if he actually means that any sort of legislative text could be termed a πρόγραμμα when made public through posting; certainly not in a technical context such as ours. (A case of synonymous use of πρόγραμμα and πρόσταγμα does occur in the related declarations P.Hels. 15, 8–9 and P.Hels. 11, 5–6 [but I am not sure of the reading here; πρόγραμμα seems to me equally possible. It could certainly be that a simple notification by the nome authorities rather than a royal command is meant; but our knowledge of the Ptolemaic *Deklarationswesen*, on which see now ARMONI 2012, 205–218 and 226–227, is still too scant to exclude the second possibility].) For the usage in Roman times see now STROPPA 2004; here we do find the word used interchangeably with other terms, cf. STROPPA 2004, 178–185 (but also 196–197), and WILCKEN 1921, 132–133 (and cf. the very interesting surmise of BIKERMAN 1946–1948, 83 [= BICKERMAN 1980, 102], that Flavius Josephus confounds Hellenistic [Seleucid] with Imperial usage). Speaking of royal proclamations WILCKEN 1921, 130–131, further identified as a basic characteristic their being sent to officials with the order to publish. I finally note the interesting observation of WILHELM 1909, 181, that προγράφειν and προγραφή can be used to denote the written pendant to προκηρύττειν and προκήρυξις.

[26] Two προγράμματα clearly emanating from the King and appended to royal ἐντολαί are contained in P.Rev. col. XXXVI (= C.Ord.Ptol. 17) and XXXVII (= C.Ord.Ptol. 18); cf. M.-Th. LENGER, C.Ord.Ptol., p. XXI, and already LENGER 1944, 115–116 and 141–142. The proclamation in P.Tebt. III.1 707 could be a response either to a local Arsinoite situation or, just possibly, to a nationwide one; if the latter, it must emanate from Alexandria (it was not absolutely necessary to state this in the cover letter). I further note that the text of the wanted notice UPZ I 121 = C.Ptol. Sklav. I 81 (certainly a πρόγραμμα, though not expressly termed one) was sent on to the Chora from Alexandria, where the theft and the escape of the slaves sought had occurred (see Wilcken's introduction, 568); and yet another possibility is that of a proclamation of local application being published by nome officials on the orders of the administration in Alexandria; cf. P.Ryl. IV 572, 65–73 with BGU VI 1214, 22–27; P.Tebt. I 27, 70–75; and UPZ I 106–108, where the King and Queen on a visit to Memphis authorize among other things a petitioner's wish to have the local authorities set up a proclamation before his house forbidding forced entry (see Wilcken's introduction to UPZ I 106–109 and to no. 108 in particular). Only the first three cases mentioned are good parallels for ours.

[27] See P.Heid. VIII, pp. 34–35. On the chronological distribution see MODRZEJEWSKI 1974, 371–372 (= MÉLÈZE MODRZEJEWSKI 2011, 50–52); cf. *ibid*., 373–376 (= MÉLÈZE MODRZEJEWSKI 2011, 52–57), for the areas covered.

[28] But note H.J. WOLFF's doubts as to the existence of such legislation in the Ptolemaic kingdom; see WOLFF 2002, 38–39, with references in n. 10; and cf. here, n. 44.

a fragment of just such a normative text (BGU XIV 2367: on loan contracts), in all probability a *diagramma*.[29]

Instead, our regulation was promulgated as a πρόγραμμα—a text type that in Ptolemaic times was, to judge from the not very numerous surviving examples[30] and references in other papyri, highly specific, dedicated to one rather than a multitude of subjects. Its main purpose was quick and thorough dissemination of information, aimed at the general public or a special group or even an individual who could not otherwise be reached, as in the case of notifications for the appearance of accused persons to be tried.[31] Sometimes it contained a prohibition, especially in police and related matters;[32] at other times it requested information (and active cooperation) from the public, so in the case of wanted notices for escaped slaves,[33] or invited expressions of interest, as with proclamations of auctions[34] or of openings for positions in the Police.[35] In other cases, more relevant for our purposes, the form was used to apprise the public of the introduction of a new administrative, fiscal or other measure, short- or longer-term, and, if needed, to enjoin compliance with it. So, for example, in connection with the ἀπόμοιρα tax,[36] a new tariff for Egyptian contracts,[37] the set price for myrrh.[38] (Note further the—as far as I can see, still unpublished—Berlin text P.Berol. inv. 13863 «über Liturgie», mentioned by SCHÄFER 1933, p. 612.) Most προγράμματα served immediate and transient practical needs; it is only with the handful of cases where the measure promulgated was to be of longer effect[39] (or could be used as

[29] See P.Heid. VIII, pp. 91–92.

[30] But I have not searched exhaustively for such texts.

[31] E.g., SB V 7609 (actual text of such a πρόγραμμα); BGU VIII 1774, 12–15, etc. See SCHÄFER 1933, 611–617.

[32] P.Tebt. I 27, 70–75 (see Ch. Armoni and K. Maresch, P.Köln XI, pp. 122–123); P.Tebt. III.1 707, 6–14; UPZ I 106–108 (see Wilcken, UPZ I, p. 458).

[33] See C.Ptol.Sklav. I 71 (= PSI VI 637), 5–6 [?] and C.Ptol.Sklav. I 82 (= SB VI 9532), 10–12; for an actual example (without the term) C.Ptol.Sklav. I 81 (= UPZ I 121).

[34] See ARMONI 2012, 107–119 and 170.

[35] SB XIV 11860, 10–12, cf. P.Genova III 101–102, with ἔκθεμα used instead of πρόγραμμα.

[36] P.Rev. col. XXXVI; and cf. col. XXXVII.

[37] BGU VI 1214, 22–27; cf. the related text P.Ryl. IV 572.

[38] P.Tebt. I 35, 15–19.

[39] P.Rev. col. XXXVI contains, apart from specific instructions, a more general order about the payment of the ἀπόμοιρα in ll. 18–19. The proclamation mentioned in BGU VI 1214 is obviously to apply till further notice. The prohibition in UPZ I 106–108 (see nn. 26 and 32) was of course meant to protect the petitioner from all future infractions, but it was of extremely limited scope. Cf. the text discussed by BIKERMAN 1946–1948 (= BICKERMAN 1980), a prohibition meant to be permanent, with a fine for violations.

precedent)[40] that the reference in our papyrus can be compared. But there is no perfect parallel; I have not succeeded in finding another πρόγραμμα regulating a matter of private law.

On the basis of all this, we may thus characterize the regulation cited by the Chrematists: It was not part of a comprehensive legislative text on marriage, but concerned (mainly or exclusively) a very specific point, the ἔκδοσις of women; it was promulgated in a form that guaranteed quick and wide dissemination and one that was not the norm in such matters. It seems, therefore, that the measure in its particular form was not a part of the early Ptolemies' regular legislative activity, but rather a response by the administration to some concrete situation or occasion, which was felt to require immediate attention or rectification. On the other hand, we have seen that the proclamation basically affirmed or reaffirmed the father's right to perform the ἔκδοσις of his daughter—what situation could this have been a response to?

Now, scholars have often emphasized the considerable freedom and independence of women in Ptolemaic Egypt—the obvious reference point being Classical and very early Hellenistic Athens, for which we possess valuable information in Menander's comedies (the poet had only been fifty years dead when our text was written). The possibility, already mentioned above, of women giving themselves in marriage, self-*ekdosis*, attested, it is true, only once in our Ptolemaic material, but also in a papyrus of Roman times (P.Oxy. XLIX 3500), strongly suggesting continuity, is singled out, e.g., by J. Mélèze Modrzejewski as a marked instance of this changed position;[41] but other aspects of marriage could also be cited; the assumption by the woman of the role of giver of her own dowry (in dowry receipts) is surely another manifestation of the same evolution.[42] Such innovations are ultimately connected with the change in sociological conditions from the ancient *polis* to the kingdom of the Ptolemies.[43]

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[40] So, I suppose, in the case of P.Tebt. III.1 707, 6–14.

[41] Mélèze Modrzejewski 2011, 373: «En revanche, on peut fort bien considérer comme étant "d'avant-garde" les femmes qui accomplissent seules l'acte de leur *ekdosis*, c'est-à-dire qui se donnent elles-mêmes en mariage. Dans la Grèce classique, une telle "auto-*ekdosis*" de la femme s'associait à la barbarie ou à la prostitution. C'est ainsi qu'Hérodote évoque le cas des filles lydiennes qui faisaient commerce de leurs charmes pour se constituer un trousseau, puis se donnaient elles-mêmes en mariage. Dans l'Athènes de Ménandre, la femme qui se donne elle-même en mariage, comme Glycéra dans *La fille aux cheveux coupés*, est une courtisane; son statut est celui d'une concubine (*pallake*). Au contraire, dans le monde hellénistique, la femme peut parfaitement effectuer elle-même son *ekdosis* en vue d'une union légitime. Le fait est attesté pour l'Égypte par deux documents papyrologiques; un document de Doura-Europos et le roman de *Chairéas et Callirhoé* de Chariton d'Aphrodisias illustrent son extension au-delà du cadre égyptien.»

[42] Noted by B. Kramer, CPR XVIII, p. 53.

[43] See, e.g., Modrzejewski 1983, 53, 67–68 (on the disintegration of traditional *ekdosis*), 70–71; Wolff 2002, 37. More generally Rowlandson 1998, 162–164.

It is, I believe, against this background that the promulgation of the πρόγραμμα cited in P.Eleph.Wagner 1 can best be understood: namely, as an attempt by the Ptolemaic state to stem these developments and to shore up the traditional institution of marriage by ἔκδοσις by the father or other male relative (and, by implication, the patriarchal order). That no explicit regulation on the matter had existed up to that point is perfectly understandable: For an earlier generation, it may still have been self-evident who was supposed to give a girl in marriage; in any relevant mention in legislative texts, the authors may have deemed a simple ὁ ἐκδιδούς sufficient, without further specification.[44]

The concrete occasion for this intervention of the authorities may have been provided by an earlier case of the same sort as that which led in 241/240 BCE to the condemnation of Musaios and Nikias—the complaint of another circumvented father? Or perhaps, less dramatically, a query by a *syngraphai*-scribe wondering whether he was doing the right thing?[45] Be that as it may, the fact that the implementation of the regulation primarily rested with such scribes may serve in part to explain the choice of its mode of promulgation (as opposed, this time, to a πρόσταγμα): The drawing up of Greek contracts was in that period farmed out by the state in the framework of the monopoly system (certainly to the μονογράφοι for simple dowry receipts, and possibly to the πραγματευόμενοι τὰς γαμικὰς συγγραφάς for *ekdosis*-agreements);[46] thus the administration may have decided to publicize the new measure within this system and use its facilities—public announcements played a major role in its operation. Our πρόγραμμα may, incidentally, have been formulated as a prohibition: "No one may give a woman in marriage except her father, ...".[47]

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[44] Because of this possibility, the case cannot confidently be used to support Wolff's doubts as to the existence of such legislation under the Ptolemies (n. 28).

[45] The occasion for the measure need of course not have been (and most probably was not) stated in the proclamation itself; for a (royal? see n. 26) πρόγραμμα stating the motivation for the measure in the typical form "whereas we are informed that ...", see P.Tebt. III.1 707, 7–11, and for royal commands with a similar rationale see, e.g., C.Ord.Ptol. 24 (= P.Hal. 1, 166–185); C.Ord.Ptol. 53 (= P.Tebt. I 5), 85–92.

[46] If these agreements are to be equated with the συγγραφαὶ συνοικισίου, on which more elsewhere; see n. 49. That the πραγματευόμενοι τὰς γαμικὰς συγγραφάς (cf. YIFTACH-FIRANKO 2003, 67 n. 59) already existed in 235/234 BCE is now suggested by P.Poethke 8, 76 (= *APF* 57, 2011, p. 42, l. 137); their precise nature (monopoly farmers or officials) unfortunately remains a matter of doubt.

[47] I had originally thought that the πρόγραμμα the regulation was promulgated in might have been issued by the fiscal administration and have concerned the contact of the public with the πραγματευόμενοι τὰς γαμικὰς συγγραφάς (possibly at their first introduction?). But I find it difficult to accept that a proclamation of that nature could have contained details of the sort implied here.

It remains a matter of doubt which development the regulation was designed to combat. One way to observe the letter but not the true spirit of the institution of ἔκδοσις was, as already mentioned, self-*ekdosis* by the bride herself; our only Ptolemaic example for this dates to the year 173 BCE (P.Giss. 2). Because self-*ekdosis* of virtuous women is such a departure from the customs of Classical times, it has in the past been doubted whether it could already have been practised in the third century;[48] our case could be an indication that it indeed was. It is to such a practice that the formulation παρ᾽ ὧν χρὴ γαμεῖν can most naturally be referred: a man should take his wife from the hands of her father or other relative, not have her give herself to him. Another, even more radical way to flout convention was to forgo (or defer) the process of ἔκδοσις altogether and begin the joint life with only the dowry receipt to protect the wife's interests. According to one (not uncontested)[49] theory, this was the stage reached around the beginning of the second century BCE, with «extended» dowry receipts that already contained regulations for the common life. Could people already have been doing this about the middle of the third century BCE?[50] In this case the Chrematists (or the proclamation itself) would be using the phrase "from whom one ought to take a wife" more loosely, to denote not just the proper person to perform the ἔκδοσις, but the proper way to perform (or, more precisely: to record) a marriage altogether. In both cases we are constrained to admit that developments that we thought belonged to the beginning of the second century were already present much earlier; we are once more made conscious of the paucity of our material for Ptolemaic marriage and divorce and of the consequent uncertainty of any attempt to sketch an evolution. I suppose there are other possibilities, but I can think of nothing particularly attractive (it is, e.g., hardly likely that strange men would suddenly feel the urge to provide dowries for girls to whom they were not related, so that the state should wish to intervene. A more interesting possibility is the right of the mother to perform the ἔκδοσις, a practice current in Ptolemaic and Roman Egypt;[51] but it seems to me doubtful that there could be very serious objections to this custom).

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[48] WOLFF 1939, 21 n. 67.

[49] The theory is that of WOLFF 1939, 7–34; for criticism and a divergent interpretation of the evidence see now YIFTACH-FIRANKO 2003, 55–72. I intend to treat the matter at length in the publication of the dowry receipt P.Heid. inv. G 705 + 726.

[50] But see already WOLFF 1939, 21 (on BGU VI 1283 from 216/215 BCE) and 27 («During the second century B.C. at the latest the evolution reached the point where it was no longer generally believed that *ekdosis* was a necessary condition of lawful marriage. - - - Yet if I am right, the change had really happened some generations earlier, and, potentially at least, it was even inherent in the framework of the Greek family law in the Egyptian Chora from the very beginning»; emphases mine).

[51] See n. 22 and YIFTACH-FIRANKO 2003, 43–44.

A final question that must remain unanswered concerns the exact relation of the regulation cited to the case tried in P.Eleph.Wagner 1: Is Nikias guilty because he appeared as the κύριος of Biote in a self-*ekdosis* document (see above), whereas self-*ekdosis* runs counter to the πρόγραμμα? Or is he guilty because in appearing as her κύριος in her marriage contract he had in the eyes of the Chrematists acted as the ἐκδιδούς, a role reserved for others by the proclamation? And was there, after all, no specific legislation penalizing the usurpation of the κυριεία of a woman?

If the reconstruction offered above, according to which the Ptolemies at some point before 241/240 through their proclamation and again in that year through the conviction of Musaios and Nikias were trying to reverse the decline of traditional marriage, is correct, it remains to be noted that the attempt failed utterly: both self-*ekdosis* and dowry receipts as binding marriage contracts (including ones where the bride was herself paying the dowry, thus comparable to self-*ekdosis*) survived into the second century and onward. One wonders whether Musaios, Biote and Nikias lived to see the change.

BIBLIOGRAPHY

ARMONI 2012
CH.ARMONI, *Studien zur Verwaltung des ptolemäischen Ägypten: Das Amt des* Basilikos Grammateus, Paderborn.

BAGNALL & DEROW 2004
R.S. BAGNALL & P. DEROW, *The Hellenistic Period. Historical Sources in Translation*, 2nd ed., Malden (MA)-Oxford.

BIKERMAN 1946-1948
É. BIKERMAN, *Une proclamation séleucide relative au temple de Jérusalem*, «Syria»25, 67–85 (= [with slight changes] E. BICKERMAN, *Studies in Jewish and Christian History*, II, Leiden 1980, 86–104).

COWEY & KALTSAS 1998
J.M.S. COWEY & D. KALTSAS, *P.Eleph. DAIK 1*, «ZPE» 123, 149–150.

FLEET 2002
B. FLEET (tr.), *Simplicius*, On Aristotle's "Categories 7–8", Ithaca (NY).

FRIIS JOHANSEN &WHITTLE 1980
H. FRIIS JOHANSEN & E.W. WHITTLE, *Aeschylus*: The Suppliants, II, Copenhagen.

HAGEDORN & KRAMER 2010
D. HAGEDOR & B. KRAMER, *Vorladung: P.UB Trier S 188-82 + S 188-119 (16,3 x 24,5 cm, Recto und Verso), Herakleopolis, 8. August 183 v. Chr.*, in: H. KNUF et al. (eds.), *Honi soit qui mal y pense. Studien zum pharaonischen, griechisch-römischen und spätantiken Ägypten zu Ehren von Heinz-Josef Thissen*, Leuven-Paris-Walpole (MA), 219–232.

KEENAN 2014
J.G. KEENAN et al. (eds.), *Law and Legal Practice in Egypt from Alexander to the Arab Conquest. A Selection of Papyrological Sources in Translation, with Introductions and Commentary*, Cambridge.

KRAMER 1999
B. KRAMER, *Urkundenreferat 1998*, «APF» 45, 214–280.

LENGER 1944
M.-Th. LENGER, *Les lois et ordonnances des Lagides*, «CE» 19, 108–146.

ŁUKASZEWICZ 2003
A. ŁUKASZEWICZ, *Quelques observations sur les chrématistes de Syène (P.Eleph. DAIK. 1)*, in: G. THÜR & F.J. FERNÁNDEZ NIETO (eds.), *Symposion 1999. Vorträge zur griechischen und hellenistischen Rechtsgeschichte, Pazo de Mariñán, La Coruña, 6.–9. September 1999*, Köln-Weimar-Wien, 433–442.

MAYSER 1926
E. MAYSER, *Grammatik der griechischen Papyri aus der Ptolemäerzeit, mit Einschluß der gleichzeitigen Ostraka und der in Ägypten verfaßten Inschriften*, II.1, Berlin-Leipzig.

MAYSER 1934
E. MAYSER, *Grammatik der griechischen Papyri aus der Ptolemäerzeit, mit Einschluß der gleichzeitigen Ostraka und der in Ägypten verfaßten Inschriften*, II.3, Berlin-Leipzig.

MODRZEJEWSKI 1974
J. MODRZEJEWSKI, *Note sur la législation royale des Lagides*,

in: *Mélanges d'histoire ancienne, offerts à William Seston*, Paris, 365–380 (= J. MÉLÈZE MODRZEJEWSKI, *Droit et justice dans le monde grec et hellénistique*, Varsovie 2011, 43–61).

MODRZEJEWSKI 1983
J. MODRZEJEWSKI, *La structure juridique du mariage grec*, in: P. DIMAKIS (ed.), *Symposion 1979. Vorträge zur griechischen und hellenistischen Rechtsgeschichte, Ägina, 3.–7. September 1979*, Köln-Wien 37–71 (= J. MÉLÈZE MODRZEJEWSKI, *Statut personnel et liens de famille dans les droits de l'Antiquité*, Aldershot-Brookfield [Vt] 1993, no. V [with addenda at the end of the vol., pp. 4–5]).

MÉLÈZE MODRZEJEWSKI 2011
J. MÉLÈZE MODRZEJEWSKI, *La famille en droit hellénistique: permanences et mutations*, in: IDEM, *Droit et justice dans le monde grec et hellénistique*, Warsaw, 359–378 (I have not seen the original publication from 1999).

NACHTERGAEL 1998
G. NACHTERGAEL, *À propos d'un papyrus documentaire et d'un ostracon biblique d'Éléphantine*, «CE» 73, 116–120.

ROWLANDSON 1998
J. ROWLANDSON (ed.), *Women and Society in Greek and Roman Egypt. A Sourcebook*, Cambridge.

SCHÄFER 1933
D. SCHÄFER, *Zwei spätptolemäische Ladungsprogrammata*, «Aegyptus»13, 610–620.

SCHOLL 2006
R. SCHOLL, *Ein Syntagma der Jäger*, «AncSoc» 36, 97–109.

SOMMERSTEIN 2008
A.H. SOMMERSTEIN (ed. & tr.), *Aeschylus* [I]: *Persians; Seven against Thebes; Suppliants; Prometheus Bound* (LCL, 145), Cambridge (MA)-London.

STROPPA 2004
M. STROPPA, *Il termine προγραμμα nella documentazione papiracea dell'Egitto romano*, «Aegyptus» 84, 177–200.

WILCKEN 1921
U. WILCKEN, *Zu den Edikten*, «ZRG RA» 42, 124–158.

WILHELM 1909
A. WILHELM, *Beiträge zur griechischen Inschriftenkunde. Mit einem Anhange über die öffentliche Aufzeichnung von Urkunden*, Wien.

WOLFF 1939
H.J. WOLFF, *Written and Unwritten Marriages in Hellenistic and Postclassical Roman Law*, Haverford (PA).

WOLFF 1970
H.J. WOLFF, *Das Justizwesen der Ptolemäer*, München[2].

WOLFF 1978
H.J. WOLFF, *Das Recht der griechischen Papyri Ägyptens in der Zeit der Ptolemäer und des Prinzipats*, II: *Organisation und Kontrolle des privaten Rechtsverkehrs*, München.

WOLFF 2002
H.J. WOLFF, *Das Recht der griechischen Papyri Ägyptens in der Zeit der Ptolemäer und des Prinzipats*, I: *Bedingungen und Triebkräfte der Rechtsentwicklung*, ed. by H.-A. Rupprecht, München.

WÖRRLE 2010
M. WÖRRLE, *Epigraphische Forschungen zur Geschichte Lykiens VIII. Ein ptolemäisches Prostagma aus Limyra über Mißstände beim Steuereinzug*, «Chiron» 40, 359–396.

YIFTACH-FIRANKO 2003
U. YIFTACH-FIRANKO, *Marriage and Marital Arrangements. A History of the Greek Marriage Document in Egypt, 4th Century BCE – 4th Century CE*, München.

Once More on the Perpetual Guardianship of Women

PAUL J. DU PLESSIS

ABSTRACT

The aim of this short piece is to investigate a statement by Gaius in his Institutes concerning the motivations for the perpetual guardianship of women in Roman law. Using a structuralist approach, the main argument put forward in this piece is that Gaius' statement should be viewed within the context of larger social forces at work in Roman society.

No volume devoted to the theme of 'family and family property' would be complete without a contribution focusing on one of the most perplexing areas of Roman family law, namely the perpetual guardianship of women. This topic, which has been studied by a number of authors,[1] has conventionally piqued the interest of legal historians owing to a text by the second-century jurist, Gaius:

> Gai. 1, 190
>
> Feminas vero perfectae aetatis in tutela esse fere nulla pretiosa ratio suasisse videtur. nam quae vulgo creditur, quia levitate animi plerumque decipiuntur et aequum erat eas tutorum auctoritate regi, magis speciosa videtur quam vera: mulieres enim quae perfectae aetatis sunt, ipsae sibi negotia tractant, et in quibusdam causis dicis gratia tutor interponit auctoritatem suam; saepe etiam invitus auctor fieri a praetore cogitur.
>
> 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 the guardian interposes his authorisation for form's sake, he is often compelled by the praetor to give authorisation, even against his wishes. [Gordon Robinson translation]

This text, in which Gaius expresses doubt as to whether the current state of the law in the mid-second century CE is satisfactory, contains two important statements. The first of these is Gaius' summary of an important «popular opinion» regarding the reason for the existence of the rule; the second is an observation about «reality» as opposed to «law». It is these two statements that will form the focus of this contribution. But before these matters can be addressed, a few comments about the nature of the source are required. In its previous publications, the LDAS (Legal Documents in Ancient Societies) Group has tended to focus on «documents» in a narrow sense (letters, instruments of commerce) with a view to expanding existing knowledge of law and, more specifically, legal practice. In this contribution, I wish to advocate the inclusion of a legal treatise as a «document» for the purposes of this type of study. My reasons for doing this are twofold. The first is the nature of Gaius's Institutes. It is the only nearly complete legal treatise from Antiquity in existence and therefore provides a unique perspective on legal literature of the «classical period». In second place, as modern scholars increasingly begin to suggest that Roman legal literature could also be treated as literary texts and therefore subjected to

[1] For a survey see DIXON 1984; LAMBERTI 2011; 2014.

the same modes of historical enquiry as, say, Livy or Horace, a fresh look at these may provide new insights.[2]

It is not my intention to provide a complete overview of the law regarding the perpetual guardianship of women in Roman law as this has been comprehensively explored by a number of authors.[3] Rather, I wish to stress three broad lines of development in the law on guardianship of women that accounts for Gaius's statement in the mid-second century CE. The first point to make is that the Romans regarded it as a uniquely Roman phenomenon.

> Gai. 1, 193
>
> Apud peregrinos non similiter, ut apud nos, in tutela sunt feminae; sed tamen plerumque quasi in tutela sunt: ut ecce lex Bithynorum, si quid mulier contrahat, maritum auctorem esse iubet aut filium eius puberem.
>
> Among foreigners, women are not in guardianship in the same way as with us, yet they are for the most part in a sort of guardianship; see, for example, the statute [law] of the Bithynians which orders that if a woman enters into a contract her husband or her adult son must give authorisation. [Gordon Robinson translation]

This comment by Gaius is interesting for at least two reasons. First, it locates Roman guardianship of women within the larger context of the legal cultures of the Mediterranean (an early form of comparative law).[4] This is not an unimportant point as, according to Gaius's account of the sources of Roman law in the first paragraph of his book, Roman law consisted of three overlapping spheres of law, the smallest of which was the *ius civile*, followed by two larger spheres, the *ius gentium* and the *ius naturale*.[5] From Gaius's statement about guardianship of women, it is clear that the matter originated from the *ius civile*, but that it was at the same time compatible with the *ius gentium* of the surrounding legal cultures. This may also explain the comment, discussed more fully below, that according to popular perception, it was fair (*aequum est*), that all women should be under perpetual guardianship.

The second point is that the law of perpetual guardianship of women was intimately connected to social expectations in Roman society regarding the making of a will and the social context of the larger *familia* that surrounded every marriage in Roman law.[6] The normal expectation was that matters of

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2 See generally POTTER 1999.

3 DIXON 1984; LAMBERTI 2014 for a survey of the literature.

4 For a survey of what the Romans perceived to be the position among the Germanic tribes, see Tac. *Germ*. 18–19.

5 Inst.Gai.1.1.

6 GARDNER 1991; MILNOR 2011; RAWSON 2013.

guardianship of women would be resolved according to the instructions of the testator as described in a valid Roman will. It was only where the will had failed (or no will had been drafted), both exceptional circumstances, that the Roman State intervened through the Praetor to appoint a guardian.

The third and most important point is that from a relatively early point in the development of the law on perpetual guardianship of women, a woman could influence the appointment of a guardian in a variety of ways.[7] The earliest form of intervention was where a widow, who had been married with *manus*, was permitted in her late husband's will to choose her own guardian (*tutor dativus*). This seems to have been permitted from c. 186 BCE. It is not altogether clear why women were given such freedom in these circumstances, but Gardner convincingly speculates that social pressure from the surrounding *familia* and the fact that widows in these cases would not inherit much property rendered this provision less important than it would appear at first glance. Here, the social reality of Roman families should not be forgotten. As Rawson states:

> Most men at Rome probably did not marry until they were in their mid to late twenties (early twenties for elite families), about ten years older than their spouses.[8]

To this may be added that the consent of the guardian was only really required for commercial transactions involving *res mancipi*.[9] As the number of *res nec mancipi* grew during the course of the Republic, one must assume that the number of occasions on which the guardian's consent was required declined substantially.

The final legislative intervention in the law of perpetual guardianship of women occurred during the reign of the Emperor Augustus who allowed women to be freed from the requirement of guardianship by successfully petitioning to be granted the dispensation of the *ius trium liberorum* (four children in the case of freedwomen). It also became possible for women to petition to be made *sui iuris*, therefore dispensing with the requirement of having a guardian. According to Gardner, this was the final nail in the coffin for the institution as it became almost impossible to enforce thereafter.[10] It has to be noted, though, that 3 (or 4) children was a high price to pay for a Roman woman. As Rawson states:

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7 For a survey of this development, see GARDNER 1991, 14-18.

8 RAWSON 2013, 96.

9 GARDNER 1991, 18.

10 GARDNER 1991, 21.

> It might take a couple six successful pregnancies to achieve three live children who would survive beyond early childhood. Wives could die in childbirth, and remarriage for the widowed husband would not have been easy if, as is often claimed, the proportion of females in the population was reduced by the practice of abandoning ('exposing', the practice of *expositio*) more female babies than males.[11]

Be that as it may, it seems to have still been current law in the time of Gaius by the mid-second century CE and, according to Schulz, was only finally scrapped from the law books during the reign of Justinian.

To the legal historian, this presents an interesting question. Why, if the law was already practically unworkable by the reign of Augustus, did it remain on the books for some time thereafter? Does this necessarily show that law was out of step with reality and remained as such for a few centuries?[12] Given the innate conservatism of law in general, and Roman law in particular, this is certainly a possibility. To this may be added the importance of cultural convention. Others such as Schulz maintain that it was merely by accident that the Romans did not abolish perpetual guardianship of women:

> One may justly raise the question as to how this *tutela* could be preserved throughout the classical period although its abolition was already due at the end of the Republic, but the answer is very simple. During the troublous [sic] times of the late Republic the Romans did not find time to abolish it, and the reactionary legislation of Augustus could certainly not be expected to do so.[13]

Schulz's argument, while interesting, does appear somewhat unconvincing. It seems hardly likely that the Roman lawgivers «forgot» to abolish it. Rather, as I will argue in the remainder of this piece, there may be more to this apparent oversight that first meets the eye. In order to do so, we must return to the reasoning of Gaius in the text quoted at the start of this piece.

Let us take the issue of «popular» perception first. According to Gaius, there was a popular perception that it was fair (*aequum est*) that women of age should be subject to guardianship owing to their *levitas animi*. This popular perception, according to Gaius, was more specious than true (*magis speciosa … quam vera*) and therefore could not be said to be a sufficient reason for maintaining the existing state of the law whereby women of age should be subject to guardianship. It is this popular perception that requires further investigation.

In his investigation of this popular perception, Schulz showed that the notion of the *levitas animi* of Roman women was most likely based on an Aris-

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11 Rawson 2013, 96.

12 Gardner 1991, 5; Parkin & Pomeroy 2007, 72.

13 Schulz 1954, 181.

totelian notion first adopted by Cicero and thereafter repeated by a number of Latin writers during the course of the Empire.[14] This then means that it was not the «original» justification for the introduction of the legal rule. Rather, it was a subsequent «popular» justification based on a Greek *topos* that had arisen in the late Republic (a period of profound change in the legal position of women in Roman society).[15] Furthermore, according to Schulz, such a view could not be reconciled with the changes introduced by the Augustan legislation:

> If the *infirmitas sexus* were a fact the *ius liberorum* would have been a punishment and not a reward, since the granting of the *ius liberorum* could not possibly remove this infirmity.[16]

Thus, this comparatively recently introduced «popular» justification for the perpetual guardianship of women did not reflect the realities of the second century CE. Not only did it not reflect the realities of the period, it was also, according to Schulz, wrong as far as the original justification for the rule was concerned. After investigating a passage from Livy, our main source for early Roman law, he concludes:

> This is the basis of the Roman tutelage of women; … this tenet of old Roman custom: public life is exclusively the business of the man; it forms part of his *officium*. … However the emancipation of women during the last century B.C. resulted in the overthrow of this old Roman custom.[17]

This then, according to Schulz was the real reason for the introduction of the notion of perpetual guardianship of women: ancient Roman custom, bound up with perceptions of different spheres of work for men and women. This would also be compatible with Gaius's observations elsewhere that guardianship of women originated from the *ius civile* and was a uniquely Roman institution.

But if this was the true motivation for the introduction of this rule in the first place and it had, by the second century CE become out of step with the factual reality in the Roman society, it must be asked why the Roman lawgivers chose to retain it. To that end, Culham observes:

> Perhaps men retained a pointless legal institution to preserve the appearance of male authority over property.[18]

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[14] Schulz 1954, 180-181; Gardner 1991, 21.

[15] See generally Culham 2004; Treggiari 2005; Lamberti 2011; Milnor 2011.

[16] Schulz 1954, 182.

[17] Schulz 1954, 183. See also Dixon 1984, 356-371

[18] Culham 2004, 151-152.

This statement cuts to the heart of the issue. On face value it would seem that the Roman lawgivers (exclusively male), chose to preserve a legal institution that in practice had long since become difficult to operate mainly because it preserved the Roman sense of the 'natural order' of men's work and women's work.[19] It is difficult to deny that there might be some elements of this reasoning behind the retention of this law. But perhaps one should also view this statement of Gaius from the perspective of Eugen Ehrlich's notions of «dead law» vs. «living law». When does «living law» become «dead law»? This is a difficult question to answer, but, I wish to contend, that this text by Gaius provides us with the Roman answer to this problem.

Structurally, Gaius' statement may be set out as follows. The existence of Rule A is [or has come to be] popularly justified by Reason B. Reason B [in the view of Gaius] is more specious than real. An example of the practice of this rule is given. This structural analysis of the rule clearly shows the problem. Rule A [the perpetual guardianship of women] is an old rule from the *ius civile* that was introduced in the mists of time. Whatever its original motivation may have been from a legal perspective (Roman *mores* and the allocation of spheres of «work»), the legal justification for the rule and the subsequent popular justification for it were incompatible. This, combined with the increased social emancipation of women and the practical manifestation of their abilities to manage their own assets without the need of a guardian, eventually led to a crisis of confidence in the continued existence of the rule. This statement by Gaius also demonstrates another facet of the interaction between law and society quite nicely. Legal reasoning and popular reasoning are not the same, but popular perception as to the motivation for legal institutions can do much to demonstrate when legal institutions become out of step with social perceptions.

Finally, this text by Gaius also shows an interesting moment in the life of a legal rule. Here, a legal rule fell out of step with reality. This happened in three stages. First, the legal rule was enforced (because it was in step with society). Then society changed and the legal rule applied to fewer scenarios than before. And yet the force of tradition did not permit its complete abrogation. Rather, law and reality became out of sync, thereby also providing an opportunity for the rise of popular [if spurious] justifications for the rule. Once popular perception and factual reality had begun to undermine the rule, the Roman lawgivers had little option but to let it fall into desuetude (the preferred method of dealing with ancient rules). It would take the reformist tendencies of a Justinian to finally sweep it from the books.

[19] See generally LENDON 1997; MCDONNELL 2006.

BIBLIOGRAPHY

CULHAM 2004
PH. CULHAM, *Women in the Roman Republic*, in: H. FLOWER (ed.), *The Cambridge Companion to the Roman Republic*, Cambridge, 139-159.

DIXON 1984
S. DIXON, *Infirmitas Sexus: Womanly Weakness in Roman Law*, «Tijdschrift voor Rechtsgeschiedenis» 52, 343-371.

GARDNER 1991
J. GARDNER, *Women in Roman Law and Society*, Bloomington-Indianapolis.

GORDON & ROBINSON 1988
W. GORDON & O. ROBINSON, *The Institutes of Gaius*, London.

LAMBERTI 2011
F. LAMBERTI, *La condizione giuridica della donna romana: ancora una riflessione*, «Teoria e Storia del Diritto Privato» 4, 23–35. http://www.teoriaestoriadeldirittoprivato.com/index.php?com=statics&option=index&cID=248

LAMBERTI 2014
F. LAMBERTI, *Donne romane fra Idealtypus e realtà sociale. Dal "domum servare" e "lanam facere" al "meretricio more vivere"*, «Quaderni Lupiensi di Storia e Diritto» 4, 61-84.

LENDON 1997
J. LENDON, *Empire of Honour: The Art of Government in the Roman World*, Oxford.

LINTOTT 2010
A. LINTOTT, *The Romans in the Age of Augustus*, Chichester.

MCDONNELL 2006
M. MCDONNELL, *Roman Manliness:* Virtus *and the Roman Republic*, Cambridge.

MILNOR 2011
C. MILNOR, *Women in Roman Society*, in: M. PEACHIN (ed.), *Social Relations in the Roman World*, Oxford, 609-622.

MORGAN 2007
T. MORGAN, *Popular Morality in the Early Roman Empire*, Cambridge.

PARKIN & POMEROY 2007
T. PARKIN & A.J. POMEROY, *Roman Social History: a Sourcebook*, London.

POTTER 1999
D. POTTER, *Literary Texts and the Roman Historian*, London.

RAWSON 2013
B. RAWSON, *Marriages, Families, Households*, in: P. ERDKAMP (ed.), *The Cambridge Companion to Ancient Rome*, Cambridge, 93-109.

SCHULZ 1954
F. SCHULZ, *Classical Roman Law*, Oxford.

SHELTON 1998
J. SHELTON, *As the Romans Did: a Sourcebook in Roman Social History*, Oxford[2].

TREGGIARI 2005
S. TREGGIARI, *Women in the Time of Augustus*, in: K. GALINSKY (ed.), *The Cambridge Companion to the Age of Augustus*, Cambridge, 130-147.

Section 6
Protecting our Children

Governmental Control of Guardianship over Minors in Roman Egypt

THOMAS KRUSE

ABSTRACT

The contribution deals with the mechanisms of governmental control of guardianships over minors in Roman Egypt as it was exercised through the responsible administrative officials at the various levels of the administration. The relevant measures of this administrative control extended over the appointment of guardians for which applications had to be filed with the administrative authorities. These applications, which aimed at an official registration as guardian, may also reflect in some respect an indigenous legal tradition, though it is doubtful if such applications were obligatory. Another important measure of control of guardians was the obligation of the latter to render account of his management of affairs. The article also examines the role of the officials responsible for the appointment and control of guardians, i.e. the prefect of Egypt, the nome strategos and, at the municipal level, the exegetes and others.

Societies both past and present were and certainly still are aware of the fact that guardianship (especially one over minors of deceased fathers) provides an opportunity to the guardian (often the paternal uncle) to abuse at the cost of causing damage to the property or even the person of his ward. Thus "the wicked guardian" – as he is styled in the title of an article by Jolowicz dating from 1947[1] – became a quite famous figure in literary tradition, though one has to bear in mind that authors presenting such guardians tend to overestimate bad examples and style strained and dysfunctional family-relationships as a rule rather than an exception of social life.

In Rome, guardianship (*tutela*) was originally modeled on the *patria potestas* or rather constructed as a sort of artificial transfer of the *potestas* of the father to the guardian until the ward was old enough to establish a *potestas* by himself. So the Roman legal concept of guardianship was initially a "reines Gewaltverhältnis" (to use a German legal *terminus technicus*) as was the *patria potestas* by which the guardian had control over the property of the ward *domini loco*. Still, in the course of time the interests of the ward and the obligation of the guardian to serve them came increasingly to the fore in Roman legal thought and theory, as made evident in the writings of the Roman jurists dedicated to the institution of the *tutela*.[2] The guardian was no longer regarded as bearer of the ward's property but only the ward himself.

In the same period, the Roman state began to regard the provision for the ward as a public affair and took care of the appointment of guardians and their management of their ward's affairs. The state also developed certain principles for the administration of the ward's property. Guardianship evolved into a sort of public obligation (*munus*) with certain institutions and mechanisms established to control the guardian's conduct. The competences of the *praetor urbanus* (who was among other things initially responsible for matters concerning guardianship) grew and were mainly furnished by his role in settling disputes resulting from guardianships. This development was already underway in the Republican period, and finally matured in the early principate, as the emperor Marcus Aurelius established the office of *praetor tutelarius* as a chief official in the city of Rome for guardianship related issues.

The evolution of the *tutela* as briefly outlined here concerns of course only the guardianship of minors, not that over women (*tutela mulieris*; κύριος in Greek) whose importance and applicability diminished through time and eventually found expression only in applications for an *ad hoc* appointment

[1] JOLOWICZ 1947.

[2] For this the reader may also refer to the article by Eva Jákab in this volume.

of guardian by women to assist them in performing a single legal act (*tutor ad actum*).[3]

In the Roman provinces such as Egypt, to which we will now turn, in particular where the *peregrini* i.e. the native population (not the Roman citizens) are concerned, the institution of guardianship evolved under the influence of local legal traditions which continued to be effective after the Roman takeover. In Egypt one of the most prominent manifestations of these local traditions was the woman's right to act as guardian,[4] a right that women were generally denied in the world of the *polis*.

In assessing the measures and instruments of governmental control of guardianships of minors (being under 14 years old) in Roman Egypt[5] as they can be gathered from the papyrus documents one should thus take into account this persistence of indigenous legal traditions, and resist the temptation to regard the phenomena figuring in these documents as being completely in accordance with Roman legal principles.

State officials would first become involved in, and monitor guardianship related issues when they appointed the guardian. According to the principles of Roman law, state officials became involved in the appointment of guardians only in the absence of a guardian appointed by will (*tutor testamentarius*) or by law (*tutor legitimus*), which would be the case in the presence of relatives qualified to assume that duty.

Yet this is clearly not the case in Roman Egypt: in an application for the appointment of a guardian dating to 218 CE a woman from the nome *metropolis* of Oxyrhynchos addresses a request to the municipal office of the *exegetes* that the paternal uncle of her underage children should be appointed as their guardian (ἐπίτροπος).[6] According to Roman law, the paternal uncle would in any case be the natural *tutor legitimus*, whose appointment would not necessitate the involvement of the state. Why, then, was this application deemed necessary? In another document, this time from the Arsinoite nome and dating to 225 CE,[7] M. Lucretius Diogenes requests the prefect of Egypt

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[3] For an overview of the development of the institution of guardianship in Roman law see JÖRS, KUNKEL & WENGER 1987, 419-430; for Egypt in particular see MITTEIS 1912, 248-256; MARKUS 1989.

[4] On this see, e.g., CHIUSI 1994; VUOLANTO 2002.

[5] On the legal age in Roman Egypt see ARJAVA 1999.

[6] BGU IV 1070 (= M.Chr. 323): [αἰτοῦμαι (?) . . . . τῷ ἰδίῳ] κινδύνῳ ἐπίτροπον τῶ[ν] ἀφηλίκων μου τέκνων | [- ca.18 -] τῆς πατρικῆς αὐτῶν κληρονομίας Αὐρήλιον Ἀχιλλέα |[5] [Θέωνος - ca.11 -] ̣αλειτο[ ] τὸν πρὸς πατρὸς αὐτῶν θεῖον ὄντα εὔπορον (ll. 3-5) – "I [request?] at my own risk as guardian of my minor children […] of their paternal inheritance, Aurelius Achilleus [son of Theon] … being their uncle from the father's side and possessing sufficient wealth".

[7] P.Harr. I 68 (Philadelphia?, Arsinoites, 225 CE).

Claudius Herennianus to order the strategos of the Herakleides-district of the Arsinoite nome (where the property of the family is located) to appoint him as guardian of the minor orphan children of his sister, because both parents have died (καταστ]ῆσαί με ἐπίτροπον τῆς ὀρφανείας τῶν παίδων) and the children have no surviving closer relatives other than himself (καὶ οὐδὶς αὐτοῖς ὑ[π]άρχει ἐνγυτέρω γέν‹ε›ι ἢ ἐγὼ [Λουκρήτι]ος Διογένης).[8] But here again, given the fact that Lucretius Diogenes was the maternal uncle of the orphans and their sole existing relative, he would anyway be destined for their guardianship as *tutor legitimus*. So, why ask the governor to take action?

In another, much earlier document, dating to 36 CE,[9] a woman named Taorses from the village of Tebtynis in the Arsinoite nome requests Chairemon, the *exegetes* of the nome capital, to instruct the notary's bureau to register a transfer of ownership of some assets of the inheritance of her minor children, their father having passed away some time earlier. In this same application she states that at an earlier date she herself has been appointed guardian of her children by the same *exegetes* upon her own application (ὧν καὶ ἀπεγραψάμην διὰ σοῦ ἐπίτροπος).[10] Taorses has four living brothers, who join in her petition and could all become *tutores legitimi*, yet the official in charge chose to accept Taorses' motion and appointed her guardian of her fatherless children.

According to Raffael Taubenschlag, the famous legal historian of Greco-Roman Egypt, there can be "no doubt that statutory guardianship was known in peregrine law, and that both paternal and maternal cognates were called upon in a certain order of procedure".[11] This view was already challenged some 70 years ago by H.F. Jolowicz.[12] Rightly so: it is difficult to detect in the texts cited above a "certain" order of procedure of any kind. One rather gets the impression that the officials in charge accepted any application for the appointment of a guardian if the candidate seemed suitable to them and if there was consensus amongst the surviving family members about the qualification of the potential candidate to act as the children's guardian. If such a consensus existed the officials in charge could, following local legal traditions, even appoint the mother, as they did (at least I would suppose) in the abovementioned case of Taorses.

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8 P.Harr. 68,9-12.

9 P.Mich. V 232 (= SB V 7568).

10 P.Mich. V 232,6.

11 TAUBENSCHLAG 1955, 120.

12 JOLOWICZ 1947, 83-84.

The applications to appoint as guardians persons who clearly were, from the Roman legal point of view, the natural *tutores legitimi* could possibly be explained by the existence of rivaling local legal traditions which somehow could have prevented an automatism in favor of an appointment of the *tutor legitimus* and could thus have prompted the population to propose other candidates, and the officials in charge to take these alternative candidates into consideration.

But may perhaps "a certain order of procedure" at least be detected in the fact that it was necessary to apply for the appointment to a guardianship? Or, in other words: Were such applications obligatory? Judging from our evidence this question is certainly hard to answer. It is true that applications for the appointment of guardian do not refer to an order by the provincial governor or any other high ranking official to apply for the appointment as guardian or to be officially registered as such, but it can not in my opinion be deduced from this fact that such an application was not obligatory if a certain person wanted to become a guardian.

With this I do not claim, of course, that the appointment of a guardian was *per se* under all circumstances obligatory: there are attested minors who act "through" (διά) certain relatives who are not styled as their guardian (ἐπίτροπος) or where male relatives act in the name of minors without identifying themselves as their guardians. For example, in a London papyrus from Antinoopolis dating to 212 CE a male infant who is underage acts διά his elder brother.[13] And in another document from Oxyrhynchos dating to the early 2nd century CE[14] a certain Theonas submits to the *exegetes* of the city an accurately drawn up list of objects which his deceased brother had bequeathed to his two minor children. The objects are not very valuable and some of them are already pledged for small sums of money. The obviously very diligent and careful uncle even states that he sold a pig for 40 drachmae which formed part of this property. At the same time, Theonas never claims that he acts as guardian of his minor nephews.

One may conclude, on account of the above said, that if there was a male person available who was willing to take care of the wards and to assume the role as head of the family it was not necessary to appoint a guardian for these children. There are other cases, however, where the family wished to sort out the situation by way of a magisterial appointment of a guardian, maybe for reason of greater safety: officially appointed guardians were accountable, after all, for management of the family affairs. This may have been particu-

[13] P.Lond. III 1164 (g) (p. 162) l. 8.

[14] P.Oxy X 1269.

larly the case where exceptionally valuable assets or estates were involved. I would think, therefore, that under these circumstances one could not assume the guardianship without official authorisation and that, if a person wanted to become a guardian of minors, his application for appointment and thereby his official registration as guardian were obligatory.

It has to be stressed in this context that the applications for appointment as a guardian also aimed at such an official registration. This is clearly shown by the words the widow Taorses from the Arsinoite village of Tebtynis chooses in 36 CE in her already cited petition to the *exegetes* of Ptolemais Euergetis concerning the transfer of ownership of property belonging to her three minor sons; she states that somewhat earlier she has been appointed by the same *exegetes* guardian of her children: υἱοὺς ἀφήλικας τρεῖς …, ὧν καὶ ἀπεγραψάμην διὰ σοῦ ἐπίτροπος,[15] "three sons under age …, for whom I have had myself registered as guardian by you". The word ἀπογράφομαι is pivotal in this phrase, meaning – in quite the same way as, e.g., in the household (or so called 'census')- declarations – 'to have oneself registered'.

If, however, the family decided not to submit formal application for the appointment of a guardian the state was not compelled to take any initiative to act on behalf of the minors. To be proactive in this way was, of course, imperative only if no relatives existed who could take care of the minor and a guardian had consequently to be appointed by the state itself. This initiative was, as it seems, sometimes delayed, presumably either by simple negligence on the part of the local authorities or because they had not been informed early enough of the existence of certain minors without surviving relatives.

In a papyrus of unknown provenance dating to the 2nd century CE a certain Heron petitions the *exegetes* to order the scribes of the nome *metropolis* to appoint a guardian for the minor son of a man named Heras who has passed away the month before because, as he states, "the seals affixed (*sc*. to the deceased's property) are still in their place", the minor "is in debt to many people and a guardian has not been appointed yet".[16] It seems as if the petitioner here was a creditor of the deceased father as well. It is also quite clearly shown by this document that in such cases people expected the guardian to be officially appointed through the officials in charge.

Another indication that such appointments were avoided more often than desired may be gathered from an edict issued by the *praefectus Aegypti*

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[15] P.Mich. V 232,6. The translation of ἀπεγραψάμην with "appointed" by the editor does not in my opinion capture the crucial point of the phrase.

[16] P.Ryl. II 121, 8-12: [τ]υγχάνει δὲ καὶ χρεωστὴς | πολλῶν μέχρι δ[ὲ] τ[ο]ύτου |[10] τ[ὰς] σφραγεῖδας (l. σφραγῖδας) ἃς ἐπέθηκ[ε] | [ἐπ]ίκειν̣ται καὶ ἐπίτροπος | [α]ὐτοῦ οὐ κατεστάθη.

Fl. Valerius Pompeianus on October 25th 287. The governor orders the local officials in charge to appoint guardians for orphans without one according to their age (presumably in a fixed period of time – there is a lacuna in the text) "for" – as he continues – "it will thus result that they receive proper attention, whereas at present much business concerning orphans and depending upon their guardians is delayed because the orphans are unattended by *tutores* or *curatores*".[17] Obviously, the key incentive for having guardians appointed under these circumstances was the wish to secure the smooth running of economic activity concerning the property of the minors rather than any concern for the minors' own well-being.

Among the officials involved in Roman Egypt in the appointment of guardians we count the provincial governor (the *praefectus Aegypti*), the head of the nome's administration (nome strategos – στρατηγὸς τοῦ νομοῦ) and the *exegetes* (ἐξηγητής): a high ranking municipal official in Alexandria and the nome *metropoleis*. The competence of the prefect of Egypt requires no further elucidation. Provincial governors were in charge of each and every affair within their province of command and could as such be permanently addressed by their subjects. This was explicitely stated to be the case in the matter of guardianships, according to a law dating back to the late Republic which signalled the governor as the authority responsible for the appointment of guardians in the provinces, not only in the case of Roman citizens but also in that of the *peregrini*.[18] But, as was usually the case with trivial activities, the governor commonly referred the matter back to the lower, local administrative instances.

This is also the case with the rarely attested cases of application for the appointment of a guardian that are addressed to the governor of Egypt. I do not suppose that, in these cases, the petitioners simply wished to back their case with the higher authority of the governor; in most of them, rather, the application derives from some peculiar circumstances: this is especially the case with citizens of Antinoopolis, who possessed certain privileges vis à vis the ordinary Egyptians:[19] in a document from the Arsinoite nome (perhaps from

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[17] P.Oxy. VI 888 (= M.Chr. 329): οὕτω γὰρ συμβήσεται τῆς π[ροσ]ηκ[ούσης ἐπιμελείας τ]υγχάνειν, ὡς νῦν γε [π]ολλὰ τῶν ὀρφανικῶν πραγμάτων τῶν ἐπὶ το[ῖς] [5]κη[δεμόσιν ὄντων ἀνα]βολῆς τυγ'χάνειν διὰ τὸ μὴ παρεῖναι τοῖς ὀρφανοῖς ἐπιτρόπους ἤτοι | κου[ράτορας. – In the time of this edict κηδεμών is obviously used as a collective term for "guardian", whereas otherwise the text distinguishes between ἐπίτροποι (*tutores*) of minors (i.e. under the usual legal age of 14) and *curatores* of younger persons who, according to Roman legal practice since the *lex Plaetoria de minoribus* (of 200 BCE), were subject to a restricted contractual capability.

[18] *lex Titia et Iulia* (or two *leges*?) (Inst. 1,20; Ulp. *frag*. XI 18), cf. also P.Oxy. IV 720.

[19] On the privileges of Antinoopolis and its citizens see ZAHRNT 1988.

the village of Philadelphia) which dates to 225 CE both the applicant and the minors he wishes to became guardian of are citizens of Antinoopolis who own property in the Arsinoite nome.[20] A similar case is attested in a papyrus from the Arsinoite village of Tebtynis, dating to 266-267 CE: an Antinoite woman requests the prefect to have her brother appointed guardian of her minor daughter. The governor should undertake this through an order to the strategos of the Arsinoite nome "where we" as she states "own land".[21] In both cases, in other words, the guardianship was connected with the administration of property of Antinoopolite wards that was located outside Antinoopolis, under the jurisdiction of the Arsinoite strategos. Since, however, the strategos was not entitled, as a matter of course, to appoint a person from outside his jurisdiction to any given position he required an order from the governor in order to have citizens of Antinoopolis appointed as guardians.

At the level of local administration applications for the appointment of guardians could be submitted either to the nome strategos or to the *exegetes*, the latter being more frequently attested in this capacity than the former.[22] But it is not possible from the evidence published so far to know how the two officials cooperated in handling such applications. As long as no other evidence points to the contrary I would suppose that the population was at liberty to decide to which of the two officials responsible for such decisions it wanted to present applications for the appointment of guardians. Within the administration of the nome capital we also find the scribes of the *metropolis* (γραμματεῖς μητροπόλεως) as officials involved in the appointment of guardians. These lower-ranking officials, however, do not act, as L. Mitteis once thought, on an equal footing with the nome strategos and the *exegetes*;[23] whenever they are involved they clearly act as subordinate officials doing so upon instructions received from their superiors: the strategos and the *exegetes*.

Accordingly, in P.Ryl. II 121 (already cited above) from the city of Arsinoe it is stated that the *exegetes* should instruct (ἐπισταλῆναι) the scribes of the *metropolis* to appoint a guardian for the deceased's minor son. In the same manner, in another case, attested in a papyrus dating to 182 or 183 CE a deputy strategos of the Oxyrhynchite nome, reacting to an application addressed to him by a man named Heras, orders the γραμματεῖς μητροπόλεως to appoint a guardian for a minor, "preferably a person from the kinfolk, and if this is not

[20] P.Harr. I 68.

[21] P.Tebt. II 326.

[22] For the administrative duties of the *exegetes*, cf. also P.Hamb. IV p. 217-270.

[23] Mitteis 1912, 254.

possible, he may come from outside, in order that the affairs of the minor do not incur any danger".[24]

Finally there is a petition to the epistrategos by a man who in 156 CE has been nominated by a γραμματεὺς μητροπόλεως of Oxyrhynchos for the guardianship of minors – εἰσέδωκέ (*sc*. the scribe of the *metropolis*) με εἰς ἐπιτροπήν as the petitioner states – the minors having no surviving paternal or maternal relatives. Since the petitioner himself is, as he states, burdened with liturgic obligations and is also in debt, he requests that the epistrategos should order the nome strategos to compel the scribes of the *metropolis* to act so that another person is appointed (καταστα̣θῆναι) in his place.[25] The procedure that is recorded in this petition is to be examined in the broader context of liturgic appointments: following an application for the appointment of a guardian, the γραμματεὺς μητροπόλεως —and for that matter any other low-ranking local administrative officials of the nome *metropolis* and the villages— would set the appointment procedure in motion by nominating suitable candidates, as they would be doing in the case of any other liturgy.[26] Their nominations however had to be ratified by superior officials, who had also to be involved, as we see from the cited text, if the nominee protested against his nomination. In general the involvement of the scribes of the nome *metropolis* in the appointment of guardians can be accounted for by their duties with respect to the town administration and their closer acquaintance with its inhabitants. Therefore it laid in their hands (but in reaction to a respective order of a superior, i.e. strategos or *exegetes*) to select persons suitable to assume a guardianship.

The local officials were probably also in charge of replacing an acting guardian by another, if they had reason to distrust him. Such is the case reported in a petition of Didymos, a minor from Oxyrhynchos who in June 123 CE addressed the deputy nome strategos and complained of fraud on the

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[24] SB XII 10792,10-14: μάλιστα | μὲν τῶν πρὸς γένους, εἰ δὲ μή, εἶεν τῶν ἔξωθεν, πρὸς \τὸ/ μηδὲν τῶν | τῷ ἀφήλικι διαφερόντων παραπολ\λέσθαι; on this text see also Lewis 1970.

[25] P.Oxy. III 487 (= M.Chr. 322).

[26] For the view of guardianship as a (burdensome!) liturgy see also SB V 7558 (= Sel. Pap. II 260 = FIRA III 30) (Karanis, 173 CE?), where a legionary veteran and citizen of Antinoopolis petitions the epistrategos because he had been appointed as guardian of the minor daughter of a fellow veteran and of her property (being located in the Arsinoite nome) in his last will and testament. The petitioner claims exemption from this guardianship by virtue of the fact that it had been ruled by a former epistrategos that "an Antinoite should not act as guardian of any one else but an Antinoite who is in the nomarchy (i.e. the administrative district of Antinoopolis) (l. 9: περὶ τοῦ Ἀντινοέα μηδενὸς ἄλλου ἐπιτροπεύειν ἢ μόνου τοῦ ἐν τῇ νομαρχίᾳ Ἀ[ν]τινοέως)". This view fits well with the notion expressed in some other documents that Antinoites should not been obliged to perform liturgies outside Antinoopolis; on this text see also the remarks of its first editor (Boak 1932).

part of his mother, Matrina, who was also his guardian.[27] Due to the vague phrasing of the petition, it is not easy to see what the fraud consisted in. The petitioner appears, however, to allege that his mother, besides other various acts of bad faith, took by deception possession of a deed belonging to Didymos and would only return it in exchange for it a "receipt of the guardianship" (ἀποχὴν τῆς ἐπιτροπῆς), a term not attested elsewhere which probably signifies a document absolving the mother from all claims connected with the management of the guardianship.[28] By acting in this way, Didymos continues, she hoped to escape the responsibility for her wrongdoing and adds that his mother did all this, "notwithstanding the fact that Philoneikos the strategos has decided, in accordance with a report of proceedings, that another person should be appointed as my guardian, distrusting both her and my own youth".[29] Obviously a trial had already taken place before the nome strategos, in the course of which the strategos decided to replace the mother as guardian of her son by another person because he distrusted the mother but at the same time thought that the petitioner was still too young to act on his own. The appointment had not yet been made and so the mother could continue to mistreat her son.

Once a guardian was officially appointed and registered, his management of the ward's affairs and property was scrutinized by the state and he was held accountable to certain officials for his actions on behalf of his ward, as is attested by a number of documents. That there did indeed exist an obligation on the part of a guardian to render account of his management of affairs can be concluded from a fragmentary sworn statement of the early 3rd century CE from the Arsinoite nome addressed to the *exegetes* of the nome *metropolis*.[30] In this statement under oath a man who had been appointed (either by testament or by magisterial appointment) as guardian of a minor declares that he "will assume the guardianship faithfully and diligently and will execute the sale of the inheritance according to the laws, (a sale) of which I will render account and file a report with your office".[31] A Heidelberg papyrus dating from

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27 P.Oxy. VI 898.

28 See the remarks of the editors.

29 P.Oxy. VI 898, 26-29: καίτοι Φιλονίκου τοῦ στρα(τηγοῦ) | καθ' ὑπομνηματισμοὺς κρείν|αντος ἕτερόν μου ἐπίτροπον | κατασταθῆναι, οὐ πιστεύοντος |[30] οὔτε αὐτῇ οὐδὲ τῇι ἡλικίᾳ μου.

30 SB XVI 12557 (222-235 CE).

31 SB XVI 12557 (= SB V 9049) (222-235 CE): ὀμ]νύω … ὑγιῶς καὶ πιστῶς] ἀντιλήμψασθαι τῆς ἐπιτροπῆς | [τῆς προκειμένης καὶ τὴ]ν πρᾶσιν τῶν καταλειφθέντων ποι[10]ήσειν κατὰ τοὺς νόμους ὦ]ν τοὺς λόγους τάξομαι καὶ καταχωριῶ | [τῷ σῷ ἀρχείῳ ἀναγραφὴ]ν [ἢ] ἔνοχος εἴην τῷ ὅρκῳ (ll. 6-11); on this text see also ZUCKER 1945; SIJPESTEIJN 1982.

141/142 CE preserves a fragmentary report addressed to the *exegetes* of Hermopolis by two guardians of minors. The papyrus records a detailed account of the income of several landholdings which the minors inherited from their deceased father. In the prescript of this report the two ἐπίτροποι state that they reacted to a formal inquiry by the *exegetes*: "Having been asked by you about the income of the landholdings bequeathed by the father of the minors, we declare that they own…".[32] (and then follows a list of the individual plots with their respective revenues).

A very fragmentary document from Antinoopolis,[33] probably dating to 205 CE, attests that the guardian of a minor appointed by the *exegetes*[34] also had to file a report or list (presumably called ἀναγραφή) of household utensils (σκεῦοι) in the possession of his ward such as blankets, baskets, vessels and the like; if the guardian sells these items he will be obliged to have the sale registered with the keepers of the public archive of the nome (βιβλιοθήκη δημοσίων λόγων), a procedure illustrated by a receipt which the same guardian issued to the *bibliophylakes* of the public archive of the Arsinoite nome, the same archive in which the guardian states that he has registered "a deed of sale of the implements and other property left by the father of the minor for the part due to him".[35]

The guardians of minors also seem to have been under the obligation to have legal transactions which affected the property of their wards authorized by the officials in charge. We have already cited in a different context the formal application to the *exegetes* of the widow Taorses dating from 36 CE.[36]

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[32] P.Heid. IV 336 (*editio princeps*: ZPE 55, 1984, 167-178): ἐ[περω]|τ̣[ώ]μ̣[ε]ν̣ο̣[ι] ὑπὸ σοῦ περὶ προσόδ̣[ων ὧν κατ]ὲ̣λ̣ε̣ιψ̣[εν ὁ] | τῶν ἀφηλίκων̣ π̣α̣τ̣ὴρ̣ Ὡρίων ἐδαφῶν δηλ̣ο̣[ῦ]|μεν ὑπάρχειν α̣ὐ̣τ̣[οῖς] κ.τ.λ. (ll. 5-8).

[33] P.Fam. Tebt. 49.

[34] P.Fam. Tebt. 49 Col. I 2: ἐπίτροπος καταστα]θ̣ε[ὶ]ς ἀπὸ ἐξη[γητοῦ.

[35] P.Fam. Tebt. 50 (Arsinoites, Dec. 18, 205 CE): βιβλ(ιοφύλαξι) δη(μοσίων) λ̣[όγ]ων | παρὰ [Φι]λοσαράπιδος Λυσιμάχο(υ) | [το]ῦ κ̣α̣[ὶ Δ]ιδύμο[υ] Ἀντινοέως | ἐπιτρό(που) καταστ̣[αθ]-(έντος) ἀπὸ ἐξηγ(ητοῦ) |[5] ἄρχ(οντος) π̣[ρυ]τανικῶν Ἰουλίου | τοῦ κ̣α̣ὶ Ἡ̣ρ̣ώδ̣ο̣υ̣ Φιλαντινόου | τ̣ο̣ῦ̣ κ̣α̣ὶ Ἡρώδου ἀφήλικος | Ἀντιν̣[ο]έως. | κατεχώρισα ὑμῖν διάπρα|[10]σιν σκ̣ε̣υ̣ῶν καὶ ἄλλων τῶν | καταλ̣ι̣φθέ̣ν̣τ̣ων ὑπὸ τοῦ | τοῦ ἀφήλικος πατρὸς εἰς τὸ | ἐπιβάλ(λον) αὐτῷ μ̣[έ]ρ̣ος. (ἔτους) ιδ | Λουκ̣ί̣ου Σεπ̣τ̣ιμίου Σευήρου |[15] Εὐσεβοῦς Περτίνακος | καὶ Μά̣[ρ̣]κου Αὐρηλίου Ἀντωνίνου | Εὐσε[β]οῦς Σεβαστῶν καὶ | [[Πουβλίο̣υ̣ Σεπτιμίου Γέτα]] | Καίσαρος [Σ]εβαστοῦ Ἀδρι(ανοῦ) κβ. | [20] (hand 2) Σερῆνος βιβλ(ιοφύλαξ) σεσημ(είωμαι). – "To the keepers of the public archives, from Philosarapis son of Lysimachos also called Didymos, an Antinoite, appointed as guardian of Julius also called Herodes, son of Phlantinoos also called Herodes, a minor Antinoite, by the *exegetes*, chairman of the *prytanikoi*. I have entered in your archive a deed of sale of the implements and other property left by the father of the minor for the part due to him. Year 14 of Lucius Septimius Severus Pius Pertinax and Marcus Aurelius Antoninus Pius, Augusti, and [[Publius Septimius Geta]] Caesar Augustus, 22nd Hadrianos. I, Serenos, keeper of archive, have signed".

[36] P.Mich. V 232 (= SB V 7568).

Taorses, who has been appointed as guardian of her minor children, requests the *exegetes* to order the notary's bureau to register a transfer of property that forms part of the inheritance of the minors. A provision to have such transactions authorized could also explain why in a document from Oxyrhynchos of 186 CE the *exegetes* of this town receives an application from three ἐπίτροποι of orphans to be given permission to put up for auction a slave pertaining to the inheritance of their wards.[37]

As long as no guardian had been appointed, the administration of the property of orphan minors without relatives was probably undertaken by the relevant officials. In four documents from the Hermopolite nome, one dating from 61/62,[38] the other three from 78 CE,[39] the *exegetes* receives applications for the lease of landed property of minors. In these texts no mention is made of guardians of the minors, and I would presume that guardians have not yet been appointed; had this been the case, one would expect the applications for lease to be addressed to them as was regularly the case whenever landed property of minors with guardians was leased out.[40] Thus one may conclude that an official such as the *exegetes* who received applications for lease of land belonging to minors without guardians acted as a sort of "public trustee of orphan children", as the editor of one of these texts has put it.[41]

To sum up: I hope that I was able to make clear with the help of the various documents discussed in this article that local state officials in Roman Egypt possessed quite far-reaching competences and possibilities to control guardianships of minors. At the same time, since these officials relied not on information they collected themselves but on that supplied by the population (as was usually the case in pre-modern administrative systems), it was not easy to ensure that the official would effectively carry out their tasks: state officials could only exercise control if they were addressed by the guardians, the wards or other persons who had a certain interest in the affairs of the latter or if the guardians cooperated with them. If relatives existed, guardians were only appointed if an application to this effect was addressed to the local officials. But the state had, of course, to be informed of such cases in the first place and this

37 P.Oxy. IV 716 (= M.Chr. 360; cf. BL X 139).

38 VBP II 18 (cf BL II 2,174; VIII 13; XI 9).

39 P.Amh. II 85-86; P.Heid. IV 337.

40 Cf. BGU II 644 (Arsinoite, 69 CE): a minor with his guardian (μετὰ ἐπιτρόπου) leases some land; P.Grenf. I 47 (Arsinoite, 148 CE): A guardian of minors has leased land (ἐμίσθωσα); P.Amh. II 91 (Arsinoite, 159 CE): A minor μετὰ ἐπιτρόπου receives an application for lease.

41 See introduction to P.Amh. II 85.

and the fact that such guardianships were seen as unpleasant liturgies which persons eagerly sought to evade[42] may have been the reason why such legally required appointments of guardians were often postponed.

It can also be shown from the papyrus documents from Roman Egypt dealing with the administrative control of guardianships that the state administration was primarily interested in securing the smooth operation of transactions connected with the property of minors, whereas the care for minors' well-being seems to have played a less prominent role. This picture may, however, very well be somewhat deceptive owing to the narrow scope of our documentation. One should thus not prematurely blame the provincial administration of insensibility and cold-heartedness for the needs of orphans and minors.

[42] See above on P.Oxy. III 487 (= M.Chr. 322) and SB V 7558.

BIBLIOGRAPHY*

ARJAVA 1999
A. ARJAVA, *Die römische Vormundschaft und das Volljährigkeitsalter in Ägypten*, «ZPE» 126, 202-204.

BOAK 1932
A.E.R. BOAK, *A Petition for the Relief from Guardianship. P. Mich. Inv. n° 2922*, «JEA» 18, 69-76.

CHIUSI 1994
T. CHIUSI, *Zur Vormundschaft der Mutter*, «ZRG RA» 111, 155-196.

JÖRS, KUNKEL & WENGER 1987
P. JÖRS, W. KUNKEL & L. WENGER, *Römisches Recht. 4. Auflage*, New York-Berlin, neu bearbeitet von Heinrich Honsell, Theo Mayer-Maly, Walter Selb, Heidelberg.

JOLOWICZ 1947
H.F. JOLOWICZ, *The Wicked Guardian*, «JRS» 37, 82-90.

LEWIS 1970
N. LEWIS, *Instructions for Appointing a Guardian*, «BASP» 7, 116-118.

MARKUS 1989
A. MARKUS, Tutela impuberis. *Einfluss des Volksrechts auf das klassische römische Vormundschaftsrecht unter besonderer Berücksichtigung der gräko-ägyptischen Papyri*, Diss. Marburg.

MITTEIS 1912
L. MITTEIS, *Grundzüge und Chrestomathie der Papyruskunde. 2. Band: Juristischer Teil. Erste Hälfte: Grundzüge*, Leipzig.

SIJPESTEIJN 1982
P.J. SIJPESTEIJN, *Sammelbuch VI 9049 - A Sworn Declaration to be a Guardian of a Minor – Reconsidered*, «RHD» 50, 197-200.

TAUBENSCHLAG 1955
R. TAUBENSCHLAG, *The Law of Graeco-Roman Egypt in the Light of the Papyri. 332 B. C. - 640 A. D.*, Warsaw 1955[2].

VUOLANTO 2002
V. VUOLANTO, *Women and the Property of Fatherless Children in the Roman Empire*, in: P. SETÄLA et al. (eds.), *Women, Wealth and Power in the Roman Empire,* Rome, 203-243.

ZAHRNT 1988
M. ZAHRNT, *Antinoopolis in Ägypten: Die hadrianische Gründung und ihre Privilegien in der neueren Forschung*, in: *ANRW* II, 10. 1, 669-706.

ZUCKER 1945
F. ZUCKER, *Beeidete Übernahme der Vormundschaft über eine Minderjährige. Pap. Jen. Inv. 92*, in: *Festschrift für Leopold Wenger zu seinem 70. Geburtstag. Bd. 2.*, Munich, 149-167.

* Papyrus documents are cited according to the *Checklist of Editions of Greek, Latin, Demotic and Coptic Papyri, Ostraca and Tablets* accessible via: http://papyri.info/docs/checklist.

The Evolution of Roman Guardianship through the Mechanism of *excusatio tutelae*

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ABSTRACT

Designed as closely related to patria potestas*, guardianship was formally understood as an aspect of* potestas *and a right exercised in the interest of the protected person until she or he reached puberty. Starting from the Principate, the initial approach to guardianship and to the role of the guardian starts to change. Guardianship* potestas *tended to shift into a guardianship similar to a charge (*munus*). Imperial policy then tended to harmonize the three types of guardianship following the model of the guardianship by magisterial appointment, in other words the idea was to coerce the guardian and in particular the testamentary guardian into making difficult for him to avoid the burden, accepting it and managing it efficiently. The purpose of this paper is not to analyse Marcus Aurelius' generalisation (followed through by successive emperors) of the system of excuses, extended it to all types of guardianship, and forcing guardians to accept the office. This contribution rather focuses on the search for the correct balance between the wards' interests and the guardians' capacity to carry out his mandate effectively and efficiently. This is what we can deduct from a study of the rich casuistic dealing with the excuse grounds and from the shift of guardianship towards the category of civilian charges.*

Guardianship was originally created to protect persons lacking practical and legal experience because of their age, their sex or their mental condition. In Roman law, this protection applied only to the property and did not concern the physical custody of the people concerned.

Historically, Roman guardianship was created and shaped in the framework of the so-called agnatic family, a civil kinship system in which all members were under the control of the *paterfamilias* or would have been under such control if he had been alive.

At the death of the *paterfamilias*, all those under his power (children or spouses) became *sui iuris*, meaning they acquired a full legal capacity. The emergence of guardianship for young children (belonging to the legal category of underage) was justified by weakness due to age; perpetual guardianship of women on the other hand was explained by the «weaker sex» assumption. Closely related to *patria potestas*, guardianship was formally understood as an aspect of the *potestas* and a right exercised in the interest of the protected person until she or he reached puberty (twelve years for girls, fourteen for boys).

Such is for example the definition given by the jurist Servius Sulpicius and quoted by Paulus (*38 ad ed.*) in D. 26.1.1 pr-1:

> Tutela est, ut Servius definit, vis ac potestas in capite libero ad tuendum eum, qui propter aetatem sua sponte se defendere nequit, iure civili data ac permissa. 1. Tutores autem sunt qui eam vim ac potestatem habent, exque re ipsa nomen ceperunt: itaque appellantur tutores quasi tuitores atque defensores, sicut aeditui dicuntur qui aedes tuentur.[1]

In Rome there existed three types of guardianship: the testamentary guardianship (*testamentaria tutela*), the statutory guardianship (*legitima tutela*), and guardianship by magisterial appointment (*dativa tutela*). The first two were older and the third one was created more recently. It was an alternative nomination mechanism intended to compensate the absence of the other two. As a matter of fact, the *lex Atilia* (186 BC) provided for the nomination of a guardian—by the Urban praetor with the assistance of several tribunes of the Plebs—if nobody had been nominated by will or if there were no civil parents or no former master in the case of freedmen. This law covered Rome and Italy and another one (*lex Iulia Titia*) organized the nomination of a magisterial

[1] "Tutelage is, as Servius defines it, force and power granted and all owed by the civil law over a free person, for the protection of one who, on account of his age, is unable to protect himself of his own accord. 1 – So tutors are those who have this force and power, and take their name from the office itself; therefore, they are called 'tutors', that is, *tuitores* – protectors – and defenders, just as sacristans are called *aeditui* because they protect a temple or *aedes"*. In this article, we use the English translation of the Digest by A. Watson (See WATSON 2008).

appointed guardian in Roman provinces according to similar principles. The aim of such dispositions was to make sure that the estate of the ward or of the woman would not be left without protection and supervision; such was the situation before the empire.

Starting from the Principate, the initial approach to guardianship and to the role of the guardian started to change. Guardianship conceived as a *potestas* gradually turned into a charge (*munus*). The interest of the ward became the priority, which had consequences on the vision of the role of the guardian itself. This evolution took place in the context of an increasing interference of the Emperor in family privacy, starting with the Augustan reform of family law aiming at moralising the Roman family (and at fighting degeneration).

In the field of guardianship, imperial policy thus tended to harmonize the three types of guardianship according to the model of guardianship by magisterial appointment. In other words, the goal was to compel the guardian, especially the testamentary guardian, to accept this duty and to fulfil it accurately. It is in this context that Marcus Aurelius established the ward praetor (*praetor tutelaris*) who dealt with the affairs of underage (appointment and supervision of guardianship).

In order to illustrate the reinforcement of the tutor's burden, I have chosen to study the question from the perspective of the *excusationes tutelae*, which were originally created in the context of the *dativa tutela*. This paper will focus on guardianship granted to minors under the age of puberty and *alieni iuris*. Women's guardianship will not be discussed because it evolved in a specific way and was not directly affected by the development of excuses used by tutors to avoid this burden.

As early as Claudius and more significantly with Marcus Aurelius, the *abdicatio tutelae*[2] was gradually replaced by a broadening of the excuse system, which eventually applied to any type of guardian.[3] In other words, the testamentary tutor who was traditionally able to refuse the duty for which he had been called no longer enjoyed that discretionary decision. The nature of the sources dealing with this aspect (i.e. rescripts of the emperor and *libri singulares de excusationibus tutelarum* drafted for the practitioners by the jurists of the Imperial council) is an indication of the importance imperial legislation dealing with the appointment and management of minors' guardianship.

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[2] Traces can be found in Cicero's letters (*Att*. 6.1.4) and during Augustus' reign (*BGU* IV 1113: WILCKEN-MITTEIS 1912, II, 2, n. 169). See BONFANTE 1963, 583-584; AMELOTTI 1966, 145-146.

[3] See VIARENGO 1996.

Moreover the rich diversity of casuistry developed around *excusationes tutelae* illustrates the inclination of emperors to develop a well-balanced vision of guardianship.

I will develop the two following points: the evolution of guardianship and the cases of excuses.

1. A PRIVATE OFFICE TURNING INTO A LEGALLY BINDING MECHANISM

Masurius Sabinus in his treatise on civil law wrote:

> In officiis apud maiores ita observatum est: primum tutelae, deinde hospiti, deinde clienti, tum cognato, postea adfini. Aequa causa feminae viris potiores habitae pupillarisque tutela muliebri praelata. Etiam adversus quem adfuissent, eius filiis tutores relicti in eadem causa pupillo aderant.[4]

This text emphasizes the importance of the role of guardians, called *officium* by the famous jurist of the early Principate, who placed them under the high protection of *mores*. In such a context, the unjustified refusal of the guardian to undertake the office assigned by will or by way of agnatic relationship, would provoke social reprobation. Regarding statutory guardianship, Pasquale Voci rightly pointed out that it was not a matter of choice because it was intrinsically linked to the agnatic relationship and was based on the natural solidarity between members of the same family.[5]

The testamentary guardian could refuse guardianship (*abdicatio tutelae*), as shown by the phrase *si volet* included in the appointment of the guardian.[6] Testators generally added rewards and gifts for the tutor appointed by will and they also provided for a clause of reversion of gifts with regards to cases in which the tutor would quit his tutorship.[7]

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[4] Gel. 5.13.5: "In the matter of obligations our forefathers observed the following order: first to a ward, then to a guest, then to a client, next to a blood relation, finally to a relation by marriage. Other things being equal, women were given preference to men, but a ward, who was under age took precedence of one who was a grown woman. Also those who were appointed by will to be guardians of the sons of a man against whom they had appeared in court, appeared for the ward in the same case" (English translation by C. Rolfe, see ROLFE 1961). See also I. 1.13.1-2.

[5] VOCI 1960, 66.

[6] Africanus (8 *quast*.) D. 26.2.23.

[7] Paulus (9 *Resp*.) D. 27.1.36 pr.: *Amicissimos quidem et fidelissimos parentes liberis tutores eligere solere et ideo ad suscipiendum onus tutelae etiam honore legati eos persequi …* ("Parents usually choose tutors for their children among their most faithful friends and then urge them to take on the burden of tutelage by rewarding them with a legacy …").

Both testamentary and statutory guardianships were designed as offices. Therefore it was difficult to avoid them without facing moral and social opprobrium.

The situation was different for the *tutela dativa*, which was a sort of expedient created by law in order to make up for the lack of either testamentary or legal guardian; it could not be avoided without an agreement of the magistrate and for exceptional reasons making it absolutely impossible to manage the guardianship. Obviously, this kind of guardian did not enjoy the *abdicatio tutelae* and had to justify to the urban praetor and the tribunes the personal or material reasons that prevented him from managing the ward's property. As a matter of fact, this private office ordered by the magistrate became gradually legally binding.

In practice, guardians probably paid little attention to the management and protection of their ward's property. This might explain why careless guardians faced increasing responsibility under imperial law and especially after Claudius. Two fragments by Ulpian provide a better understanding of the situation. The first one seems to deal with the negligence of the *dativus tutor*.[8] The jurist has in mind the situation of a guardian appointed by a magistrate, who did not give excuses within the legal period and did not engage in the process of management. Consuls decided that he would bear the risks of the failure to manage. The fact that consuls are mentioned implies that Ulpian may have referred to the state of the law in Claudius' time. In fact the Emperor had deprived the praetor and the tribunes of the nomination of guardians and transferred it to the consuls. The text should be studied in connection with another fragment of the Severan jurist in which he explains that an *actio tutelae directa* cannot be brought against the guardian who has failed to manage a ward's property. This is why the praetor delivers an *actio utilis* against one who has failed to manage the pupil's property.[9]

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[8] *Vaticana Fragmenta* 155: Item. Igitur observandum deinceps erit, ut qui tutor datus sit, si quas habere se causas excusationis arbitrabitur, adeat ex more. Nec in infinitum captiosi silentii tempus, per quod res interfrigescat, concessum sibi credant: hi qui Romae vel intra centesimum fuerint, sciant in proximis diebus quinquaginta se excusationis causas allegare debere aut capessere administrationem; ac nisi id fecerint, in ea causa fore, in qua sunt, de quibus consules amplissimi decreverunt periculo suo eos cessare.

[9] Ulpianus (79 *ad edictum*) D. 46.6.4.3: Sed enim qui non gessit, omnino non tenebitur: nam nec actio tutelae eum qui non gessit tenet, sed utili actione conveniendus est, quia suo periculo cessavit: et tamen ex stipulatu actione neque ipse neque fideiussores eius tenebuntur. compellendus igitur erit ad administrationem propterea, ut stipulatione quoque ista possit teneri ("One who does not administer will in no way be liable; for the action on tutelage does not lie against a non administrator; but he is to be proceeded against by an *actio utilis*; for it is at his own peril that he failed to act; nevertheless, neither he nor his sureties are suitable by the action on the stipulation. Hence, he will have to be compelled to assume administration so that he too can be liable on the stipulation").

This imperial provision focuses on the careless guardian who did not keep his promise to maintain the ward's property intact (*satisdatio rem pupilli salvam fore*); such a promise was made mandatory by Emperor Claudius for statutory guardians or guardians appointed without inquiry and in case of multiple tutors.[10]

Starting with the reign of Claudius, a strong concern for protection of the minor's estate integrity against the careless guardian developed. This explains the growing tendency of guardians trying to escape the heavy and onerous burden of guardianship. They had to manage the property with due diligence and to prepay some expenses. Besides, if a dispute arose during or at the end of the guardianship, the guardian could be sentenced to pay damages and had to suffer *infamia* resulting from the *actio tutelae*.

For example, Modestinus in his treatise on excuses (which of course belongs to a later period) mentions the binding character of being appointed as a guardian. In fact, the *de cuius* had appointed his worst enemy as a guardian for his underage son in order to overwhelm him with management charges and financial losses.[11]

It would be far-fetched to think that all inactive guardians acted in bad faith. The situation became more difficult for all types of guardians. It seems that around the second century, testamentary guardians had to appear before the magistrate in Rome or in the provinces in order to be exempted from their duty. The *abdicatio tutelae* seems to have been gradually absorbed by the system of *excusationes*.[12] Actually, once appointed, the guardian could hardly avoid his office. Inactivity then became a way to elude the management of guardianship while showing one's willingness not to assume the role of guardian.

Marcus Aurelius is generally considered as the one responsible for creating the system of excuses. It originally had been restricted to guardianship by magisterial appointment and had been extended to all types of guardianships. Guardianship of the underage was made compulsory except if the guardian could raise an excuse. Some indication of the content of the imperial provision can be derived from a passage of the fourth book of Modestinus' treatise on excuses. According to the *Oratio principis* of Marcus Aurelius, a person who had been appointed as a guardian in the city where he resided or within a 100 miles-area, was given a period of 50 days to present his excuses before the *praetor tutelaris*. Beyond 100 miles from the place of nomination, he was

[10] See for example I. 1.24.

[11] Modestinus (2 *excusationum*) D. 27.1.6.17.

[12] Amelotti 1966, 146.

given 30 days, with an additional day to travel 20 miles.[13] This time period was counted in continuing days from the moment the guardian was informed of its nomination.[14] Besides, the text states that if the praetorian *decretum* denied the exemption, the guardian could appeal against it. This derives from a constitution by Alexander Severus:

> C. 5.62.6 pr-1: Quinquaginta dies, qui praefiniti sunt ad professionem excusationis his qui tutores seu curatores dati sunt, ex eo die cedere, ex quo decretum praetoris aut testamentum parentis notum factum erit ei qui ad munus vocatus fuerit, ipsa constitutio quae hoc induxit sanxit. 1. Sed si quis in eius temporis computatione ab eo cuius de ea re notio fuit iniuriam passus non provocavit, adquiescere rebus iudicatis debet. Alex. a. Maximo. <a 224 pp. iii non. mai. Iuliano et Crispino conss.>.[15]

This text points out that one who had been appointed as a guardian had to show a steady will to give excuse before the competent magistrate.

A rescript of Septimius Severus and Caracalla helps to specify the stages of the *excusatio* procedure. Although there is no explicit reference to Marcus Aurelius' provision, the individual case can be linked to this Emperor's decision.

The rescript given by both Septimius Severus and Caracalla provided that the waiver from guardianship is not automatic, even though there is a ground for exemption.

> C. 5.62.3: Excusationis quidem tuae, si ingenuus libertino tutor datus es, certa causa est. sed cum te praeses provinciae audiendum non putaverit propter praescriptionem, quasi tardius adires, nec a decreto provocaveris, intellegis parendum esse sententiae. Sev. et Ant. aa. Crispino. <a 206 pp. id. mart. Albino et Aemiliano conss.>.[16]

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[13] Modestinus (4 *excusationum*) D. 27.1.13.2.

[14] Modestinus (4 *excusationum*) D. 27.1.13.9.

[15] C. 5.62.6: "That the period of fifty days fixed for giving an excuse by those who are appointed as guardians or curators commences to run from the time that the order of the praetor or the testament of the parent will be made known to the persons called to perform that duty, is stated by the same constitution which fixed the time of fifty days. 1. And if anyone injured by the decree of the praetor who had jurisdiction in the matter does not appeal from him within that time, the decree must be obeyed. Promulgated on 5 May 224". It must be noted that this imperial constitution seems to be in the continuity of the preceding text in which the same Emperor refers to Marcus Aurelius's *Oratio* which would have denied freedmen (when appointed guardians of their *patronus*) the benefit of any type of excuse. See also a rescript by Diocletian and Maximian (C. 5.62.18), which refers to the legal time period for the excuse procedure set up by Marcus Aurelius.

[16] C. 5.62.3: "If you were appointed as guardian for a freedman, but you are a free born person, you have a good excuse (for not acting). But since the provincial governor of the province thought that he should refuse to listen to you because the time for giving an excuse had expired when you went before him, and you did not appeal from that order, you know that the decision must be obeyed. Promulgated on 15 March 206".

In that case, a free man was appointed as guardian of a freedman. He did not even start to administer the guardianship because he probably knew that this was a cause for exemption. He therefore decided not to appear before the provincial governor in order to be excused from the guardianship within the legal period. In such case, he was no longer allowed to submit his reasons for excuse and had to assume the burden and management of guardianship. He was probably compelled to bear also the potential consequences of his failure to act (*periculo suo cessare*). Exemption of guardianship was not automatic, even though there was ground for exemption.

Guardianship, whatever its form, had become a mandatory function. Only a *iusta causa* submitted to the *praetor tutelaris* in Rome or to the provincial governor, and a decree issued by the magistrate, could exempt the appointed guardian from his obligation.

Originally, accepting the burden of guardianship was a duty placed under the control of the *mores*; under the Empire, guardianship became a legally binding private charge. Legal sources show that on both terminological and substantial levels, guardianship and public charges had moved closer. The *tutela* was called *munus*,[17] *onus*[18] and *officium*. This shift in terminology is made clear in a text by Modestinus.

> Modestinus (2 excus.) D. 27.1.6.15: Tutela non est rei publicae munus nec quod ad impensam pertinet, sed civile: nec provinciale videtur tutelam administrare.[19]

Guardianship was not a public charge but derived from civil law because the guardian received no compensation. The jurist means that management is nevertheless mandatory throughout the empire. The link established between guardianship as a private office and *rei publicae munus* was intended to reinforce its mandatory character and to justify the system of excuses.[20]

Marcus Aurelius generalized the system of excuses to all types of guardianship, and successive emperors extended it. Yet our contention is that it was not a deliberate attempt to force the guardians to accept the office, but rather a way to strike a balance between the ward's interests and the guardian's ca-

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[17] See for example: Alexander Severus C. 5.62.8; Gordianus C. 5.62.12.

[18] For example: Alexander Severus C. 5.62.10.

[19] Modestinus (2 *excus.*) D. 27.1.6.15: "Tutelage is neither a public nor a remunerated charge, but a private one; nor is it considered a provincial charge to administer a tutelage". Concerning the authenticity of the fragment mentioned in Latin in a piece written by Modestinus in Greek (Παραίτησις ἐπιτροπῆς): GERMINO 2007; MASIELLO 1983, 9, 38-41; GUZMÁN BRITO 1976, 174; VIARENGO 1996, 142.

[20] On this point: GRELLE 1961, esp. 328-329.

pacity to effectively and efficiently assume his function. This is what emerges from a study of the rich casuistic material about the grounds for excuse.

2. THE CASUISTRY OF EXCUSES: A REFLECTION ON A WELL-BALANCED VISION OF GUARDIANSHIP

The subject is well documented and occupies a prominent place in the major sources of Roman law (*Vaticana Fragmenta*, Theodosian Code, Justinian Code and Institutes etc.).

Two types of sources specifically deal with *excusatio tutelae*.

First there are imperial constitutions. Numerous rescripts, letters, and constitutions of the emperor from the second century AD onwards deal with excuses in the field of guardianship. Emperors gave their opinions in rescripts and usually referred to their predecessors' decisions (especially to those of Marcus Aurelius). *Excusatio tutelae* was thus a recurrent and controversial issue, addressed by emperors on a case-by-case basis.

The second type of sources is treatises on excuses written by the most famous jurists of the Severan dynasty, namely Paul, Ulpian and Modestinus.

Paul is the author of a *Liber singularis de officio praetoris tutelaris*, the second edition of which was published between 203 and 211 with the title *Editio secunda de iurisdictione tutelari*. The topic is identical to the *Liber singularis de excusationibus tutelarum* written during the reign of Septimius Severus and Caracalla.[21] There is also the *De excusationibus liber singularis* written by Ulpian, probably between 199 and 211.[22] Finally, Modestinus wrote a *De excusationibus* in six volumes, probably after 215, under Emperor Alexander Severus and was largely influenced by the works of Paul and Ulpian to which he referred.[23]

All of them belong to the larger category of practical treatises dealing with the *officia* of the magistrates and written by jurists under the Severan emperors.[24] They aimed at guiding practitioners in the intricacies of the procedure of excuses for guardianship. For example, Modestinus informs the reader that his work was intended to explain the complex character of this procedure to

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[21] LENEL 1889, II, 850-856.

[22] LENEL 1889, II, 1798-1845.

[23] LENEL 1889, I, 54-69.

[24] See SCHULTZ 1946, 242-252; MASIELLO 1983, 12-16; MAROTTA 2004.

a certain Egnatius Dexter.[25] These works are full of references to the imperial legislation and, to a lesser degree, to Jurisprudence.

Let us now examine the different types of excuses developed in imperial provisions that endeavour to reconcile the minor's interests and the situation of the guardian. These *excusationes* can be divided into two main groups: those resulting from the guardian's physical or material incapacity and those deriving from pure privilege.

2.1. Excuses resulting from the Guardian's Physical or Material Incapacity

Guardianship was a temporary office that ended with the puberty of the ward[26]. This is why emperors granted a just cause of excuse to the guardian who was appointed in the same will first as a guardian and then as a curator, once the minor had reached puberty. In such case the guardian was excused from curatorship.[27]

Usually the presentation of excuses took place as soon as the guardian was informed or knew about his nomination, provided that he did not start managing the estate; if he did, he was no longer allowed to present his excuses.[28] The same is true if the appointed guardian had promised the father's ward during his lifetime that he would accept this burden.[29]

When they granted excuses, emperors took into account the physical and material impossibility for the guardian to accomplish that management. Such was the case for example in the following situations: old age (over 70 years),[30] hostility between the minor's father and the guardian,[31] lack of business experience and extreme poverty,[32] number of children,[33] number of already exist-

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[25] Modestinus (1 *exc*.) D. 27.1.1 pr.

[26] According to Gaius (1.168), the non-transferability of the ward's guardianship relied on the fact that it was a temporary office which ended when the male ward reached the age of puberty, as opposed to legal guardianship of women which lasted during their lifetime and could therefore be transferred for a profit.

[27] For instance: Imp. Diocletian and Maximian in C. 5.62.20.

[28] Modestinus (4 *exc*.) D. 27.1.13.12.

[29] Modestinus (6 *exc*.) D. 27.1.15.1.

[30] For instance: Mod. (2 *exc*.) D. 27.1.2 pr ; Philippus C. 5.67.1.

[31] Mod. (2 *exc*.) D. 27.1.6.17.

[32] For example: a rescript by Septimius Severus and Caracalla quoted by Ulpian (*liber sing. exc*.) D. 27.1.7; Mod. (2 *exc*.) D. 27.1.6.19.

[33] For example: a rescript by Septimius Severus and Caracalla C. 5.66.1.

ing guardianships,[34] nomination in a province far from the guardian's place of residence,[35] etc.

If someone acting in good faith raised an issue about the status of the *pupillus*, he should be granted exemption of guardianship.[36] Similarly in the case of a dispute about inheritance between an uncle designated as guardian in the will and the ward, the uncle should receive an exemption.[37] By contrast, if the dispute about inheritance did not involve all of the ward's property, the excuse had no just reason.[38]

Circumstances could change during the management, making it impossible to administer the ward's property. Emperors allowed the guardian to produce an excuse (*excusatio a suscepta tutela*) in case of absence *rei publicae causa*,[39], serious illness or insanity crisis. But this sort of excuse was granted for a limited time. The guardian was suspended during his absence and one year after his return,[40] or until he recovered; during the period of insanity a curator could be nominated.[41]

These rescripts show that emperors tried to find a just balance between the financial interests of the ward, especially the unitary and continuous management of his property by the same person, and major impediments preventing the guardian from performing his duties.

2.2. Excuses Deriving from Pure Privilege or Immunities

In this second category, the link between this type of excuse and the concern for protection of the ward's interests is not immediately clear. Excuse appears rather as a pure privilege given by the Emperor to the appointed person. In a way it reflects the generalization of excuses to any type of guardian.

The grounds for exemption based on privilege are numerous and the treatises on excuses listed them carefully (Paul, Callistratus, Ulpian, Modestinus). The persons enjoying this kind of privileges were for example: veterans,[42]

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34 For example: a rescript by Septimius Severus and Caracalla C. 5.69.1.

35 A rescript by Septimius Severus and Caracalla quoted by Modestinus (2 *exc*.) D. 27.1.10.4.

36 A rescript by Marcus Aurelius and Lucius Verus quoted by Modestinus (2 *exc*.) D. 27.1.6.18.

37 Iulianus (20 *Dig*.) D. 27.1.20.

38 Marcianus (2 *inst*.) D. 27.1.21pr.

39 Gordianus C. 5.64.1.

40 Gordianus C. 5.64.2.

41 Paul (*lib. sing. exc. tut*.) D. 27.1.11; Modestinus (3 *exc*.) D. 27.1.10.8 and D. 27.1.12pr.

42 See Caracalla C. 5.65.1; Mod. (3 *exc*.) D. 27.1.8pr, 2-6; Gordianus C. 5.65.2.

members of the praetorian guard,[43] members of the *fabrorum* corporation,[44] philosophers, grammarians, teachers of rhetoric, doctors,[45] law professors teaching in Rome,[46] athletes who had won a price in the sacred games,[47] provincial priests (in particular those of Asia, Bithynia and Cappadocia),[48] some municipal magistrates[49] etc.

Emperors granted them on a case-by-case basis to certain categories of persons, which points to the existence of a *munus*. In other words, it raises the question of guardianship as a charge in the legal sense of the word.

From the point of view of the appointed guardians, it was a charge very similar to other *munera*, as shown by imperial rescripts. These sources display the constant interactions between emperors and people regarding the distribution of offices among provincial cities.[50] Citizens asked for tax reliefs and presented petitions, as can be seen from the several following examples.

Marcus Aurelius replied by rescript that an aedile could be appointed as a guardian, although aedileship entailed exemption from private charges.[51]

Likewise, Alexander Severus replied that colonists were not excused from civilian charges, therefore not from guardianship either.[52]

Gordianus mentions the case of someone who accepted guardianship although he could have availed himself of an excuse without losing his privilege.[53]

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[43] Ulp. (*lib. sing. off. praet. tut.*) D. 27.1.9.

[44] Callistratus (4 *cogn.*) D. 27.1.17.2.

[45] Modestinus (2 *exc.*) D. 27.1.6.1-11, 16. For further details, you may refer to NUTTON 1971; GERMINO 2007.

[46] Modestinus (2 *exc.*) D. 27.1.6.12.

[47] Modestinus (2 *exc.*) D. 27.1.6.14.

[48] Modestinus (2 *exc.*) D. 27.1.6.13.

[49] Modestinus (2 *exc.*) D. 27.1.6.16.

[50] On this point see: MILLAR 1983; FELICI 2006; JASCHKE 2006.

[51] Callistratus (4 *de cogn.*) D. 27.1.17.4: Is qui aedilitate fungitur potest tutor dari: nam aedilitas inter eos magistratus habetur qui privatis muneribus excusati sunt secundum divi Marci rescriptum ("Someone serving as aedile can be appointed tutor, although the aedileship is one of those magistratures which provide exemption from private *munera,* according to a rescript of the deified Marcus").

[52] C. 5.62.8: Coloni (id est conductores) praediorum ad fiscum pertinentium hoc nomine excusationem a muneribus civilibus non habent ideoque iniunctae tutelae munere fungi debent. Alex. a. Maximo. <a 225 pp. iiii k. febr. Fusco et Dextro conss.> ("Colonists, that is to say, tenants of fiscal estates are not on that account exempt from civic duties, and they must, accordingly, perform the duty of managing a guardianship to which they may be called. Promulgated on 29 January 225").

[53] C. 5.62.12: Voluntaria tutelae munera privilegiis nihil derogant. Gord. a. Valentino. <a 238 pp. xi k. nov. Pio et Pontiano conss.> ("A voluntary management of a guardianship does not abrogate any privileges. Promulgated on 22 October 238").

Legally speaking, both emperors and jurisprudence classified guardianship in the category of civilian charges, probably as early as the end of the second century, in the context of a reassessment of the category of *munera* by the Roman jurisprudence[54].

The classification of *munera civilia* organized by Hermogenianus illustrates the legal situation of late classical law in this field. According to him, *munera civilia* were attached either to the property or to the person. Guardianship is classified with personal charges (*Aeque personale munus est tutela*),[55] defined as follows:

> Illud tenendum est generaliter personale quidem munus esse, quod corporibus labore cum sollicitudine animi ac vigilantia sollemniter extitit, patrimonii vero, in quo sumptus maxime postulator.[56]

This definition is similar to the one given by Modestinus (see above D. 27.1.6.15) who insisted that guardianship was a civil charge without compensation for the guardian.

The development of the system of excuses as a means to soften the mandatory character of the office has shifted guardianship towards public charges. Terminology and motives for excuses provide evidence of this shift and of the propinquity of exemption causes for guardianship and for other public charges. Therefore guardianship, which was initially an office based on agnatic relationship or on the testator's trust in the person of the guardian, became mandatory just like any other public charge related to the community. Guardianship, as a private charge, was then absorbed in the *munera publica*, just like all *munera civilia*. It is in that background that we should understand the introductory prologue of the title *De excusationibus tutorum vel curatorum* of the Institutes of Justinian: *nam et tutelam et curam placuit publicum munus esse*.[57]

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[54] See GRELLE 1961.

[55] Hermogenianus (1 *Epit.)* D. 50.4.1.4.

[56] Hermogenianus (1 *Epit.)* D. 50.4.1.3: "In general, something is to be regarded as a personal *munus* if it regularly arises from bodily activity together with the conscientious exercise of the mental faculties; as a patrimonial *munus* if it particularly involves expense".

[57] I. 1.25 pr.

BIBIOGRAPHY

AMELOTTI 1966
M. AMELOTTI, *Il testamento romano attraverso la prassi documentale. I. Le forme classiche di testamento*, Florence.

BONFANTE 1963
P. BONFANTE, *Corso di diritto romano. I. Diritto di famiglia*, Milan.

FELICI 2006
M. FELICI, *Riflessioni sui munera civilia di Arcadio Carisio*, in: L. CAPOGROSSI COLOGNESI & E. GABBA (eds.), *Gli statuti municipali*, Pavia, 153-182.

GERMINO 2007
E. GERMINO, *Una causa di excusatio tutelae in un testo di Erennio Modestino: D. 27.1.6*, in C. CASCIONE & C. MASI DORIA (eds.), *Fides Humanitas Ius. Studi in onore di L. Labruna*, IV, Neaples, 2189-2215.

GRELLE 1961
F. GRELLE, *«Munus Publicum». Terminologia e sistematiche*, «Labeo» 7, 308-329.

GUZMÁN BRITO 1976
A. GUZMÁN BRITO, *Dos estudios en torno a la historia de la tutela romana*, Barañain.

JASCHKE 2006
K. JASCHKE, *Munera publica. Funzione e carattere dei curatores nelle città romane sulla base delle fonti epigrafiche*, in: L. CAPOGROSSI COLOGNESI & E. GABBA (eds.), *Gli statuti municipali*, Pavia, 183-202.

LENEL 1889
O. LENEL, *Palingenesia iuris civilis*, II, Leipzig.

MAROTTA 2004
V. MAROTTA, *Ulpiano e l'impero II. Studi sui «libri de officio proconsulis» e la loro fortuna tardoantica*, Neaples.

MASIELLO 1983
T. MASIELLO, *I «libri excusationum» di Erennio Modestino*, Neaples.

MILLAR 1983
F. MILLAR, *Empire and City, Augustus to Julian: Obligations, Excuses and Status*, «JRS» 73, 76-96.

NUTTON 1971
V. NUTTON, *Two Notes on Immunities: Digest 27.1.6.10 and 11*, «JRS» 61, 52-63.

ROLFE 1948-1954
J.C. ROLFE, *The Attic Nights of Aulus Gellius*, I, Harvard.

SCHULTZ 1946
F. SCHULTZ, *History of Roman Legal Science*, Oxford.

VIARENGO 1996
G. VIARENGO, *L'"excusatio tutelae" nell'età del Principato*, Genova.

VOCI 1960
P. VOCI, *Diritto ereditario romano*, I, Milan.

WATSON 2008
A. WATSON, *The Digest of Justinian*, I-II, Philadelphia.

WILCKEN & MITTEIS 1912
U. WILCKEN & L. MITTEIS, *Grundzüge und Chrestomathie der Papyrusurkunde*, II, Leipzig.

Vormundschaft in lateinischen *tabulae*

ÉVA JAKAB

ABSTRACT

Tutela, Vormundschaft war eine wichtige Rechtsinstitution im römischen Recht. Moderne Autoren gliedern das Gebiet in tutela impuberum und tutela mulieris – Vormundschaft der Minderjährigen und der Frauen. Dem Vormund wurde „Macht und Gewalt" zugesichert, um die Interessen des Unmündigen zu schützen: Ihre Hauptaufgabe bestand in der Verwaltung des Mündelvermögens. Der Beitrag konzentriert sich auf die dokumentarischen Quellen, die von der Praxis der tutela berichten. Tabulae bezeugen, wie die Vormünder bestellt oder abgelöst wurden. Andere Urkunden zeigen, dass die auf den ersten Blick streng anmutende Beschränkung der Rechtsfähigkeit der Frauen im alltäglichen Geschäftsleben wesentlich abgeschwächt werden konnte. Insbesondere vermögende Frauen, die die Mitwirkung von Sklaven und Freigelassenen zur Hilfe hatten, konnten ihre finanziellen Angelegenheiten sorglos ohne Vormund führen.

Die Juristen Roms waren schon früh bemüht, das Wesen der Vormundschaft (*tutela*) in möglichst exakten Definitionen zu erfassen. Die überlieferten Texte zeigen, dass eine treffende Formulierung durch Generationen weitergereicht wurde. Etwa Iulius Paulus, der berühmte Theoretiker, der in der zweiten Hälfte des 1. Jahrhunderts n.Chr. wirkte, bezieht sich in seinem Traktat auf seinen Vorgänger Servius Sulpicius Rufus, der im 1. Jahrhundert v.Chr. lebte und zu den bedeutendsten republikanischen Juristen zählte:[1] „Die Vormundschaft ist, wie Servius definiert, die Macht und Gewalt (*vis ac potestas*) über einen freien Menschen, die vom Zivilrecht gegeben und gewährt wird, um den zu schützen, der sich wegen seines Alters nicht selbst verteidigen kann."[2] Paulus folgt hier Servius und stellt auf die zentrale Rolle der *vis* und der *potestas* ab, der schützenden Macht und Gewalt über einen minderjährigen Freien. Das technische Wort *potestas* verweist auf die *patria potestas*, die väterliche Gewalt, die bei unmündigen vaterlosen Schutzwürdigen in gewissem Sinne kraft des *ius civile* nachgebildet wird. Im § 1 wird dieser Definition auch noch eine etymologisierende Erläuterung angehängt, die das Wort „*tutor*" zu erklären sucht: „Vormünder sind diejenigen, die diese Macht und Gewalt (*vim ac potestatem*) innehaben; und aus eben dieser Aufgabe haben sie auch ihren Namen erhalten. Sie heißen nämlich *tutores*, Vormünder, weil sie Beschützer und Verteidiger sind, ebenso wie *aeditui*, Tempelwächter, diejenigen genannt werden, die *aedes*, Tempel, schützen."[3] Wie die *aeditui*, die Tempelwächter, über die Integrität, Unverletztheit der heiligen Orte wachen, so wachen nach Paulus die Vormünder über Person und Vermögen der Minderjährigen.

Die oben zitierte Definition des Servius aus dem 1. Jahrhundert n.Chr. blieb im antiken Rom für Jahrhunderte maßgeblich. Sie wurde auch noch in die Institutionen Justinians (im 6. Jahrhundert) ziemlich wörtlich übernommen.[4] Es fällt sogleich auf, dass beide Fragmente die *tutela impuberis*, die Vormundschaft über Minderjährige vor den Augen hatten; die Vormundschaft über Frauen bleibt hier ausgeklammert. Dieser Mangel ist wohl mit der Rechtsentwicklung der nachklassischen Zeit zu erklären, wodurch die Frauentutel abgeschafft wurde. Nichtsdestoweniger hielten jedoch die Römer daran

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1 Vgl. KUNKEL & LIEBS 2001, 25.

2 D. 26,1,1 pr. Paulus 38 ed.: *Tutela est, ut Servius definit, vis ac potestas in capite libero ad tuendum eum, qui propter aetatem sua sponte se defendere nequit, iure civili data ac permissa*. Alle Übersetzungen aus dem Corpus Iuris Civilis folgen O. BEHRENDS, R. KNÜTEL, B. KUPISCH & H.H. SEILER, *Corpus Iuris Civilis (Text und Übersetzung)*, Bd. II-IV, Heidelberg 1995-2005.

3 D. 26,1,1,1 Paulus 38 ed.: *Tutores autem sunt qui eam vim ac potestatem habent, exque re ipsa nomen ceperunt: itaque appellantur tutores quasi tuitores atque defensores, sicut aeditui dicuntur qui aedes tuentur*.

4 Inst. 1,13,1 und 2.

fest, dass der Vormund über Person und Vermögen des Minderjährigen eine Machtposition, eine umfassende Schutzgewalt haben soll, die der *patria potestas* ähnelt. Anfangs war diese *potestas* beinahe grenzenlos, der Prätor fand es jedoch bald notwendig, eine gewisse öffentliche Kontrolle einzuführen, um die Machtposition der *tutores* etwas einzuschränken.[5]

In D. 26,1, in dem oben zitierten Titel der Digesten, folgen den einleitenden Sätzen lange Kommentare, die sich hauptsächlich damit beschäftigen, wer zum Vormund ernannt werden kann. Bevor wir uns damit auseinandersetzen, sollten wir noch ein paar Worte über die Vormundschaft im römischen Recht allgemein sagen. Moderne Lehrbücher zum römischen Recht definieren die Rechtsfigur der *tutela* wie folgt: „Unmündige (*impuberes*) und Frauen stehen, wenn sie *sui iuris* sind, unter Tutel."[6] Der rechtliche Grund der Unfähigkeit, sich um die eigene Geschäfte kümmern zu können, lag bei der ersten Gruppe im geringen Alter (hierher gehörten diejenige, die das Alter der *pubertas* noch nicht erreichten); bei der zweiten Gruppe hingegen im weiblichen Geschlecht. Doch bereits Gaius stellte lakonisch fest, dass für ihn die wahren Gründe der Frauentutel nicht nachvollziehbar seien (Gai. 1,190): „Es gibt aber kaum einen einleuchtenden Grund, der dafür spricht, dass volljährige Frauen unter Vormundschaft stehen. Denn die allgemeine Annahme, dass sie wegen ihrer Wankelmütigkeit (*levitas animi*) sehr oft getäuscht werden und es daher richtig ist, dass sie von Vormündern, die ihre förmliche Zustimmung (*auctoritas*) erteilen müssen, geleitet werden, ist mehr Schein als Wirklichkeit. Denn volljährige Frauen führen ihre eigenen Geschäfte selbst und in etlichen Fällen ist es bloße Formalität, dass der Vormund seine Zustimmung erteilt; auch wird er häufig vom Prätor gezwungen, die Zustimmung auch gegen seinen Willen zu erteilen."[7] Literarische Quellen bezeugen, dass bereits im 1. Jahrhundert v.Chr. vermögende Römerinnen, etwa Terentia und Tullia, ihre Güter unter ihrer Kontrolle hatten.[8] Neuere Forschungen zeigen, dass die wachsende Freiheit und Unabhängigkeit der Frauen wahrscheinlich durch die Ehegesetze des Augustus gebremst worden sei.[9] Worin der Grund für die lebenslange Vormundschaft über Frauen auch gelegen sein mochte, ihr Inhalt steht fest:[10] Frauen konnten ohne Zustimmung (*auctoritas*) ihres Vor-

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5 Vgl. dazu etwa KASER & KNÜTEL 2014, 363.

6 KASER & KNÜTEL 2014, 362.

7 Übersetzung von KASER & KNÜTEL 2014, 369.

8 Vgl. DIXON 1986, 93-120.

9 S. den Überblick in KASER & KNÜTEL 2014, 369.

10 Gai. 1,190 gibt dazu nur eine summarische Übersicht, aber Ulpian reg. 11,27 erläutert die Fälle ausführlicher. Vgl. dazu NELSON & MANTHE 1999, 145-146.

munds keine *legis actio* und kein *iudicium legitimum* anhängig machen, kein Rechtsgeschäft des *ius civile* führen, z.B. kein Testament anfertigen, keine Übereignung von *res mancipi* gültig vornehmen, keine Sklaven freilassen oder keinem eigenen Freigelassenen eine Erlaubnis erteilen, mit einem fremden Sklaven zusammenzuleben, und im allgemeinen keine Verbindlichkeit (Schuldverpflichtung, Obligation) eingehen.[11] Gaius unterrichtet seine Leser sorgfältig darüber, aus welchem Rechtsgrund ein Vormund die Verwaltung des Mündelvermögens übernehmen kann: Testament, gesetzliche Anordnung oder magistratische Bestellung.[12] Im Folgenden werden wir hierauf noch zurückkommen.

Es empfiehlt sich, vor der eingehenden Untersuchung des Quellenmaterials einen kurzen Blick auf den Kontext zu werfen. Welche Bedeutung dürfte die Rechtsfigur „Vormundschaft" in der römischen Welt – in Gesellschaft und Wirtschaft – gespielt haben? Welche (bescheidenen) Aussagen lassen sich im Spiegel der juristischen Quellen, überliefert grundsätzlich in den Sammlungen Justinians, dazu treffen?

1. DIE BEDEUTUNG DER VORMUNDSCHAFT IM SPIEGEL DER QUELLEN

Im Folgenden versuche ich anhand einfacher Zahlen zu verdeutlichen, welch zentrale Rolle die Vormundschaft in den Schriften der römischen Juristen einnahm. In den Institutionen Justinians nimmt die Darstellung der Regeln über die Vormundschaft etwa 45% der Zeilen des ersten Buches (*De personis*) ein. In den Fragmenten der Titel Inst. 1.13 bis 26 werden die elementaren Kenntnisse über die *tutela* anschaulich zusammengefasst. In den Institutionen des Gaius[13] wird sogar ein Drittel (etwa 33%) des Traktats über Personen der Vormundschaft gewidmet.[14] Folgt man der These, dass die Institutionen des Gaius aus dem 2. Jahrhundert vor allem zur Belehrung der Neubürger aus den Provinzen verfasst wurden,[15] passt die detaillierte Behandlung dieser Rechtsfigur gut ins Bild. Dieser Eindruck wird weiter bekräftigt, wenn man die Digesten überprüft, die Sammlung von Exzerpten aus den Schriften der klassischen

[11] KASER & KNÜTEL 2014, 369-370.

[12] Gai. Inst. 1,144-187; vgl. dazu NELSON & MANTHE 1999, 142-147; zur *lex Atilia* und *datio tutoris* in den Munizipalgesetzen s. insbesondere NÖRR 2001, 1-72.

[13] Die bekanntlich als Vorlage zur Abfassung des Lehrbuchs Justinians gedient haben.

[14] Gai. 1,143-199.

[15] Vgl. THÜR 1998; MANTHE 2004, 12 und auch 21-24.

römischen Juristen, die im 6. Jahrhundert zusammengestellt wurde. Von den fünfzig Büchern sind zwei (sogar ziemlich umfangreiche) der Vormundschaft gewidmet: D. 26 und D. 27. Will man versuchen, sich über deren Bedeutung und verhältnismäßige Länge ein Bild im Kontext des ganzen Quellenmaterials zu verschaffen, ist man gezwungen, auch hier die Zeilen zu zählen. Die Texte, die sich mit der Vormundschaft beschäftigen, umfassen in den zwei Büchern über *tutela* (D. 26 und D. 27) insgesamt etwa 5.500 Zeilen. Zum Vergleich ist heranzuziehen, dass die *locatio conductio,* einer der wichtigsten Verträge[16] insgesamt nur in 980 Zeilen besprochen wird. Der Kauf, der allerwichtigste Kontrakt im Warenaustausch, wurde insgesamt in etwa 3.000 Zeilen abgehandelt; und auch davon sind mehr als 1.100 Zeilen den Nebenabreden gewidmet.

Vergleicht man den Umfang der Titel über Vormundschaft mit dem Umfang der Titel über *locatio conductio* und Kauf im Vertragsrecht, kommt man zu dem Schluss, dass die zwei wichtigsten Verträge des Wirtschaftslebens in den Digesten insgesamt wesentlich schwächer repräsentiert sind als die Vormundschaft. Bereits dieses einfache Spiel mit den Zahlen zeigt, dass der Vormundschaft im Rechtsleben Roms eine zentrale Rolle zugesprochen wurde. Es liegt nahe, dass es dabei um die Kontrolle von bedeutenden Vermögensmaßen ging, die für die soziale Elite Roms von großem Interesse waren.[17]

Es fragt sich, ob diese herausragende soziale und wirtschaftliche Bedeutung durch das überlieferte Urkundenmaterial bestätigt wird. Vor der Untersuchung dieser Frage möchte ich noch darauf hinweisen, dass ein beträchtlicher Anteil der Fälle, die von den Juristen besprochen wurden, aus dem hellenistischen Milieu des griechischen Ostens stammte. Blättert man in den Bücher D. 26 und D. 27, fällt es sogleich auf, dass zahlreiche Fragmente auf Griechisch überliefert sind. Es handelt sich dabei insgesamt um 110 Fragmente, die das Ausmaß von etwa 655 Zeilen erreichen. Dazu kommen zahlreiche, auf Lateinisch verfasste Entscheidungen, in denen ebenfalls Fälle aus provinzialer Umgebung besprochen werden; auf sie ist noch zurückzukommen.

Aber kehren wir zu der oben gestellten Frage zurück: Was verrät die urkundliche Überlieferung über die große wirtschaftliche und soziale Bedeutung des Themas *tutela*? Wird die zentrale Rolle der Rechtsfigur im Alltagsleben der Römer auch durch die Anzahl und Inhalt der erhaltenen Dokumente bestätigt?

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[16] Im modernen Recht werden die Sachverhalte, die in Rom hierher gezählt wurden, als Mietvertrag, Dienstvertrag oder Werkvertrag definiert.

[17] VERBOVEN 2002.

2. ZUR URKUNDLICHEN ÜBERLIEFERUNG

Ein rascher Überblick über das erhaltene Quellenmaterial erweckt den Verdacht, dass die urkundlichen Quellen den oben gewonnenen Befund keineswegs bestätigen. Ganz im Gegenteil! Urkunden, die das Rechtsleben in vormundschaftlichen Verhältnissen nachweisen würden, sind in auffällig geringer Anzahl überliefert.[18] Es liegt jedoch nahe, dass der Grund dafür im Zufall der Überlieferung liegt. Im dritten Band der FIRA (*Fontes Iuris Romani Antejustiniani* III², 1943) wurden von Arangio-Ruiz insgesamt acht Dokumente zum Thema „Vormundschaft" aufgenommen, Nr. 24-31. All diese Urkunden stammen aus provinzialem Milieu, aus der römischen Provinz Ägypten. Sie betreffen folgende Rechtsgeschäfte: *datio tutoris* (Nr. 24, 25, 28), *excusatio tutoris* (Nr. 30), *liberatio tutoris* (Nr. 26, 31), Abkommen *inter contutores* (Nr. 29) und *ius liberorum* (Nr. 27). In vier Geschäften werden die Frauentutel und in weiteren vier die Vormundschaft über Minderjährige behandelt.

Der Datierung nach umfassen die Dokumente den Zeitraum von fast dreihundert Jahren: Die erste ist mit 14 v.Chr. datiert, die letzte mit 263 n.Chr. Von den acht Urkunden sind sieben auf Papyrus, und nur eine einzige (Nr. 25) auf Holztafeln (*tabulae*) festgehalten. Alle acht Urkunden stammen aus Ägypten; sie wurden überwiegend auf Griechisch (manche bilingue) angefertigt — und das sogar in Fällen, in denen offensichtlich römische Bürger involviert waren (etwa Nr. 31). Die einzelnen Texte vermitteln wertvolle Kenntnisse über das Rechtsleben — die Berichte stammen jedoch, wie es oben bereits festgehalten wurde, aus der griechisch-hellenistisch gefärbten Welt Ägyptens.[19]

Mustert man genauer das reiche Material der epigraphischen Quellen durch, findet man jedoch auch weitere Belege, die vom Umfeld der *tutela* berichten. Aus dem 3. Jahrhundert ist etwa eine Schenkungsurkunde überliefert (FIRA III² 93), in der eine gewisse Iulia Monime als *donatrix* auftritt.[20] Der Text dokumentiert die Übereignung eines Grundstücks mit Heiligtum durch *mancipatio* an ein Kollegium des Gottes Silvanus; die Frau tritt mit einem Geschlechtsvormund auf (Z. 9-12). In FIRA III² Nr. 95 verschenkt Statia Irene hingegen eine Grabstätte an M. Licinius Timotheus ohne Vormund, obwohl sie ebenfalls das Manzipationsformular benützt. Im Urkundentext wird mehrmals hervorgehoben, dass diese *donatrix* die stolze Besitzerin des *ius liberorum* ist.[21]

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[18] Der reiche Fund an Papyri wird hier überwiegend ausgeklammert; vgl. dazu CAVENAILE 1958; RUPPRECHT 1986.

[19] Vgl. dazu den Beitrag von Th. Kruse in diesem Band.

[20] Vgl. dazu NELSON & MANTHE 1999, 146.

[21] NELSON & MANTHE 1999, 146-147.

Das bunte Urkundenmaterial, das im dritten Band der FIRA publiziert wurde, lässt folgende Schlüsse zu: Einerseits entspricht die Anzahl der überlieferten Urkunden keineswegs den Erwartungen, die durch die Länge der juristischen Kommentare erweckt wurden. Andererseits unterstützt die geographische Herkunft der Urkunden eine andere Vermutung, die aufgrund der formellen Untersuchung der Digesten bereits aufgestellt wurde: Die Vormundschaft und deren behördliche Regelung bzw. juristische Begutachtung waren in den Provinzen von besonderer Bedeutung.

Spätere Funde ermöglichen einen weiteren Blick in den Alltag der vormundschaftlichen Geschäfte, die sogar aus dem zentralen Gebiet des Imperiums, aus der Campania, stammen. Die Urkunden im Archiv der Sulpicii oder weitere aus Herculaneum können für das Rechtsleben Roms als Musterbeispiele gedeutet werden.

Aus Herculaneum sind vor allem *dationes tutoris* erhalten. Ein gutes Beispiel ist Tabula Herculanensis, DELLA CORTE 1951, 228 (n. 13), eine *datio tutoris mulieris* aus dem 1. Jahrhundert n.Chr.:

> IIvir ex decurionum decret[o, quo ne ab] iusto tutore [tutela abeat, ex] lege Iulia [et Titia dixit: Aresc[usae Q. Vibidius [A]mpliatus sit tuto[r.[22]
>
> Der Duovir hat gemäß dem Beschluss der Dekurionen, damit eine Tutel durch einen rechtmäßigen Tutor nicht fehle, angeordnet: Für Arescusa soll Q. Vibidius Ampliatus Tutor sein.

Dieter Nörr stellt fest, dass Herculaneum wohl eine eigene *lex municipii* gehabt haben dürfte, die eventuell auch die Bestellung von Tutoren regelte.[23] Trotzdem wird hier die Befugnis der Dekurionen, aufgrund ihrer magistratischen Macht einen Vormund zu ernennen, unmittelbar auf die *lex Iulia* gestützt.[24]

Wie Rechtsgeschäfte von Frauen, die formell unter Vormundschaft gestanden sein mochten, in der Alltagspraxis durchgeführt wurden, würde man eher im Archiv der Sulpicii erwarten. Durch den Zufall der Überlieferung bieten diese Urkunden dem modernen Leser einen überwiegend repräsentativen Ausschnitt des damaligen sozialen und wirtschaftlichen Lebens.[25] Hier findet man alle Arten von Alltagsgeschäften reichlich dokumentiert. Desto mehr überrascht, dass Urkunden in Verbindung mit Vormundschaft im gesamten Archiv sehr schwach vertreten sind. In dem von Giuseppe Camodeca 1998

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22 Text nach der Rekonstruktion von ARANGIO-RUIZ 1974, 451-452.

23 NÖRR 2001, 11-12.

24 Zur ähnlichen Befugnis des Statthalters s. NÖRR 2011, 29-32.

25 Vgl. dazu etwa CROOK 1994, 260-261; GRÖSCHLER 2008.

neu edierten Band sind insgesamt 127 Dokumente enthalten. Von denen bezeugen überraschender Weise nur zwei von der Mitwirkung eines Vormunds. Wie ist dieser schmale Befund zu erklären?

Die Mitwirkung eines Vormunds wurde nur in TPSulp. 60 und 99 festgehalten; beide Texte handeln von *tutela mulieris*. Um einen näheren Einblick zu gewinnen, sollte man einen Blick auf einige Texte werfen. Ein gutes Beispiel ist TPSulp. 60 (Puteoli, 43 n.Chr.), die aus dem Milieu des Bankhauses berichtet:

> TABELLAE TITINIAE A[NTRACIDIS]
>
> Exp(ensos)
>
> Eupliae Theodori f(iliae) [HS DC] | Meiliacae tutore aucto[re] | Epichare Aphrodisi f(ilio) Athe[niensi]; | Petiit et numeratos acce[pit] | Domo ex r[i]sco
>
> Acceptos
>
> Risco (vac.) [HS DC] | Eos HS DC | nu[mmos, qui s(upra) s(cripti) s(unt)], | Interrogant[e Titinia Antracide], | fide sua esse ius[sit Epichares Aphrodisi] | f(ilius) Athenensis p[ro Euplia Theodori f(ilia)] | Meliacae Ti[tiniae Antracidi] | Act[um Puteolis ...[26]

Der ungewöhnlich formulierte Text wird im Schrifttum als *nomen arcarium* ausgelegt: es liegt nahe, dass es sich um die Gewährung eines Darlehens durch die Bank handelt. Die Besonderheit der Formulierung liegt darin, dass die Valutierung des Darlehens vermutlich durch Umbuchung von dem Konto der Gläubigerin auf das Konto der Schuldnerin durchgeführt wurde.[27] Für das vorliegende Thema ist von Relevanz, dass beide Parteien des Rechtsgeschäfts Frauen sind: Euplia, die Schuldnerin, ist vermutlich eine Griechin, die mit ihrem Geschlechtsvormund, Epichares (der vielleicht auch ihr Ehemann war) auftritt.[28] Titinia, die Gläubigerin, dürfte der lokalen Geschäftsszene angehört haben, die mit Hilfe der Bank ihr Geld gegen Zinsen anlegte. Der geschuldete Betrag, 1.600 Sesterzen, ist in diesem Dokument relativ gering. Der gut erhaltene Text zeigt, dass das Rechtsleben der Stadt Puteoli den Vorschriften des klassischen römischen Rechts über die beschränkte Handlungsfähigkeit der Frauen folgte. Euplia kommt auch in weiteren Urkunden vor: Vermutlich wirkte Epichares auch in ihren anderen Geldgeschäften (in Nr. 61 und 62) als

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[26] TPSulp. 60: „Täfelchen der Titinia Antracis; ausgezahlt 1.600 Sesterzen an Euplia, mit Zustimmung ihres Vormundes Epichares, Sohn des Aphrodisius, aus Athen, sie hat gebeten und bar zugezählt erhalten aus dem Haus, aus der Kasse. Eingenommen der Kasse 1.600 Sesterzen ...“

[27] GRÖSCHLER 1997, 69-70; JAKAB 2003; anders WOLF 1998.

[28] JAKAB 2003, 494; anders jedoch WOLF 2001, 120, der hier eine *tutela impuberum* unterstellt.

Vormund mit. Diese *tabulae* sind jedoch sehr schlecht erhalten, und gerade der für die Vormundschaft relevante Textteil fehlt.

Nr. 99, ein ebenfalls sehr schlecht erhaltener Text ist die zweite Urkunde im Archiv, in der eine *tutela* erwähnt bzw. gut lesbar dokumentiert wurde. Es handelt sich um die Stipulation einer gewissen Marcia Fausta,[29] der Schuldnerin in dem dokumentierten Rechtsgeschäft — auch sie folgt den Gesetzen über die Frauentutel und tritt mit ihrem Vormund auf (Z. 10). Nr. 82, ein *chirographum* aus einer Auktion, überliefert ebenfalls ein Frauengeschäft, in dem die Freigelassene Patulcia Erotis einen gewissen Betrag von dem Bankier C. Sulpicius Cinnamus erhielt.[30] Die Urkunde wurde von ihrem Patron angefertigt, sie zeigt jedoch keinen Hinweis auf irgendeine Vormundschaft.

Wie ist der schmale Befund zu verstehen? In dem Archiv der Sulpicii sind insgesamt 23 Urkunden erhalten, die Geldgeschäfte von Frauen betreffen. Nimmt man die 97 Urkunden, deren Zustand eine juristische Analyse zulässt, als Basis, bedeuten die 23 Urkunden einen beträchtlichen Anteil von 24 %. Um so mehr fällt es auf, dass die meisten Geschäfte ohne Vormund abgeschlossen wurden. In einer früheren Publikation habe ich die These vertreten, dass vermögende Römerinnen den Geschlechtsvormund durch den Einsatz von Vermittlern (Sklaven, Freigelassene oder Bankvermittlung) elegant umgehen konnten.[31] Die dort behandelten Texte, die Frauengeschäfte aus dem Archiv der Sulpicii ohne Vormund aufweisen, bleiben hier überwiegend ausgeklammert. Ich stelle hier nur ein einziges Dokument vor, um die rechtsgeschäftliche Technik, welche diese Art des „Umgehungsgeschäfts“ betrifft, anschaulich zu machen (TPSulp. 58, Puteoli):

prae[t]er HS viginti milia
nummum in rationem
Priscil[l]ae d[o]minae meae;
eaque HS quattuor millia,
quae su[p]ra s[cr]ipta sunt,
proba recte dari fide rogavit
C(aius) Sulpicius F[a]ustus fide promisi
Pyramus Caesiae Priscillae ser(vus).
Act(um) Puteol[i]s.[32]

[29] Der Name ist sehr schlecht erhalten, vgl. CAMODECA 1999, 210-211.

[30] Zu den Bankiers der Sulpicii vgl. GRÖSCHLER 1997, 57-66; ANDREAU 1995, 153-155; WOLF 1985, 779-780.

[31] JAKAB 2013.

[32] TPSulp. 58: „… außer die 20.000 Sesterzen auf die Rechnung meiner Herrin Caesia Priscilla; dass diese 4.000 Sesterzen, die oben genannt sind, in guter Münze und ordnungsgemäß gezahlt werden, hat sich Caius Sulpicius Faustus versprechen lassen und habe ich, Pyramus, der Sklave der Caesia Priscilla, versprochen. Geschehen in Puteoli.“

Es handelt sich um den Torso eines Triptychons; erhalten ist nur eine Innenseite (*scriptura interior*) mit dem Ende des Vertragstextes und die Rückseite mit den Siegeln der Zeugen. Ausgestellt wurde die Urkunde ebenfalls in Puteoli. Gelesen werden kann eine Stipulation, die zwischen Faustus und Pyramus, dem Sklaven einer gewissen Caesia Priscilla (Z. 8), abgeschlossen wurde. Faustus, der Bankier, hat 4.000 Sesterzen ausbezahlt und sich die Rückzahlung in Form einer Stipulation versprechen lassen. Es handelt sich wahrscheinlich um ein Darlehen.[33] Vermutlich stand auf *Tabula* I *pagina* 2 ein *chirographum*, etwa *scripsi me accepisse et mutua debere* und dem dürfte das überlieferte Rückzahlungsversprechen gefolgt sein. In der Urkunde werden jedoch drei Personen erwähnt: Faustus, der Sklave Pyramus und seine *domina* Caesia Priscilla. Es fragt sich deshalb, ob Pyramus das Darlehen auf seine eigene Rechnung (im Rahmen seines *peculium*) oder, quasi stellvertretend für seine Herrin, aufgenommen hat. Pyramus, der Sklave der Caesia Priscilla, hätte nämlich zu Lasten seines *peculium* von der Bank der Sulpicii ohne Bedenken 4.000 Sesterzen erhalten können. Gegen diese Lösung spricht jedoch Folgendes: In Z. 1 ist eine bereits bestehende Schuld von 20.000 Sesterzen genannt; gefolgt von der Bemerkung *in rationem Priscillae dominae meae* (Z. 2-3).

Die Wendung *in rationem* will Camodeca auf die bereits geschuldeten 20.000 beziehen.[34] Mir scheint jedoch richtiger, sie mit dem soeben beurkundeten Rechtsgeschäft (mit dem aktuellen Darlehen von 4.000 Sesterzen) zu verbinden.[35] Zeile 2-3 von TPSulp. 58 bestätigen meines Erachtens, dass die 4.000 Sesterzen (ebenso wie die früher ausbezahlten 20.000) zu Lasten der Abrechnung (des Kontos) der Priscilla verbucht wurden. Pyramus wirkte dabei bloß als Bote, als Abnehmer des Geldes mit (durch den rechtlich voll anerkannten Besitz- und Eigentumserwerb durch Sklaven). Seine *domina* ging nicht persönlich in das Bankhaus der Sulpicii, um das Geld in Empfang zu nehmen; sie hat dafür ihren Sklaven eingesetzt. Es liegt nahe, ihre Abwesenheit damit zu erklären, dass ehrenhafte Frauen in der Antike jeden öffentlichen Auftritt vermieden.[36] Dieses Problem konnte jedoch leicht gelöst werden, weil vermögende Frauen in ausreichender Anzahl über Vermittler verfügten.

Zusammenfassend lässt sich feststellen, dass die urkundliche Überlieferung zum Thema Vormundschaft ein eher enttäuschendes Bild zeigt. Zur Vormundschaft über Mündel sind kaum Dokumente aus dem Rechtsleben erhalten. Die meisten Texte betreffen die Frauentutel – es sind jedoch zahlreiche

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33 GRÖSCHLER 2006.

34 CAMODECA 1999, 149.

35 Vgl. JAKAB 2013, 123-125 mit weiteren Quellen.

36 Zum sozialen Hintergrund allgemein vgl. GARDNER 1995, 258-267.

Dokumente überliefert, in denen Frauen ihre Geldtransaktionen ohne einen Vormund abwickeln.

Meinen Beitrag könnte ich mit diesem eher negativen Ergebnis hier eigentlich schließen. Es gibt jedoch noch eine weitere wertvolle Quellengruppe, die – zwar indirekt, aber doch vertrauenswürdig – über die Urkundenpraxis Informationen vermitteln kann: Die Sammlung der Schriften der klassischen römischen Juristen, die in den Digesten tradiert wurden.

3. URKUNDENPRAXIS IM SPIEGEL DER JURISTENSCHRIFTEN

Die beinahe 5.500 Zeilen, die in den Digesten Reflexionen aus der hoch theoretisierenden Welt der Juristen über Fragen aus dem Alltagsleben bzw. aus der Gerichtspraxis überliefern, bieten auch für die vorliegende Untersuchung eine reiche Fülle am Material. Im Folgenden werde ich nur einzelne Aspekte hervorheben, um das oben aus dem Urkundenfund gewonnene Bild zu ergänzen.

Wenn Ulpian, Paulus, Modestin oder Cervidius Scaevola konkrete Fälle aus dem Alltag besprechen oder auf Anfragen der Parteien Gutachten erstellen, stützen sie ihre Sachverhalt-Darstellungen nicht selten auf Urkundenklauseln. Oft werden gelungene oder misslungene Abreden aus konkreten (Beweis-) urkunden zitiert und ausgelegt. In anderen Fällen werden Ratschläge zu der richtigen Anfertigung von Dokumenten erteilt. Es handelt sich dabei etwa um die Bestellung und Ersetzung von Vormündern, um die Sicherheitsleistung des Vormunds, um die Verwaltung des Mündelvermögens oder um die Erteilung der Zustimmung (*auctoritas*) des Vormunds. Ich verweise hier nur auf einige Beispiele: *Lucium Titium liberis meis tutorem do* (Gai. 1,149); *Liberis meis vel uxori meae Titius tutor esto* (Gai. 1,149); *uxori (meae) tutorem do* (Gai. 1,149); *Titiae uxori meae tutoris optionem do* (Gai. 1,150); *Titiae uxori meae tutoris optionem dumtaxat semel do / dumtaxat bis do* (Gai. 1,152); *Lucium Titium tutorem do, si is non vivit, tum Gaium Plautium tutorem do* (D. 26,2,33 Iav.); *illi aut illi filiis meis, utri eorum volet, Titius tutor esto* (D. 26,2,23 pr. Afr.); *Titius si volet illi filio meo tutor esto* (D. 26,2,23,1 Afr.); *parakalō epimeleisthai tōn pragmatōn* (D. 26,3,1,1 Mod.); *eosque aneclogistos esse volo* (D. 26,7,5,7 Ulp.); *si liber erit, tutor esto* (D. 26,2,10,4 Ulp.); *tutorem do, si satisdederit* (D. 26,1,6,1 Ulp.).[37] Die Liste könnte man noch lange weiterführen. Viele Streitigkeiten entstanden insbesondere über testamentarische Vormundbestellungen. Einerseits könnten alte Bestimmungen eines Testaments im Laufe der Jahre zwischen Testamenterrichtung und Ableben obsolet

[37] Im Digestentitel D. 26 sind insgesamt 18 einschlägigen Stellen erhalten.

geworden werden (etwa durch den vorzeitigen Tod des Vormunds, durch Änderungen seines Status oder seiner gesellschaftlichen Stellung). Andererseits führten bedingte Vormundbestellungen oder Spannungen zwischen der testamentarischen und gesetzlichen Vormundschaft nicht selten zu Streitigkeiten.

Solche wörtlichen Zitate ermöglichen die Rekonstruktion der Formulare, die im Rechtsleben konsequent benützt wurden. Vergleicht man die Anzahl der Texte über Frauentutel und *tutela impuberum,* kommt man zu dem Schluss, dass die Juristen sich überwiegend mit den Angelegenheiten der Minderjährigen beschäftigt haben.

Es sind auch die typischen Probleme der Kautelarpraxis reichlich vertreten. Dazu gehören insbesondere, ob ein technisches Wort oder ein oft gebrauchter Begriff erweiternd oder einschränkend verstanden werden soll. In diesem Sinne überlegt etwa Ulpian: „Wenn jemand für seine Töchter oder Söhne Vormünder bestellt hat, ist anzunehmen, dass er sie auch für eine nachgeborene Tochter bestellt hat, weil von der Bezeichnung ‚Tochter' auch die nachgeborene Tochter erfasst wird."[38]

In zahlreichen Entscheidungen bzw. Gutachten begegnen uns Fälle, die eindeutig oder sehr wahrscheinlich aus einer Provinz kamen: D. 26,1,6,1; D. 26,2,1; D. 26,2,26; D. 26,2,30; D. 26,3,1,2; D. 26,3,2 pr.; D. 26,7,47,2; D. 26,7,58,2; D. 26,7,59 usw.[39] In diesen Texten werden oft Phänomene der hellenistischen Rechtskultur mit den Normen oder Grundprinzipien des römischen Rechts konfrontiert. Nicht selten zeigt der Statthalter große Toleranz für die lokale Praxis, die aber von den Juristen Roms hart kritisiert wird. Ein typisches Beispiel liefert dafür Papinian (D. 26,2,26 pr. Pap. 4 resp.):

> Nach unserem Recht (*iure nostro*) kann durch Testament des Vaters die Vormundschaft über die gemeinsamen Kinder nicht der Mutter übertragen werden, und wenn der Provinzstatthalter aus Rechtsunkenntnis (*imperitia*) irrt und entscheidet, der Wille des Vaters sei zu befolgen, wird doch sein Amtsnachfolger der Entscheidung, die unsere Gesetze nicht zulassen, zu Recht nicht beitreten.[40]

Im ersten Satz fasst der Jurist den Sachverhalt kurz zusammen und gibt seine Meinung über das juristische Problem. Ein Familienvater hat in seinem Testament die Vormundschaft über die aus seiner legitimen Ehe stammenden Kinder seiner Frau, der Mutter dieser Kinder, übertragen. Die Erwähnung des

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[38] D. 26,2,5 und 6.

[39] Es handelt sich im Digestentitel D. 26 insgesamt um 33 solche Stellen.

[40] D. 26,2,26 pr. Pap. 4 resp.: Iure nostro tutela communium liberorum matri testamento patris frustra mandatur, nec, si provinciae praeses imperitia lapsus patris voluntatem sequendam decreverit, successor eius sententiam, quam leges nostrae non admittunt, recte sequetur.

Statthalters verweist darauf, dass der Fall aus einer Provinz stammte. Aus hellenistischer Umgebung (aus Ägypten, aber auch aus Thessalien, Milet usw.) sind zahlreiche Dokumente (Papyri oder Inschriften) überliefert, die eine solche Praxis bestätigen: Die Mutter wird als *epitropos* oder *kyrios* bestellt.[41]

Aus dem Textzusammenhang geht hervor, dass der Statthalter hier in einem Prozess entschieden hat (*decrevit*). Vermutlich haben Familienangehörige das Testament des Vaters angegriffen, um die Einsetzung der Mutter zum Vormund nichtig erklären zu lassen. Es ist bekannt, dass das Amt des Tutors im römischen Recht strikt den männlichen Bürgern vorbehalten war: *Tutela plerumque virile officium est* (D. 26,1,16 pr. Gaius). Und auch weiter: „Frauen können nicht zu Vormündern bestellt werden, weil das ein Amt des Mannes ist…".[42] In unserem Fall dürfte der Statthalter aufgrund der vorgelegten Beweisurkunde, d.h. aufgrund des Testaments, entschieden haben (*favor testamenti*). Sein Beschluss lehnt sich dem allgemeinen Prinzip an, in Familienangelegenheiten dem örtlichen Gewohnheitsrecht den Vorrang zu gewähren. Es dürfte jedoch in Rom umstritten gewesen sein, wie weit man vom römischen Recht abweichen konnte. Es ist auch denkbar, dass dabei auch der Status der Betroffenen (ob es sich um die in der Provinz lebende römische Bürger handelte oder um Peregrine) eine Rolle spielte. Jedenfalls verweist Neraz in dem oben zitierten Fragment darauf, dass die Möglichkeit von Ausnahmen bestand: „… es sei denn, Frauen beantragen beim Kaiser ausdrücklich die Vormundschaft über ihre Kinder."[43]

In den Digesten, in den beiden Büchern über Vormundschaft (D. 26 und 27), findet man auch zahlreiche Verweise auf normative Regelungen: die Zwölf Tafeln, die *lex Iulia Vellaea, lex Iulia et Papia Poppea*, das prätorische Edikt, *Senatus consulta, oratio principis* oder kaiserliche Reskripte werden reichlich zitiert.[44] Die Rechtsquellen regeln das Rechtsinstitut *tutela* auf einer eher abstrakten Ebene, mit Anspruch auf eine allgemeine Akzeptanz. Daneben findet man mehrere Texte, die auf konkrete Entscheidungen der Statthalter hinweisen, die von den Juristen nicht selten abgelehnt oder korrigiert werden.

Mustert man die Texte durch, fällt es auf, dass in diesem Themenbereich von den Juristen außerordentlich viele kaiserliche Reskripte zitiert werden. Hier sollte eine vergleichende Untersuchung durchgeführt werden, welche die

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41 Ähnliche Fälle aus hellenistischer Umgebung vertreten die Quellen SB VI 9065, Z. 5-8; I.Mylasa II, 807; Milet I 3,151, Z. 4-6; BGU VIII 1813, Z. 1-10; IG IX 2, 1040, Z. 1-10; I.Erythrai/Klazomenai II 201, Z. 151-164; vgl. VÉLISSAROPOULOS-KARAKOSTAS 2011, 231-233.

42 D. 26,2,18 Neraz.

43 Vgl. dazu GARDNER 1995, 23-25.

44 Man zählt insgesamt 47 kaiserliche Konstitutionen; 7 *Senatus consulta*; und neun Verweise auf die Zwölf Tafeln. Zur Gesetzgebung über Vormundschaft s. NÖRR 2001, 29-30.

Anzahl der Reskripte (wie viele Reskripte fallen auf einen *titulus*, auf ein Buch usw.) und das Verhältnis zu der Häufigkeit der Reskripte in anderen Themenbereichen analysiert. Außerdem könnte die chronologische Zuordnung der Reskripte (welche Kaiser sind am stärksten vertreten) zu neuen Erkenntnissen führen. Es wären auch eventuelle Zusammenhänge mit gesellschaftlichen oder wirtschaftlichen Änderungen und das Verhältnis zu der *Constitutio Antoniniana* interessant. Es wäre ebenfalls denkbar, dass parallele Überlieferungen in epigraphischen Quellen zu entdecken sind.

Schließlich möchte ich noch zwei Texte heranziehen, die als Einführung in die Entscheidungstechnik der Juristen einführen. In seinem Kommentar zum prätorischen Edikt berät Ulpian über die korrekte Abwicklung eines Darlehensgeschäfts zugunsten des Mündels (D. 26,7,9 pr. Ulp. 36 ad ed.):

> Quotiens tutor pecuniam pupillarem faenori dat, stipulatio hoc ordine facienda est. Stipulari enim debet aut pupillus aut servus pupilli: quod si neque pupillus eius aetatis erit, ut stipulari possit, neque servum habebit, tunc ipse tutor quive in eius potestate erit.[45]

Ulpian gibt ganz konkrete Ratschläge, wie eine Forderung aus Stipulation für einen Mündel korrekt begründet werden soll.[46] In vielen Juristentexten wird auf die strenge Pflicht des Tutors hingewiesen, das Mündelvermögen gewinnbringend zu verwalten. Wenn Bargeld vorhanden ist, soll es gegen Zinsen angelegt werden. Die strikte Rangordnung der denkbaren Gläubiger (*stipulatores*), die hier von Ulpian nahe gelegt wird, war juristisch höchst relevant. Es ist bekannt, dass die *impuberes infantia maiores*, die ihr siebtes Lebensjahr schon erreicht haben, Forderungen aus Rechtsgeschäften auch *sine auctoritate tutoris* erwerben konnten. Ulpians zweite Variante, sich durch einen Sklaven vertreten zu lassen, stand jedem Vermögenden (unabhängig von Alter oder Geschlecht) offen (wie es oben bei den Frauengeschäften bereits gezeigt wurde). Nach Ulpian darf der Vormund selbst als *stipulator* nur ausnahmsweise auftreten. Zahlreiche Fragmente bezeugen, dass im letzten Fall eine riskante Verschmelzung zwischen dem Vermögen des Mündels und des Vormunds drohte. Es war manchmal problematisch nachzuweisen, von wem die Insolvenzgefahr zu tragen ist und in wessen *calendarium* die Zinsen verbucht werden sollen.

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[45] D. 26,7,9 pr. Ulp.: „Immer wenn ein Vormund Mündelgeld als verzinsliches Darlehen gibt, muss eine Stipulation in der folgenden Ordnung abgeschlossen werden. Denn entweder das Mündel oder ein Sklave des Mündels muss sich [die Rückgewähr] stipulationsweise versprechen lassen. Ist aber das Mündel noch nicht in dem Alter, dass es sich förmlich versprechen lassen kann, und hat es keinen Sklaven, dann tut es der Vormund selbst oder jemand, der sich in seiner Hausgewalt befindet."

[46] Zur Bedeutung der Beurkundungspraxis kann ich erwähnen, dass im Archiv der Sulpicii (1. Jh. n.Chr.) alle Darlehensurkunden mit Stipulationsklausel angefertigt wurden.

Aus einem anderen Fragment erfährt man, wie solche Vermögensverwaltungen in der Praxis gehandhabt wurden (D. 26,7,57 pr. Cervidius Scaevola 10 dig.):

> Chirographis debitorum incendio exustis cum ex inventario tutores convenire eos possent ad solvendam pecuniam aut novationem faciendam cogere ...[47]

Cervidius Scaevola berichtet hier von einem Brand, der (zum Teil) auch das Archiv des Mündelvermögens vernichtete. Im abgebrannten Gebäudeteil wurden *chirographa* (subjektiv stilisierte meistens vom Schuldner selbst eigenhändig geschriebene Schuldscheine) aufbewahrt, die in einem eventuellen Prozess als Beweise hätten dienen können. Nach dem Untergang der Dokumente blieben die Vormünder jedoch untätig — sie bemühten sich in keiner Weise, diese Forderungen für das Mündelvermögen zu sichern. Der Jurist macht darauf aufmerksam, dass Forderungen solcher Art üblicherweise in mehreren Urkunden dokumentiert werden. Es läge nahe, das Inventar des Mündelvermögens als Beweismittel zu verwenden. Scaevola erwähnt zwar nicht, aber das *calendarium* oder die *rationes* hätten ebenfalls als Beweisurkunde dienen können. Die Vormünder hätten auch die Schuldner aufsuchen und sie zur Ausstellung neuer Schuldscheine zwingen können.

Abschließend lässt sich feststellen, dass Dokumente über Vormundschaft von Minderjährigen und Frauen in den lateinischen *tabulae* verhältnismäßig dürftig überliefert sind. Das Urkundenmaterial lässt kaum erahnen, welch enorme Bedeutung die Vormundschaft im Rechtsleben Roms einnahm. Trotz des schmalen Befundes sind die überlieferten Wachstäfelchen wertvolle Belege der Praxis, die — durch juristische und literarische Quellen ergänzt — ein instruktives Bild aus dem Alltag der vormundschaftlichen Geschäfte vermitteln.

[47] D. 26,7,57 pr. Scaevola: „Schuldscheine (*chirographa*) waren bei einem Feuer verbrannt. Gleichwohl hätten die Vormünder die Schuldner nach dem Vermögensverzeichnis (*ex inventario*) des Mündels verklagen können, um sie zur Zahlung des Geldes oder zur Vornahme einer Novation zu zwingen."

Literatur

Andreau 1995
J. Andreau, *Affaires financières à Pouzzoles au Ier siècle ap. J.-C.: Les tablettes de Murecine*, «REL» 72, 39-55.

Arangio-Ruiz 1974
V. Arangio-Ruiz, *Studi epigrafici e papirologici*, Napoli.

Camodeca 1999
G. Camodeca, *Tabulae Pompeianae Sulpiciorum. Edizione critica dell'archivio puteolano dei Sulpicii*, I-II, Roma.

Cavenaile 1958
R.C. Cavenaile, *Corpus Papyrorum Latinarum (CPL)*, Wiesbaden.

Crook 1994
J.A Crook, (Rez.), 'L'archivio puteolano dei Sulpicii by G. Camodeca', «JRS» 84, 260-261.

Della Corte 1951
M. Della Corte, *Tabelle cerate ercolanesi*, «PdP» 6, 224-230.

Dixon 1986
S. Dixon, *Family Finances: Terentia and Tullia*, in: B. Rawson (Hrsg.), *The Family in Ancient Rome*, London, 93-120.

Gardner 1995
J.F. Gardner, *Frauen im antiken Rom. Familie, Alltag, Recht*, München.

Gröschler 1997
P. Gröschler, *Die tabellae-Urkunden aus den pompejanischen und herkulanensischen Urkundenfunden,* Berlin.

Gröschler 2006
Gröschler, *Die Konzeption des mutuum cum stipulatione*, «TR» 74, 261-287.

Gröschler 2008
P. Gröschler, *Die pompejanischen und herkulanensischen Urkunden als Erkenntnisquelle für das römische Recht*, in: M. Avenarius (Hrsg.), *Hermeneutik der Quellentexte des Römischen Rechts*, Baden-Baden, 44-62.

Jakab 2003
E. Jakab, *Bankurkunden und Buchführung (TPSulp. 60 und die graeco-ägyptischen Papyri),* in: G. Thür & F.J. Nieto (Hrsg.), *Symposion 1999: Akten der Gesellschaft für griechische und hellenistische Rechtsgeschichte 14,* Köln, 493-530.

Jakab 2013
E. Jakab, *Financial Transactions by Women in Puteoli*, in: P. du Plessis (Hrsg.), *New Frontiers: Law and Society in the Roman World*, Edinburgh, 123-150.

Kaser & Knütel 2014
M. Kaser & R. Knütel, *Römisches Privatrecht*, 20. Aufl. München.

Kunkel & Liebs 2001
W. Kunkel & D. Liebs, *Die römischen Juristen. Herkunft und soziale Stellung*², Köln.

Manthe 2004
U. Manthe, *Gaius Institutionen*, Darmstadt.

Nelson & Manthe 1999
H.L.W. Nelson & U. Manthe, *Gai Institutiones III 88-181*, Berlin.

Nörr 2001
D. Nörr, *Zur Palingenesie der römischen*

Vormundschaftsgesetze, «ZRG RA» 118, 1-72.

RUPPRECHT 1986
H.-A. RUPPRECHT, *Zur Frage der Frauentutel im römischen Ägypten,* in: G. WESENER (Hrsg.), *Festschrift für Arnold Kränzlein*, Graz, 95-102.

THÜR 1998
G. THÜR, *Die Antezessoren-Vorlesung: Iustiniani Institutiones Redivivae*, in: O.M. PETER & B. SZABO (Hrsg.), *A bonis bona discere, Festgabe János Zlinszky*, Miskolc, 587-595.

VÉLISSAROPOULOS-KARAKOSTAS 2011
J. VÉLISSAROPOULOS-KARAKOSTAS, *Droit grec d'Alexandre à Auguste (323 av. J.-C. – 14 ap. J.-C.)*, II, Athènes.

VERBOVEN 2002
K. VERBOVEN, *The Economy of Friends. Economic Aspects of Amicitia and Patronage in the Late Republic,* Bruxelles.

WOLF 1985
J.G. WOLF, *Aus dem neuen pompejanischen Urkundenfund: Die Streitbeilegung zwischen L. Faenius Eumenes und C. Sulpicius Cinnamus*, in: *Studi in onore di Cesare Sanfilippo*, VI, Milano, 769-780.

WOLF 1998
J.G. WOLF, *Die tabellae der Titinia Antracis und die Bürgschaft des Epichares*, «IVRA» 49, 25-39.

WOLF 2001
J.G. WOLF, *Der neue pompejanische Urkundenfund. Zu Camodecas Edizione critica dell'archivio Puteolano dei Sulpicii*, «ZRG RA» 118, 73-132.

The Mother as Guardian of her Children in Rome and in the Oriental Provinces of the Empire

LORENZO GAGLIARDI

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.

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[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.

[2] WENGER 1905; GLÜCK 1906, 68f.; WENGER 1907, 305-311; BONFANTE 1925, 587; LA PIRA 1930, 53ff.; FREZZA 1930-1931; SOLAZZI 1933; FREZZA 1933-1934; SOLAZZI 1937; SACHERS 1948, 1527ff.; LONGO 1953, 283; KASER, 1971, 353 n. 8; ALBANESE 1979, 439f. n. 37; GARDNER 1991, 147; TALAMANCA 1990, 163; FAYER 1994, 436ff.; MARRONE 1994, 266; CHIUSI 1994, 191ff.; SANZ MARTÍN 1998; GUARINO 2001, 602; EVANS GRUBBS 2002, 236ff.; RAWSON 2003, 125; HÜBNER 2009, 68; SANZ MARTÍN 2009, 43f.; OBARRIO MORENO 2011, 284ff. *Contra* CRIFÒ 1964; CRIFÒ 1965; CRIFÒ 1966; CRIFÒ 1982; DESANTI 1995, 149 n. 7. For a balanced view, MASIELLO 1979, 38; SÁIZ-LÓPEZ 2011, 327.

[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.[4] 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,[5] according to which a woman, by failing

[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 pupillis, cum ad curam publicam pertineat, liquere omnibus volo. Et ideo quae mater vel non petierit tutores idoneos filiis suis vel prioribus excusatis reiectisve 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.*): Filiis 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 grandsons? 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 responses 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 CRIFÒ 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 similia*.

[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 suspecti 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.[8] 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.[9]

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

[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.[10]

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.[11] 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.[12] 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 filiis 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].

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[10] 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").

[11] 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).

[12] 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.

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.[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 *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.[14] Nevertheless, the emperor set forth that pursuant to the *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 *pater* to appoint the mother guardian of the children by will and any decision of the provincial governor allowing such appointment should be overturned.[15] D. 26.2.26pr. (Pap. 4 *resp*.):

> Iure nostro tutela communium liberorum matri testamento patris frustra mandatur, nec, si provinciae praeses imperitia lapsus patris voluntatem sequendam decreverit, successor eius sententiam, quam leges nostrae non admittunt, recte sequetur.
>
> 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 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.

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13 Cf. ROTONDI 1922, 203f.

14 So, CRIFÒ 1964, 122.

15 This is affirmed in a general way also in D. 26.3.1.1 (Mod. 6 *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 debitorem impuberis accipiendo 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 reliquorum nomine debet reddat, apud praetorem convenire potes. quamvis enim matrem tuam susceptis bonis vestris indemnitatem pro hac administratione tutori se praestituram 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 fideiussorem praestiterit vel pignora dederit, quoniam quodammodo suum negotium gessisse videtur, senatus consulti auxilio neque ipsa neque fideiussor 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 congredi 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[16] and, above all, from Paul. *Sent*. 1.4.4 (*Mater, quae filiorum suorum rebus intervenit, actione negotiorum gestorum et ipsis et eorum tutoribus tenebitur*),[17] 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 CHIUSI 1994,167 ff.; CHIUSI 2005, 128.

[19] On this topic, WENGER 1905; WENGER 1909; KÜBLER 1910; TAUBENSCHLAG 1929; ARANGIO-RUIZ 1930, 46f. n. 3; LA PIRA 1930; FREZZA 1930-1931; SOLAZZI 1933; FREZZA 1933-1934; SOLAZZI 1937; BIONDI 1951, 68ff.; BIONDI 1952-1954, II, 237f.; TAUBENSCHLAG 1955, 149ff.; PRÉAUX 1959; WOLFF 1973, 68ff.; WOLFF 1974; ARJAVA 1999, 202-204; VUOLANTO 2002; HÜBNER 2009, 68.

guardian of their joint children.[20] Other female relatives—the grandmother,[21] sister[22] and aunt[23]—of the underage child are rarely documented as *epitropoi*. The latest account of a female *epitropos*, an aunt to be precise, dates to 181-189 CE,[24] while the latest evidence of a mother labelled *epitropos* dates to 175-178 CE.[25] The term *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,[26] while in another text the term *frontistria* is used to define the position of the grandmother who acts in a sort of «co-guardianship» with the father of the wards.[27] In Egypt, the mother became *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 *epitropos* of her children is also documented in an inscription of the province of Lycia and Pamphylia, which dates from the

[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 = MChr 287 (127CE); SBXVI 12288.1.11-15 (ca 175-178 CE). Very uncertain P.Mich. XVIII 785 (47 or 61CE); P.IFAO 3.5 (II century CE). The *epitropos* mother is attested also before the first century CE in BGU VIII 1813 (62-61 BCE) and, as *epitropos aneglogistos*, in *SB* VI 9065.8-19 (I century BCE) and in BGU XIV 2374 (88-81 BCE): see MONTEVECCHI 1997. Equivalent to the *epitropos* was the *prostatis* mother of P.Med.Bar. 1 (142 BCE): cf. MONTEVECCHI 1981; MONTEVECCHI 1989. For a detailed comparison between Ptolemaic and Roman law on our topic, see YIFTACH-FIRANKO 2006, 164f., 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.^{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 = MChr 307 (before 99 CE). Cf. on this respect also JAKAB 2001, 68 ff. and moreover CHAMPLIN 1991, 109f. and KRAUSE 1994, 92. On the Ptolemaic law concerning our topic see KRELLER 1919, 177. On spouses made beneficiaries of each other in hereditary provisions, HÄGE 1968, 91 ff., 171ff. and YIFTACH-FIRANKO 2003, 221ff.

[21] P.Fouad 35 (48 CE); P.Vind.Tand. 27 (I century CE).

[22] P.Athen. 7 (I century CE: a sister, *epitropos* together with her brother).

[23] P.Oxy. III 495.14 (181-189 CE): in this case, the *epitropos* was the sister of the father of the ward.

[24] P.Oxy. III 495.14 (181-189 CE).

[25] SB. XVI 12288.1.11-15 (ca 175-178 CE).

[26] P.Brux. 1.4 = P.Lugd.Bat. 5.4 (174 CE); BGU VII 1662 (182 CE); SB X 10571 (194 CE); P.Cair. 10575 = SB XVIII 10757 (195 CE); P.Lond. III 1164a, p. 156 (212 CE).

[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 *frontistria*, is the meaning of words such as *kedestria* and *ekdikos*, which appear later: see GAGLIARDI 2012, 425 n. 11.

reign of Domitian.[28] 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.[29]

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,[30] but it could also be performed by the grandmother, as documented by a number of papyri,[31] 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.[32] 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)[33] 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 I 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.Amh. 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 III^2, 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^2 30 (172-173).

[32] See *Babyl*. *Talmud*, Gittin 52: אין עושין אפוטרופין נשים ועבדים וקטנים ואם מינן אבי יתומין הרשות בידו (Translation: "Women, slaves and minors should not be appointed as guardians. But if the father of the fatherless has appointed them, he was free to do so"). Cf. COTTON 1993, 99f.; ILAN 1995, 172ff.; VUOLANTO 2002, 223.

[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 | ὑπὸ τοῦ Ἡρακλείδου καταλ‹ε›ιφθέντων πάντων Μάρωνι τῷ καὶ Ἁρποκρατίωνι καὶ τοῖς ἄλλοις | αὐτοῦ ἀδελφοῖς Μάρωνι ἑτέρῳ καὶ Ἡρακλείδῃ καὶ Διδύμῃ, ὁμοίως ἀφήλιξι, Ἀμμώνιον Εὐρή|μωνος τοῦ Μάρωνος μητρὸς Ἀνδρομάχης τῆς Ἀμμωνίου ἀπὸ ἀμφόδ(ου) Φρεμεί, ἐπακολουθούσης αὐτῆς τῇ ἐπιτροπῇ καὶ παραλαμβανούσης αὐτῆς τὰ ἐξ αὐτῶν περιγεινόμ(ενα).[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 *epakolouthesis*:

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[34] See on this point COTTON 2005, 38f.

[35] J. REA, in P.Oxy. LVIII (London 1991) 17. In a similar fashion see also LEWIS 1993, 31ff.; COTTON 1993, 97; OUDSHOORN 2007, 353.

[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.

ὡς ὁ Ἀμμώνιος ἠξίωσε εἰς τὸ ἀσυκοφάντητον αὐτὸν γενέσθαι ποιουμένης | α[ὐ]τῆς τὰ[[ς]] τῆς κοσμητείας καὶ τὰ ἄλλα τῶν παίδων δαπανήματα ἐπι|τετράφθαι δεδωκέναι τε ἐν ὑπαλλάγματι πρὸς τὴν ἐπιτροπὴν καὶ ἐπακολούθ(ησιν) | τὰ ὑπάρχοντα αὐτῇ ἐν τῇ Πολέμωνος μερίδι…[40]

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:

καθ’ ὧν ‹καὶ› οὐδὲν οἰκονομήσ‹ε›ι | ἄχρι οὗ [οἱ] παῖδες ἐν ἡλικ[[ο]]ίᾳ γένονται (read γένωνται) εκδονται (read ἐκδῶνται) ‹τε› αὐτῇ τε καὶ τῷ Ἀμμωνίωι | τὴν κα[θή]κουσαν τῆς ἐπιτροπῆς ἀποχήν.[41]

.... in relation to which she will not undertake anything until the children come of age and give her and Ammonios the befitting receipt regarding the 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 δοκεῖ | ὑμεῖν δ̣ο̣ῦναί μ[οι τὸ] ἀ̣ργύριον δι' ἀσφαλίας \ . . . / περὶ ὑποθήκης τῶν ὑπαρχόντων μου, χορη|[γ]οῦσα τ̣ό̣κον τ̣ο̣ῦ [ἀργυρίο]υ̣ ὡς ἑκατὸν δηνα̣ρίων δηνάριν ἓν ἥμισυ , ὅθεν λαμπρῶς διασωι̣θ[ῇμου] ὁ̣ υἱὸς... .[42]

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… [Translation N. Lewis, in LEWIS, YADIN & GREENFIELD 1989]

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.[43]

[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[44] and in 159 CE for a mother.[45] It was therefore thought that the two institutions were never simultaneously applied,[46] 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.[47]

However, documents discovered more recently allow us to postpone the latest evidence as to an *epitropos* mother to 175-178 CE[48] (and *epitropos* aunt to 181-189 CE)[49] and, if we deem *epitropos* and *frontistria* to be equal, as held in this paper, we may even reach 212 CE.[50] Therefore, there is an overlap between women *epitropoi* and *epakolouthetriai*, 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.[51]

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

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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-RUIZ 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: ARJAVA 1998a, 155ff. On the rules which applied before this period, cf. LEWIS 1970.

scholars[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.

[52] LA PIRA 1930, 73. *Contra* ALBANESE 1979, 439f. n. 37; VUOLANTO 2002, 222f. Interaction is assumed by CHIUSI 1994, 19ff.; CHIUSI 2005, 132.

BIBLIOGRAPHY

ALBANESE 1979
B. ALBANESE, *Le persone nel diritto privato romano*, Palermo.

ARANGIO-RUIZ 1930
V. ARANGIO-RUIZ, *Persone e famiglia nel diritto dei papiri*, Milan.

ARJAVA 1998a
A. ARJAVA, *Paternal Power in Late Antiquity*, «JRS» 88, 147-165.

ARJAVA 1998b
A. ARJAVA, *Women and Law in Late Antiquity*, Oxford.

ARJAVA 1999
A. ARJAVA, *Die römische Vormundschaft und das Volljährigkeitsalter in Ägypten*, «ZPE» 126, 202-204.

BIONDI 1951
B. BIONDI, *Aspetti morali della tutela*, in: *Festschrift Fritz Schulz* I, Weimar, 52-73 [= *Scritti giuridici* III, Milan 1965, 79-103].

BIONDI 1952-1954
B. BIONDI, *Il diritto romano cristiano* I-III, Milan.

BLUME 2009
F.H. BLUME, *The Annotated Justinian Code. Second Edition* (2009), published at the University of Wyoming College of Law web site, http://www.uwyo.edu/lawlib/blume-justinian/ajc-edition-2//.

BONFANTE 1925
P. BONFANTE, *Corso di diritto romano* I, *Diritto di famiglia*, Rome [corrected reprint, G. BONFANTE & G. CRIFÒ (eds.), Milan 1963].

CARBONE 2013
M. CARBONE, *L'affidamento della tutela alla madre: da Teodosio I (CTh. 3.17.4) a Giustiniano (Nov. 118.5)*, «Iuris Antiqui Historia» 5, 121-136.

CHAMPLIN 1991
E. CHAMPLIN, *Final Judgments. Duty and Emotion in Roman Wills, 200 B.C.-A.D. 250,* Berkeley.

CHIUSI 1994
T.J. CHIUSI, *Zur Vormundschaft der Mutter*, «ZRG RA» 111, 155-196.

CHIUSI 2005
T.J. CHIUSI, *Babatha vs. the Guardians of Her Son: A Struggle for Guardianship – Legal and Practical Aspects of P.Yadin 12-15, 27*, in: R. KATZOFF & D. SCHAPS (eds.), *Law in the Documents of the Judaean Desert*, Leiden-Boston, 105-132.

COTTON 1993
H.M. COTTON, *The Guardianship of Jesus Son of Babatha. Roman and Local Law in the Province of Arabia*, «JRS» 83, 94-108.

COTTON 2005
H.M. COTTON, *Roman Officials in Judaea and Arabia and Civil Jurisdiction*, in: R. KATZOFF & D. SCHAPS (eds.), *Law in the Documents of the Judaean Desert*, Leiden-Boston, 23-44.

CRIFÒ 1964
G. CRIFÒ, *Sul problema della donna tutrice in diritto romano classico*, «BIDR» 67, 87-166.

CRIFÒ 1965
G. CRIFÒ, *Ancora sulla donna tutrice in diritto romano classico*, «BIDR» 68, 337-340.

CRIFÒ 1966
G. CRIFÒ, *'Ius iurandum in litem' e tutela materna*

(Ulp. D. 12.3.4 pr.), «Annali della Facoltà giuridica dell'Università di Macerata» 28, 1-8 [= *Scritti in memoria di Antonino Giuffrè* I, Milan 1967, 173-180].

CRIFÒ 1982
G. CRIFÒ, *La donna e la tutela*, «Labeo» 28, 52-61.

DESANTI 1995
L. DESANTI, *De confirmando tutore vel curatore*, Milan.

DIXON 1988
S. DIXON, *The Roman Mother*, London-Sidney.

EVANS GRUBBS 2002
J. EVANS GRUBBS, *Women and the Law in the Roman Empire. A Sourcebook on Marriage, Divorce and Widowhood*, London-New York.

FAYER 1994
C. FAYER, *La 'familia romana', Aspetti giuridici e antiquari* I, Rome.

FREZZA 1930-1931
P. FREZZA, *La capacità delle donne all'esercizio della tutela nel diritto romano classico e nei papiri greco-egizi*, «Aegyptus» 11, 363-385 [= *Scritti* I, eds. F. AMARELLI & E. GERMINO, Rome 2000, 3-25].

FREZZA 1933-1934
P. Frezza, *La donna tutrice e la donna amministratrice di negozi tutelari nel diritto romano classico e nei papiri greco-egizi*, «Studi Economico-Giuridici pubblicati per cura della Facoltà di Giurisprudenza della R. Università di Cagliari» 22, 125-160 [= *Scritti* I, eds. F. AMARELLI & E. GERMINO, Rome 2000, 317-351].

GAGLIARDI 2012
L. GAGLIARDI, *La madre tutrice e la madre ἐπακολουθήτρια: osservazioni sul rapporto tra diritto romano e diritti delle province orientali*, «Index» 40, 423-446.

GARDNER 1991
J.F. GARDNER, *Women in Roman Law and Society*, London-Sidney.

GLÜCK 1906
F. GLÜCK, *Commentario alle Pandette*, tradotto ed arricchito di copiose note e confronti col Codice Civile del Regno d'Italia XXVI, transl. P. COGLIOLO & C. FADDA, Milan.

GUARINO 2001
A. GUARINO, *Diritto privato romano*, Neaples.

HÄGE 1968
G. HÄGE, *Ehegüterrechtliche Verhältnisse in den griechischen Papyri Ägyptens bis Diokletian*, Cologne-Graz.

HAENSCH 1994
R. HAENSCH, *Die Bearbeitungsweisen von Petitionen in der Provinz Aegyptus*, «ZPE» 100, 487-546.

HÜBNER 2009
S. HÜBNER, *Callirhoe's Dilemma: Remarriage and Stepfathers in the Greco-Roman East*, in: S. HÜBNER & D.M. RATZAN (eds.), *Growing up Fatherless in Antiquity*, Cambridge-New York, 61-82.

ILAN 1995
T. ILAN, *Jewish Women in Greco-Roman Palestine*, Tübingen.

JAKAB 2001
E. JAKAB, *Berenike vor Gericht. Apokeryxis, Gesellschaft und Buchführung in P.Oxy. XXII 2342*, «Tyche» 16, 63-85.

KASER 1971
M. KASER, *Das Römische Privatrecht* I, Munich.

KRAUSE 1994
J.-U. KRAUSE, *Witwen und Waisen im Römischen Reich* II, *Wirtschaftliche und gesellschaftliche Stellung von Witwen*, Stuttgart.

KRELLER 1919
H. KRELLER, *Erbrechtliche Untersuchungen auf Grund der gräco-ägyptischen Papyrusurkunden*, Leipzig-Berlin.

KÜBLER 1910
B. KÜBLER, *Über das 'ius liberorum' der Frauen und die Vormundschaft der Mutter, ein Beitrag zur Geschichte der Rezeption des römischen Rechts in Ägypten*, «ZRG RA» 31, 176-195.

LA PIRA 1930
G. LA PIRA, *Riflessi provinciali nel diritto tutelare classico romano*, «BIDR» 38, 53-73.

LEWIS 1970
N. LEWIS, *On Paternal Authority in Roman Egypt*, «RIDA» 17, 251-258.

LEWIS 1993
N. LEWIS, *Notationes Legentis*, «BASP» 30, 27-33.

LEWIS, YADIN & GREENFIELD 1989
N. LEWIS, Y. YADIN & J.C. GREENFIELD (eds.), *The Documents from the Bar Kokhba Period in the Cave of Letters. Greek Papyri ed. N.*

Lewis, Aramaic and Nabatean Signatures and Subscription, Jerusalem.

Longo 1953
G. Longo, *Diritto romano. Diritto di famiglia*, Rome.

Marrone 1994
M. Marrone, *Istituzioni di diritto romano*, Palermo.

Masiello 1979
T. Masiello, *La donna tutrice. Modelli culturali e prassi giuridica fra gli Antonini e i Severi*, Neaples.

Migliardi Zingale 1997
L. Migliardi Zingale, *I testamenti romani nei papiri e nelle tavolette d'Egitto. Silloge di documenti dal I al IV secolo d.C.*, Turin.

Mitteis 1912
L. Mitteis, *Grundzüge und Chrestomathie der Papyruskunde. I, Grundzüge*, Leipzig.

Montevecchi 1981
O. Montevecchi, *Una donna 'prostatis' del figlio minorenne in un papiro del II^a*, «Aegyptus» 61, 103-115 [= *Scripta selecta*, ed. S. Daris, Milan 1998, 273-285].

Montevecchi 1989
O. Montevecchi, *Ancora su 'prostates' – 'prostatis'*, «Aegyptus» 69, 109-112 [= *Scripta selecta*, ed. S. Daris, Milan 1998, 287-290].

Montevecchi 1997
O. Montevecchi, Ἀνεκλόγιστος - ἀνεπιτρόπευτος, «Aegyptus» 77, 43-52.

Obarrio Moreno 2011
J.A. Obarrio Moreno, *Estudios de tradición romanistica. 'Tutela et curatela'*, Madrid.

Oudshoorn 2007
J.G. Oudshoorn, *The Relationship between Roman and Local Law in the Babatha and Salome Komaise Archives. General Analysis and Three Case Studies on Law of Succession, Guardianship and Marriage*, Leiden-Boston.

Préaux 1959
C. Préaux, *Le statut de la femme à l'époque hellénistique*, in: *Recueils de la Société Jean Bodin XI. La femme* I, Brussels, 127-175.

Rawson 2003
B. Rawson, *Children and Childhood in Roman Italy*, Oxford.

Rotondi 1922
G. Rotondi, *Studi sulle fonti del Codice giustinianeo*, in: V. Arangio-Ruiz (ed.), *Scritti giuridici* I, *Studii sulla storia delle fonti e sul diritto pubblico romano*, Milan 1922, 110-283 [first published in «BIDR» 26 (1913), 173-246 and 29 (1916), 104-180].

Sachers1948
E. Sachers, *Tutela*, in: *RE* VII.A.2, Stuttgart, 1497-1599.

Sáiz López 2011
V. Sáiz López, *La relación materno-filial por consanguinidad y su naturaleza jurídica, del derecho romano a la tradición romanística medieval*, «Revista Internacional de Derecho Romano» 7, 319-366.

Sanz Martín 1998
L. Sanz Martín, *La tutela del codigo civil y su antecedente historico la tutela romana*, Madrid.

Sanz Martín 2009
L. Sanz Martín, *La tutela en el derecho romano*, Madrid.

Solazzi 1933
S. Solazzi, *L'istituto greco-egizio della madre* ἐπακολουθήτρια *e il diritto romano*, «Atti della Reale Accademia di Scienze morali e politiche di Napoli» 55, 361-382 [= *Scritti di diritto romano* III, *1925-1937*, Naples 1960, 411-426].

Solazzi 1937
S. Solazzi, *Note di diritto romano*, «Atti della Reale Accademia di Scienze morali e politiche di Napoli» 58, 1-110 [= *Scritti di diritto romano* III, *1925-1937*, Naples 1960, 587-672].

Talamanca 1990
M. Talamanca, *Istituzioni di diritto romano*, Milan.

Taubenschlag 1929
R. Taubenschlag, *Die 'materna potestas' im gräko-ägyptischen Recht*, «ZRG RA» 49, 115-128 [= *Opera minora* II, Warsaw 1959, 323-337].

Taubenschlag 1955
R. Taubenschlag, *The Law of Greco-Roman Egypt in the Light of the Papyri. 332 B.C.-640 A.D.*, Warsaw.

Vitelli 1931
G. Vitelli, *Estratto dall'archivio di uno strategos dell'Egitto Romano*, «BIAO» 30 (*Mélanges Victor Loret*), 59-63.

Vuolanto 2002
V. Vuolanto, *Women and the Property of Fatherless Children in the Roman Empire*, in: P. Setälä et al. (eds.), *Women, Wealth and Power in the Roman Empire*, Rome, 203-243.

Watson 1971
A. Watson, *The Law of*

Succession in the Later Roman Republic, Oxford.

WATSON 1985
The Digest of Justinian, Latin Text edited by T. MOMMSEN with the aid of P. KRUEGER, English Translation edited by A. WATSON, I-IV, Philadelphia.

WENGER 1905
L. WENGER, *Zur Vormundschaft der Mutter*, «ZRG RA» 26, 449-455.

WENGER 1907
L. WENGER, *Curatrix*, «ZRG RA» 28, 305-311.

WENGER 1909
L. WENGER, *Zu den neuen Oxyrhynchus Papyri,* in: *Wiener Eranos. Zur Fünfzigsten Versammlung Deutscher Philologen und Schulmänner in Graz*, Vienna, 270-276.

WILCKEN 1932
U. WILCKEN, *Urkunden-Referat*, «APF» 10, 70-98.

WOLFF 1973
H.J. WOLFF, *Hellenistisches Privatrecht*, «ZRG RA» 90, 63-90.

WOLFF 1974
H.J. WOLFF, *Das Vulgarrechts-problem und die Papyri*, «ZRG RA» 91, 54-105.

YIFTACH-FIRANKO 2003
U. YIFTACH-FIRANKO, *Marriage and Marital Arrangements. A History of the Greek Marriage Document in Egypt. 4th Century BCE - 4th Century CE*, Munich.

YIFTACH-FIRANKO 2006
U. YIFTACH-FIRANKO, *Spouses in Wills: A Diachronic Survey (III BC - IV AD)*, «JJP» 36, 153-166.

Section 7
Beyond Greece and Rome

Guardianship for Orphans in Talmudic law

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ABSTRACT

The article reviews the Talmudic institution of guardianship for orphans, as it appears in sources from Palestine and Babylon, mostly from the second to the fifth centuries CE. It is likely that the foundations of this institution are found in foreign law, but after it was absorbed in Jewish law, it began to build an independent life, and was not necessarily affected by its legal system of origin. The design of the institution was mainly conducted by the Jewish sages of the second-century (Tannaim). The Mishnah and Tosefta are already showing a fairly well-developed system of guardianship laws. This system was not changed substantially afterward, and the later Talmudic sages (Amoraim) continued to develop the institution upon the foundation created by their predecessors. The Talmudic sources present a fairly well-developed institution, from its creation through the duties of the guardian during his tenure to the end of the guardianship term.

INTRODUCTION

It seems that like in other instances, the Greek term for guardian – *epitropos* (אפוטרופוס')[1], which appears many times in Talmudic literature shows us that it involves an institution which was created in Talmudic law under the influence of Greek and Roman Law, two legal traditions that were prevalent in Palestine at the time of the creation of the institution of guardianship.[2] This does not mean, at the same time that the principles of the laws of Talmudic guardianship, which I shall not discuss in this short article, are identical to those of any known Greek or Roman law.[3] Within this framework I shall confine my analysis to Talmudic Law and its principles exclusively.

Most of the references to the *epitropos* in Talmudic literature relate to his activities as the person responsible for the property of minors[4] who were orphaned from their fathers,[5] and it is to this subject which the article shall be devoted. Yet the institution of guardianship also relates to adults, who, due to mental disabilities, are unable to safeguard their property properly.[6] Guardianship also encompasses the duty to oversee property, the owner of which was still alive at the time the guardian was appointed.[7] The Babylonian *Amoraim* added a further category of *epitropos* who is appointed by the court to manage the assets of a legally sane individual who was taken captive or was forced to

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[1] This way to spell *epitropos* in Hebrew is the common form for spelling this term, especially in later periods of Hebrew, however in many Talmudic sources it appears in different forms. For more details see: the wide variety of forms of the entry "epitropos" in The Historical Dictionary Project of The Academy of the Hebrew Language, http://maagarim.hebrew-academy.org.il/Pages/PMain.aspx ; KASOVSKY 1956, 260; REINITZ 1984, introduction, II; CHOMEY 2008, 1 n. 1.

[2] GULAK 1922, 146: «The name epitropos originates in the Greek language and it shows that the institution of guardianship developed amongst our People during the Second Commonwealth under the influence of Greek and Roman Law. However in the days of the Mishnah this guardianship had already taken form, and the laws in respect thereto were established thereafter and remained until the later generations». See also FALK 1978, 326-327.

[3] BERMAN 1926, 31; REINITZ 1984, IV-V and the sources cited there in the footnotes. For a comparison between Roman Law and Jewish Law see COHEN 1966, 243-244; YARON 1960, 140-150. For a methodical comparison between Talmudic Law and Roman Law see BLOCH 1904.

[4] At the end of the Tannaitic period the age of legal majority was set at 12 for girls and at 13 for boys, however this was not always the situation, and beforehand a sexual maturity examination was administered on an individual basis for each child. See GILAT 1990. According to the *Shulkhan Arukh, Hoshen Mishpat* CCXC:1 the father had to appoint an *epitropos* for a foetus which had not yet been born and the *Vilna Gaon* in his commentary there cites the Talmudic source for this. Regarding the age of legal capacity with regard to the laws of acquisition see YARON 1960, 141-145.

[5] SPERBER 1984, 56: "guardian, trustee (usually of minors, orphans)".

[6] For example M. *Bava Kamma* IV:4.

[7] For example M. *Ketubot* IX:4.

suddenly escape.[8] In addition, in the later stages one may see that the use of the term *epitropos* was expanded to also describe someone who acts for the benefit of someone else's property even if he is not in fact a real *epitropos* in the legal sense of the word.[9]

From the many sources of appointing an *epitropos* over orphans one may derive three principles:

1. The father is responsible for raising his children and for managing their assets;[10] only if he dies or finds it difficult to act should an *epitropos* be appointed for them.

2. The mother, even if she is alive is not generally thought of as the guardian of her children's property. Below I shall discuss the question whether it is at all appropriate to appoint a woman as guardian (*epitropa*).

3. The function of the *epitropos* relates mainly to managing the assets of the wards, and not to raising or to educating them.[11]

In the opinion of Asher Gulak the institution of guardianship was introduced into Jewish law «during the Second Commonwealth».[12] Relying on the Apocrypha, Josephus and the Gospels he adds that the introduction occurred already a «few generations before the destruction of the Temple».[13] Ze'ev Falk also mentions the Second Commonwealth:[14]

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8 BT. *Bava Metsia* 39a and b.

9 See SPERBER 1984, 57-58. We have found this term used in this borrowed sense also in an earlier source: T. *Ketubot* I:6 (here and below the reference is to the Saul Lieberman edition of the *Tosefta*): "אין אפטרופוס לעריות [There is no guardian against unchastity]" (However, FALK 1978, 329 speculates that the source for the idiom comes from the law of an actual *epitropos* – and it means that one does not appoint an *epitropos* for a woman with whom the guardian is forbidden to have a relationship, in accordance with PT. *Ketubot* I:8 25a and therefore he translates this idiom as "There is no guardian for the forbidden degrees").

10 This is not the place to enter into the question whether it would be correct to define the father in legal terms as the «natural guardian» of his children. In Talmudic literature the father is never referred to as an *epitropos* and from this fact, and for other reasons, Israel Gilat has concluded that Talmudic law does not relate to the father as an *epitropos*: GILAT 1995, 157-163). For the opposing view that claims that there is substantive recognition in the Talmud of the idea of natural guardianship, even if this term is not used in relation to the father see KAPLAN 2009, 34-38, and compare with the complex view of Rabbi Ouziel: OUZIEL 1991, 143-147.

11 GULAK 1922, 146.

12 Above n. 2.

13 GULAK 1930-1931, vol. 1, 21; vol. 2, 246.

14 FALK 1978, 326-327. Compare: REINITZ 1984, IX-XI, esp. nn. 32, 35.

> During the Second Commonwealth the rights of a fatherless child were no longer protected by a near kinsman: this function now required a new framework… Following the example of the practice of the Greek cities, a person charged with the care of an orphan was called by a Greek term *epitropos*.

Talmudic literature, as it is wont in many places, does not specify the date on which the institution of guardianship was absorbed or created in Jewish Law. The only sign that can attest to this issue are the names of the sages who regulate its operation. It appears that two of the earliest *Tannaim* who are mentioned are Abba Shaul[15] and Rabbi Eliezer ben Yaakov[16] who lived at the end of the Second Commonwealth and who dealt with the laws of an *epitropos'* oath. Reinitz correctly points out that if they are dealing with this detail, one may assume that the basic outlines of this institution had already crystalized in their day.[17] It is interesting also to note that like in many other places, here too the Babylonian *Amoraim* try to offer Biblical support for this institution:[18]

> But it is in accordance with Rava son of R. Huna, who said in the name of R. Giddal in Rav's name: How do we know that, when [minor] orphans come to divide their father's estate, Court appoints a guardian on their behalf, whether (this is done) to their benefit or disadvantage? [You say,] 'To their disadvantage'! Why? – But [say thus:] to their [subsequent] disadvantage, but with the [original] intention that it shall be to their advantage, from the verse, [and ye shall take] one prince of every tribe (Num. 34, 18).

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15 M. *Gittin* V:4. T. *Bava Bathra* VIII:16.

16 BT. *Gittin* 52b.

17 REINITZ 1984, IX. However, COTTON 1993, 99 n. 58 claims that these *Tannaim* lived during a later period, and this claim is made in order to support her statement that «by the second half of the second century C.E. the main lines of the institution had already been drawn». Yet HYMAN 1910 –whom she cites there – actually dates Abba Shaul at the time of the Second Commonwealth (volume 3, 1106), in accordance with M. *Middot* II:5, and it should be added that he apparently studied under Rabban Yohanan ben Zakkai (M. *Avot* II:8). Regarding Rabbi Eliezer ben Yaakov, Cotton states without any supporting evidence that this was the second *Tanna* with this name who was a disciple of Rabbi Akiva. However even if we do not have the evidence to decide which of the two sages with the same name spoke here, the fact that he deals with exactly the same Halacha as that which was dealt with by Abba Shaul could actually tilt the scales in favour of the first *Tanna* bearing that name who lived in the time of the Second Commonwealth (HYMAN 1910, volume 1, 181) and who appears together with Abba Shaul in other places in the Tannaitic literature (M. *Middoth* II:5 and V:4; T. *Menakhoth* IX:5).

18 BT. *Kiddushin* 42a. In later halakhic literature various decisors wrote that indeed the activities of an *epitropos* have the validity of a Biblical law. See for example: Nachmanides commentary on BT. *Gittin* 52a s.v. "That which is cited in the Mishnah", and see also BERMAN, 30-31 who tries to find a mention of this institution in various biblical stories, and the criticism of Rabbi Ben Zion Ouziel of this: OUZIEL 1991, 23 in the footnote.

METHOD OF HIS APPOINTMENT

In Tannaitic literature we find three ways by which a person may become an *epitropos* for property of orphans: 1. Appointment by their father during his lifetime; 2. Appointed by the court; 3. Without an appointment but through the performance of an action – through the orphans themselves applying to the person who has agreed to become an *epitropos*. These three types are mentioned in one *Mishnah*:[19]

> If orphans were supported by a householder, or if their father appointed a guardian for them, he must give Tithe from the produce that belongs to them. If a guardian was appointed by the orphans' father he must take an oath; if he was appointed by the court he need not take an oath. Abba Saul says: The rule is to the contrary.

As well as in one section in the *Tosefta*:[20]

> R. Simeon b. Manasiah says, "Orphans who were supported by a householder—whether their father [before his death], or a court [after the father's death] made them dependent [on him]—he [the householder] tithes and provides food for them for the sake of the social order".

Simple logic dictates that the optimal method of appointment is that by the children's father, and only if the father failed to take care of the appointment before his death should it be undertaken by the court, which acts in the father's place, as stated, in another context, by the Babylonian *Amora* Rami Bar Hama: "Rami Bar Hama learnt: Orphans do not require a *prosbul*, because Rabban Gamaliel and his Court are the parents of orphans".[21] Maimonides was later to rely upon this saying in his discussion of the order of appointments:[22]

> When a person dies, leaving some orphans who are past majority and others who are below majority, he must appoint a guardian before his death, who will care for

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[19] M. *Gittin* V:4. For a discussion of the dispute in the *Mishnah* see below p. 262. The first two ways are mentioned in other places in the *Mishna* and in the *Tosefta*. See for example: M. *Bava Kamma* IV:4 T. *Bava Bathra* VIII:13. On the question whether there is any connection between these methods of appointment and what transpired in the documents of Babatha regarding the guardianship of her son Jesus see COTTON 1993, 99, and for another view FALK 1978, 328 and OUDSHOORN 2007, 316-317.

[20] T. *Terumoth* I:12. However the term *epitropos* is not mentioned here. Rather it appears in the *Halakhot* which appear before this one which also deal with orphans, their property and their tithes, to be discuss later in this paper. See below p. 252.

[21] *Gittin* 37a, FALK 1978, 328 writes that in most cases «a guardian would be appointed by the father in his will».

[22] MT. *Inheritance* X:5.

> the portion of the minors until they come of age. If the father does not appoint such a guardian, the court is obligated to appoint a guardian for them until they come of age. For the court acts as the parents of the orphans.

In other words, since the *epitropos* enters into the shoes of the orphans' father the optimal situation is where he is appointed by the latter. However if the father has not done so, the court – who fills the role of the father, at least temporarily and partially – is the body that will appoint the e*pitropos*. Below we shall see that the preference for having the father make the appointment is given expression in the fact that the restrictions on the appointment by the court do not exist when it comes to an appointment by the father.

1. Appointment by the father

Talmudic literature does not contain an exact description of the method of appointment by a father, but one may assume that there is no specific procedure for that appointment and it is similar to making a will, whether it be a will of a healthy person or of someone on his death bed.[23] In the Babylonian Talmud it emerges that there may be a situation of the father creating guardianship even where he does not explicitly utter his wish to do so. Thus according to the *Amora* Shmuel:[24]

> Rav Judah said in the name of Samuel: If a [dying] man gave all his property to his wife, in writing, he [thereby] only appointed her guardian. It is obvious [that if he assigned all his property to] his grown up son, he [thereby], merely appointed him guardian. What [is the law, however, if he assigned it to] his young son? – It was stated [that] R. Hanilai Bar Idi said in the name of Samuel: Even [If to] his youngest son who [still] lies in [his] cradle.

From the words of the Talmud it emerges that one should try discern the opinion of the testator[25] and assume that he did not intend to bequeath all his property to his wife or to one of his sons, but rather to appoint them guardians for all the surviving orphans. This, as stated, is the case even if this is not the most straightforward interpretation of the testator's words. Furthermore, from this passage it also emerges that this vague declaration may also create a guardian who is completely incapable of filling the role since he is "still in his cradle". This strange conclusion is the product of the assumption that the father is un-

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[23] Gulak 1922, 147; Falk 1978, 328; Entsiklopedyah 121b, and see BT. *Ketubot* 109b; *Bava Bathra* 132a.

[24] BT. *Bava Bathra* 131b.

[25] Thus the medieval commentators understood this, for example *Rashbam ibid*. and Maimonides in MT. *Laws of Acquiring Gifts* VI:1-4.

restricted in the choice of guardians that he appoints, even if the court cannot appoint them, a point which I shall dwell upon later.

It is possible that an implied appointment can already be found in the *Mishnah*:[26]

> If a man deposited money for his daughter with a third person [Heb. *Shalish*], but she says, I trust my [betrothed] husband, the third person must still perform that with which he was charged. So R. Meir. R. Jose says: If it was but a field [that was already bought for her] and she wished to sell it, it must be deemed sold from such time. This applies to a woman that is of age; but as for her that is still a minor, the act of a minor remains void.

The Babylonian Talmud[27] already identified that which was stated in the *Mishnah* above with the law of the *epitropos*, and in the wake thereof various commentators adopted the same approach.[28] Therefore it is possible that already in this *Mishnah* it emerges that someone who was entrusted with money for the safekeeping of orphans becomes, in practice, an *epitropos* even if he was not explicitly appointed as such, as Falk says with regard to this *Mishnah*:[29] «Such a guardian was called a *Shalish*… since the fact that the property is in his control is evidence of his appointment».

2. Appointment by the Court

In this case too the sources do not require a special procedure. From the sources it emerges that if, as stated, the father has not appointed an *epitropos* and if the court – like the orphans' father and as the body responsible for public order – sees that there is need to do so for the orphans' welfare[30] (and also where there are mentally disabled individuals) or for the benefit of the public in general, it must take its own initiative and appoint an *epitropos*.

The principle that an *epitropos* should be appointed for the welfare of the wards is mentioned in the *Tosefta*:[31]

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[26] M. *Ketubot* VI:7.

[27] BT. *Ketubot* 70a.

[28] Chomey 2008, 35-36.

[29] Falk 1978, 328.

[30] BT. *Gittin* 40a-b speaks of a case where the court appointed an *epitropos* for a minor whose father was alive. This, however, was an exceptional case where the father did not act properly and tried to deceive the court by transferring his slave to his minor son. Nonetheless in order not to harm the minor's property the court appointed him an *epitropos*.

[31] T. *Yevamoth* IX:2 and compare T. *Terumoth* below n. 63.

> A priest who was a deaf-mute, an idiot, or a minor who purchased slaves – they do not eat heave offering. But [if] a court acted in their behalf, or [if] a court appointed guardians for their estates, or [even if] the slaves came to them in an inheritance from some other source – these slaves do eat heave-offering.

Here it involves *Cohanim* (=priests) who are orphans or who are mentally disabled and who have the right to eat *terumah*. But since they have no legal capacity to make an acquisition, if they acquired slaves for themselves, these slaves are not considered their property and are thus not permitted to eat the *terumah* (as opposed to slaves of an adult *Cohen* and of a sane person). Obviously this may inflict financial damage, because instead of *terumah* which the *Cohen* receives for free he now must go out and purchase ordinary food for his slaves. In such a case the court will appoint an *epitropos* for the *Cohanim* and he will acquire the slaves for them; thus the acquired slaves will be able to eat *terumah*.

The initiated appointment by the court is mentioned in the Babylonian Talmud in a case which *prima facie* is very common:[32]

> R. Nahman said in Samuel's name: When orphans come to divide their father's estate, Court appoints guardians for them, and they select a fair portion for each [orphan].

In other words, it is the court's role to see to it that minors are not being discriminated against, and as the medieval commentator *Menahem haMeiri* explains there:

> When adult orphans come to divide an estate with their minor siblings, the court appoints an *epitropos* for the minors who selects a fair portion for them, which is to say that the adult orphans should value the portions and the *epitropos* then comes to select the fair portion, and it is not divided by casting lots.

The Babylonian Talmud speaks about another case where one must be concerned about the assets of heirs who are orphans:[33]

> Rava said: The law is that we do not distrain upon the property of orphans, but if he [the father] said: 'Give', then we distrain upon it. If he said, '[Give] this field', or 'this mina', we distrain upon it without appointing guardian. But if he said, '[Give] a field', or 'a mina', we distrain upon it and appoint a guardian. The sages of Nehardea say: In each case we distrain upon it and appoint a guardian…

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[32] BT. *Kiddushin* 42a (and repeated in three other places in the Babylonian Talmud).

[33] BT. *Arakhin* 22b.

This section deals with a case where the father has declared that his children must pay back his debts. The dispute here surrounds the question whether in every case an *epitropos* should be appointed for the heirs, or only in the case where the father has not stipulated a specific property from which to pay back his debt.[34] At any rate, it is clear that the appointment of an *epitropos* is meant to avoid harm to the orphans.[35]

As stated, sometimes an *epitropos* will be appointed in order to prevent minors or incapacitated persons from damaging the public. Thus the *Mishnah* establishes:[36]

> If the ox of a man of sound senses gored the ox of a deaf-mute, an imbecile, or a minor, the owner is culpable; but if the ox of a deaf-mute, an imbecile, or a minor gored the ox of a man of sound senses, the owner is not culpable. If the ox of a deaf-mute, an imbecile, or a minor had gored another, the court[37] must appoint a guardian over them and their oxen are testified against in the presence of the guardian.

The background to this *Mishnah* is the fact that at the beginning of the *Mishnah* it states that minors and mentally disabled persons are not liable if their ox has damaged, just as they would not be liable if they themselves damaged.[38] Indeed, both the Babylonian and Jerusalem Talmuds reserve the

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[34] Rashi *ibid*.: "If there is an unspecified field and an unspecified portion then the orphans require an *epitropos* who will be appointed to select a nice portion and to pay the debt from the low value portion".

[35] *Shulhan Arukh, Hoshen Mishpat* CX:4: "Minors whose grantor commanded as follows: give a field or a portion to this specific person, we only attach the property which the minors inherited after we have appointed an *epitropos* for them to maintain their rights". Also on the previous page in the BT. *Arakhin* there is the idea that one must take care of an orphan in matters of a debt, where they are the ones who are in debt. According to Rav Asi *ibid*. if it was a loan on interest one must see to it that the debt is eliminated, and according to Rabbi Yohanan it should also be done when it involves a claim from the marriage contract of their father's widow, when she needs money for food for sustenance. The term *epitropos* does not appear there but it is logical that an *epitropos* should be appointed in such a case and so it was ruled by Maimonides on the basis of the things mentioned there (MT. *Laws of Lender and Borrower* XII:3): "If the loan was a debt at interest owed to a gentile, we appoint a guardian, attach the property that the minor inherited, sell it, and pay the debt. The rationale is that the interest consumes the estate. Similarly, if a woman demands payment of the money due her by virtue of her *ketubah* – whether she is the deceased's widow or divorcee – we appoint a guardian for the heirs".

[36] M. *Bava Kamma* IV:4. And see the *Mekhilta of Rashbi* (Epstein-Melamed Edition), 189 in its completion according to this Mishnah.

[37] In the manuscripts of the *Mishnah* and the Talmuds the word "court" does not appear, and it seems to be a later addition. Nevertheless, this addition is necessary and logical, and it is reasonable to assume that it reflects the intention of *Mishnah*, which obviously assumed that the court was the appointer, against the backdrop of the fact that the appointment by the court was known to us in the absence of the father, and as stated above.

[38] M. *Bava Kamma* VIII:4 "It is an ill thing to knock against a deaf-mute, an imbecile, or a minor:

main part of the discussion in the *Mishnah* to the question of paying damages from the *epoitropos's* assets or the orphans' assets,[39] but a simple reading of the *Mishnah* clearly shows that it comes to create a situation in which one may substitute an ox with no reputation of damaging with one with such a reputation and thus to charge the owner accordingly. In other words the *epitropos* constitutes a replacement for the owners who are mentally disabled. This understanding clearly emerges from the *Tosefta*:[40]

> The ox of the deaf-mute, an idiot, or a minor which gored the ox of a person of sound senses – the owner does not have to pay. R. Akiva and R. Jacob say, "the owner, despite his condition] pays half".
>
> An ox, the owner of which became a deaf-mute, lost his senses, or went overseas—R. Judah b. Neqosa says, "Sumkhos says, Under all circumstances it remains in the status of being deemed harmless, unless they give testimony against the beast in the presence of the owner." R. Yose says, "They appoint a guardian for it".
>
> They give evidence against it in the presence of the guardian – the deaf-mute gained capacity to hear, the idiot regained his senses, or the minor reached maturity or the owner came back from overseas, R. Judah b. Neqosa says, "Sumkhos says, 'Under all circumstances it remains in its original status of being harmless, unless they give testimony against the beast in the presence of the owner yet a second time' ". R. Yose says, "It remains in its established status".

From the words of R. Yose it is clear that with his appointment the guardian is meant to fill the place of the owner of the ox where the latter cannot be found or if he lacks mental capacity.[41]

3. Creating *de facto* guardianship

The third and most interesting case is that of an *epitropos* who is not appointed explicitly but acquires this position because the orphans are supported by him. As stated, we found this method in the *Mishnah* and in the *Tosefta*, where the sole activity mentioned is the separation of *terumoth* and tithes for the orphans.[42]

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he that wounds them is culpable, but if they wound others they are not culpable".

[39] PT. *Gittin* V:4 47a and *Bava Kamma* IV:4, 4b; BT. *Bava Kamma* 39a. For a discussion on the Talmuds theories see Reinitz 1984, 3-18.

[40] T. *Bava Kamma* IV:4.

[41] And see Lieberman 1992, vol. 9, 39 "And it appears that it should be written: and you make the ox into a *Mu`ad* [an ox with a reputation to damage] before guardians. In other words guardianship turns the ox into a *Mu`ad* , and even Sumkhus does not dispute the Halakhah that we appoint an *epitropos* for him in order to protect it".

[42] Minors cannot give *Terumah* (M. *Terumot* I:1) and therefore they cannot eat from the produce

It emerges *prima facie* from the *Tosefta*[43] that the status of "householder" who supports the orphans is identical to that of the person who was appointed for them by their father or by the court. However, since term "*epitropos*" is absent from this *Tosefta,* and from the fact that in the *Mishnah*[44] the *epitropos* is the person who was appointed by the father or by the court (whereas the person who supports the orphans is not referred to explicitly by this name), one could argue that in *Tannaitic* literature the "householder" did not possess the status of an *epitropos* in every respect. This in fact is the position of Reinitz who suggests that in the Tannaitic sources this "householder" was not an actual *epitropos* but rather a person who was concerned with separating *terumoth* and tithes for orphans whom he supported.[45] Nonetheless I am of the opinion that the context in the *Tosefta Terumoth* – viz. its proximity to the two of the most detailed *Halakhot* concerning the laws of guardianship in Tannaitic literature, and its presentation of "orphans who are supported" alongside the two other guardianships as one group with one identical law – points, in this context, to an actual guardian.

Indeed no later than the end of the third century or at the beginning of the fourth century, this *Mishnah* was considered by the important Babylonian *Amora* Rav Nahman not as specific to the law on *terumoth* and tithes, but as the key criterion for establishing the status of such householder as a genuine *epitropos*:[46]

> Certain orphans who boarded with an old woman had a cow which she took and sold. Their relatives appealed to R. Nahman saying, what business had she to sell it? He said to them: We learnt in the *Mishnah*: "If Orphans Board With A Householder".

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which belongs to them. The importance of the *Terumah* activity of the *epitropos* for orphans was given expression in the fact that such activity is the first thing mentioned amongst the activities which the guardians do for the benefit of the orphans in T. *Terumah* and *Bava Bathra,* below n. 63.

43 Above n. 20.

44 Above n. 19.

45 Reinitz 1980, 220-223.

46 BT. *Gittin* 52a. It is part of the issue which the aforementioned Mishnah discusses and it is the most important issue in the Babylonian Talmud amongst those issues dealing with an *epitropos* for orphans. All the commentators on this episode and the decisors understood that from it the principle emerged that "a householder who willingly supports minor orphans or takes care of their financial affairs has the law of *epitropos* in every respect" (*Shulhan Arukh Hoshen Mishpat* CCXC:24). For a different approach see Reinitz 1980, 224. Kaplan 2009, 36 also admits that the common understanding is that that "old woman" is considered a female guardian but expresses some doubt about this interpretation.

From the words of Rav Nahman it emerges that it was permitted for that woman to sell the ox for the orphans and that the said *Amora* rejects their relatives' argument that she had no authority to sell on their behalves because she was not the *epitropos* (Rashi, *ibid*. "who appointed [her] *epitropos*?"): he claims that from the *Mishnah* it emerges that one may create a guardianship even without an appointment (Rashi: "we learnt in the *Mishnah* that it was orphans who were supported – even though he was not appointed, he is considered an *epitropos*"). Obviously from this episode in the Babylonian Talmud, one may learn that in such a case a woman could become an *epitropos*. Was this also the case with an appointed *epitropos*? It is this subject that I shall turn to presently.

THE IDENTITY OF THE *EPITROPOS* FOR ORPHANS

The capacity of the father to appoint an *epitropos* is given expression in the *Tosefta* by the fact that he may appoint persons whom the court cannot appoint:[47]

> A court may not make ('עושין') guardians of women and slaves at the outset [i.e., of its own accord]. But if their [i.e., the orphans'] father appointed them during his life-time, they make ('עושין') them guardians.

The simple explanation is that the court is prohibited from appointing the guardians of its own accord ("at the outset"), but if they have been appointed by the father, the court will not prevent this act of appointment (therefore the plural form for "making" ('עושין,) is used as in the first clause)[48]. In the Babylonian Talmud an adaptation of this distinction is cited in an even sharper manner:[49]

> Women, slaves and minors[50] should not be made guardians: if, however, the father of the orphans chooses to appoint one, he is at liberty to do so.

In these sources there is no explanation for the distinction between the father and the court. One may assume that the logic for this is that the father, who is also owner of the property – and who we presume acts in the best interests

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47 T. *Terumah* I:11; *Bava-Bathra* VIII:17.

48 LIEBERMAN 1992, vol. 1, 304.

49 BT., *Gittin* 52a.

50 This word "minors" is apparently devoid of all logic, and this has been noted by a number of commentators, however it is found in all manuscripts. And see LIEBERMAN 1992, vol. 1, 303-304.

of his children and appreciates his assets more than anyone else – may think that the best *epitropos* should specifically be a woman (perhaps the children's mother?) or his slave.[51] On the other hand, the court which is further removed from the property and from the orphans is prevented from doing this, as there would be an assumption that most women and slaves function less well than do free men, and as Rashi explains there in this section of the Babylonian Talmud:[52] "Women – it is not their way to go out and to come and to toil.[53] Slaves – are not trustworthy". By contrast, from the words of the Babylonian Talmud[54] it emerges that there are no restrictions whatsoever on the identity of the guardians appointed by the father, and as a matter of principle he can also appoint "his youngest son who still lies in his cradle".

In the *Beriatha* which only appears in the Babylonian Talmud we learn of another restriction imposed on a court appointment:[55]

> Our Rabbis taught: Six things were said of the 'amme ha-arez': We do not commit testimony to them; we do not accept testimony from them; we do not reveal a secret to them; we do not appoint them as guardians for orphans; we do not appoint them stewards over charity funds…

From the general details which appear here one may deduce that ignoramuses are suspected of being cheats and thieves, and therefore they should not be appointed as guardians, for we fear that they may harm the property of the orphans.[56]

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[51] It does not go without stating that according to the *Mishnah* a person may appoint his wife as guardian to manage his affairs. M. *Ketubot* IX:4: "If a man set up his wife as a shopkeeper or appointed her a guardian he may exact of her an oath whensoever he will". See also what is stated in the Babylonian Talmud, above n. 24. For a wider discussion on the appointment of women and the reasons to limit this see REINITZ 1985, 167-173.

[52] And also LIEBERMAN 1992, vol. 1, 303; FALK 1978, 328. And see KAPLAN 2009, 37: «The rule disqualifying women and others from serving as court-appointed guardians is found in the first chapter of *terumot*, after various other rules empowering the guardian of orphans to act in a manner that promotes their best interests and prohibiting dangerous actions on their behalf that do not further their best interests. This context suggests that the Sages were of the opinion that the disqualification of women, slaves and minors was also in the orphans' best interest».

[53] The Babylonian Talmud already distinguishes between men and women in managing property, *Bava Kamma* 15a: "Men can negotiate in business, women cannot".

[54] Above n. 24. Reasons for why the father can do this are cited in Entsiklopedyah, 122a.

[55] BT. *Pesachim* 49b. We should view this source against the backdrop of its context which is the episode dealing with the harsh disparagement of ignoramuses and their many faults, especially the fact that they do not observe the law. Nonetheless it is worded as if it was a genuine legal instruction, and the medieval commentators have indeed ruled that it does have practical application.

[56] Compare this to the words of Rav Ashi (BT. *Bava-Metsia* 70a) regarding one who is qualified to manage the finances of orphans: "But, said R. Ashi, we seek out a man whose property is secure, who is trustworthy, obedient to the law of the Torah, and will not suffer a ban of the Rabbis, and the

The Babylonian Talmud added more restrictions on the identity of the guardians whom the court can appoint, and clearly this is also out of fear of harm to the property of the orphans. Thus Rav Huna declared:[57]

> R. Huna said: "A minor is not permitted to enter upon a captive's estates, nor the next of kin upon a minor's estates, nor a next of kin of a next of kin upon a minor's estates"… "Nor a next of kin of a next of kin upon a minor's estates" – this refer to a brother on the mother's side. "Nor a next of kin upon a minor's estates: since he [the minor] cannot protest, he may take presumptive possession thereof".

R. Huna's rule, as the latter stratum of the Talmud (*Stamma*) explains, establishes that one should not appoint a relative to manage the assets of a relative because he is likely to take control of their assets with the claim that he has inherited them, "since the minor cannot protest… and it is better for them to appoint a stranger who cannot claim inheritance in them" (Rashi, *ibid*.). And to be on the safe side (and for an "extra safeguard", as Maimonides puts it)[58] even a relative of a relative should not be appointed, even if he is not a direct relative of the minor, because he is likely to seize the assets for the benefit of his relative.

We have found in the Babylonian Talmud that there is also a general affirmative guideline regarding a person who is suitable to be appointed an *epitropos*:[59]

> Said Abaye: Anyone who appoints a guardian should appoint one like this man who understands how to turn [the scales] in favor of orphans.

In other words one should appoint a person who is concerned with the interests of the orphans.[60]

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money is given to him in the presence of a court". In Minor Tractate *Derekh Eretz Zuta* ch. X (there is a dispute over the time and question whether this source originates from the period of the Talmud or was a later institution), we find a quote by R. Yose: "the bloodletting healer, the tanner, and the builder are not appointed charity collectors for the town or guardians". In all probability, and in light of the words in BT. *Kiddushin* 82a, the reason is that because of their lowly professions they would not be able to act in the best interest of the orphans or perhaps they were suspected of theft.

[57] BT. *Bava Metsia* 39a. As to the question of the appointment of a relative, the article in REINITZ 1986 is devoted. To a discussion of Rav Huna's theory and the way in which it has been interpreted in later periods, see *ibid*. especially pp. 157-167. According to him at pp. 155-156, contrary to Roman Law, in Tannaitic literature there is no preference for the appointment of relatives as guardians, and yet neither is there any restriction on appointing them if the court views them as appropriate for the task. For the position which advances prohibiting the appointment of relatives see FALK 1978, n. 9.

[58] MT. *Inheritance* VIII:2.

[59] BT. *Ketubot* 109b.

[60] Compare above alongside n. 32 onwards.

The Talmudic Law that distinguishes between an appointment by the father and an appointment by the court, and the reasons for this are neatly encapsulated in Maimonides:[61]

> If the dying person ordered: "Give the minor's portion of my estate to him. Let him do whatever he wants with it", he has the license to deal with his own estate in this manner.
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> Similarly, if the dying person appointed a minor, a woman or a servant as the guardian for the minors, he has the license to deal with his own estate in this manner. A court, by contrast, should not appoint a woman, a servant, a minor or an unlearned person who is suspect to violate the Torah's prohibitions' as a guardian.
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> Instead, they should seek out a faithful and courageous person who knows how to advance the claims of the orphans and bring arguments on their behalf, one who is capable with regard to worldly matters to protect their property and secure a profit for them. Such a person is appointed a guardian over the minors whether or not he is related to them. If he is a relative, however, he should not take control of the landed property.

THE TASK OF THE *EPITROPOS* FOR ORPHANS

From the previous discussion relating to the appointment it is clear that the aim of the *epitropos* must be to act in the best interest of the orphans, and therefore the court is restricted with regard to appointing a person whom we fear will not operate in an optimal manner. We have also seen above[62] a series of cases where the initiated appointment of an *epitropos* was required for the purpose of managing the property for the benefit of the orphans.

A detailed breakdown of the *epitropos*' activities may be found in the *Tosefta*:[63]

> [10] Guardians separate *Terumah* (priestly offering on produce) and give tithes on the property of orphans. They sell houses, and vineyards, cattle [and] male and female slaves, in order to provide food for orphans [and] to prepare for them a sukkah, lulab, and show-fringes, and [to perform for them] every obligation which is stated in the Torah—to purchase for them a scroll of the Torah and Prophets, [that is,] a duty the scope of which is clearly delimited in the Torah.
> But they may not redeem captives on their behalf [i.e., with funds from these sales], nor, in the synagogue, levy upon them charity to the poor, [that is, any] duty the scope of which is not clearly delimited in the Torah.

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61 MT. *Inheritance* X:6.

62 Above, pp. 251ff.

63 T. *Terumoth* I:10-11, and repeated in T. *Bava Bathra* XIV:16 and with changes in BT. *Gittin* 52a.

> And they are not permitted to set [the orphan's] slaves free, but they may sell them to others so that they may set them free. Rabbi says, "I say that [the slave] may give him his value and redeem himself".
>
> [11] [Guardians] may not sell [property of orphans] that is at a distance in order to purchase [property] that is near; [nor may they sell] that which is of low quality in order to purchase that which is of high quality.
> They may not litigate for the orphans [neither in cases in which the orphans stand] to incur a liability nor [in cases in which the orphans stand] to receive a benefit, neither to make a claim [against others] nor [in cases of] a claim being made [against the orphans], unless they have received permission from a court…
> [Guardians] may sell slaves in order to purchase landed property, but they may not sell landed property in order to purchase slaves. Rabban Simeon b. Gamaliel says, "[They may] not even [sell] slaves in order to purchase landed property".

One may see that all the activities indeed relate to managing the orphans' property and their finances in their best interests. The *Tosefta* covers four planes of activities:

1. Activities required for the sake of feeding the orphans – one may assume that the words to "feed the orphans" apply also to the activities of separating *Terumah*, and thus indeed it emerges from both Talmuds.[64] From the *Mishnah* it emerges that if there is a need, the *epitropos* can also borrow money for the sake of the orphans.[65]

2. Activities required for the sake of upholding religious obligations which incur financial costs – the *epitropos* must assist the orphans in upholding the *mitzvoth* imposed upon them, even if the obligation is merely pedagogic since they are still minors. Clearly the Talmudic law views the upholding of *mitzvoth* as an activity which is in the best interest of the orphans. However there is a restriction and it must be confined to something which "has a limit" as the Babylonian Talmud puts it. In contradistinction they cannot use their property to uphold a *mitzvah* where the expense is not fixed, and as Rashi explains there: "Charity – has no limit since paupers may be found at all times and thus their money would be completely used up".[66]

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[64] PT. *Terumaoth* I:1 40b; BT. *Gittin* 52a, there the texts is set out as follows: "Guardians set aside terumah and tithe which is meant for consumption and not for storing" and see LIEBERMAN 1992, vol. 1, 300-301 and n. 24, and see above the *Tosefta* in n. 31.

[65] M. *Shvi'ith* X:6: "R. Huspith says: They may write a prozbul for a man on the security of his wife's property, or for an orphan on the security of his guardian's property". This case involved orphans who did not own any land and it was clear that it involved orphans who borrowed and not orphans who lent, because in the latter case they do not need a prozbul in order that their loans do not become extinguished (see LIEBERMAN 1992, vol. 2, 592 and n. 49).

[66] It is possible that later on this restriction was somewhat weakened. See the story with Rabbah

3. Activities for the sake of improving the property or preserving its value – the sale of assets is only permissible if it will definitely assist in preserving the value of the orphans' assets. This is not the place to detail the various considerations behind each and every circumstance treated in the *Tosefta*. It is sufficient to state that, for example, exchanging lands is forbidden according to the Babylon Talmud because there is an inherent risk therein, even if *prima facie* the new asset is better than the old one.[67]
   Nonetheless from the ruling made by the Palestinian *Amora* R. Yehoshua ben Levi – who allowed the sale of fields in order to purchase oxen for agricultural labor – it emerges that the sale of assets is permitted where it is clear that the sale will increase the overall value of the orphans' assets.[68] The Babylonian *Amora* R. Nahman also permitted the *epitropos* to buy clothes from the property of the orphans, if he assumed that suitable clothing would assist him in managing their property in a more efficient manner.[69] From these cases one may conclude that the *Amoraim* tempered the Tannaitic restrictions where they thought it was clear that it should be done for the benefit of the orphans' property, which is the highest principle in the activities of the *epitropos*.

4. Litigation relating to the property – from the wording of the *Tosefta* it emerges that an *epitropos* is forbidden to conduct any litigation relating to the orphans' property unless he received permission to do so from the court, which would in all probability evaluate the circumstances of the case. Nonetheless the Talmuds tried to relax this restriction and the *Amoraim* disagreed as to whether there are cases in which the *epitropos* is permitted to litigate – where it is absolutely clear to him that this will be to the orphans' benefit – and on the question what will happen where he has lost.[70]

It should be added that according to the later Babylonian *Amora* Rafram the law of the *Mishnah* which states that minors may sell chattel[71] does not apply if an *epitropos* was appointed for them.[72] The explanation given by R. Yohanan

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who justified imposing the giving of charity on orphans, in BT. *Bava Bathra* 8a.

67 BT. *Gittin* 52a: "The guardians are not at liberty to sell a distant [field] of their wards in order to redeem one that is nearby or to sell a bad [field] with the idea of redeeming a good one, since there is a risk that the crops may be struck with blight".

68 Ibid.

69 BT.*Gittin* 52b, below n. 91.

70 See LIEBERMAN 1992, vol. 1, 302-303; Entsiḳlopedyah, 124a.

71 M. *Gittin* V:7, T., *Gittin* III:12.

72 BT. *Ketubot* 70a.

in both Talmuds[73] is that we only give orphans the possibility of selling assets "for them to live", in other words in order that they should be able to buy food. However in a case in which there is an *epitropos* whose job it is to provide livelihood, there is no reason to assign legal validity to their sale, since there is someone who will take care of them and there is a presumption that he will exercise better discretion.

OVERSEEING THE ACTIVITIES OF THE *EPITROPOS*

We saw in the previous section that in order to litigate in relation to the orphans' property, the *epitropos* is required to receive permission from the court. Yet such a permission would also indicate that the guardian is not completely independent in exercising his discretion.[74] The *Mishnah* also categorically establishes that the *epitropos* has no possession of the orphans' assets,[75] for if the guardian takes care of the assets for the benefit of the orphans with the permission of the court, his activity cannot constitute proof of ownership.

THE OATH OF THE *EPITROPOS*

The purpose of every oath is to ensure that the person taking it may be trusted. Already in the earlier period[76] *Tannaim* disagreed as to whether we should make the *epitropos* take an oath at the end of his tenure that he satisfactorily handled the property of the orphans or that he has not retained anything in his possession.[77] This dispute has three sources. The *Mishnah*[78] points to a controversy between *Tanna Kamma* (first, anonymous opinion) and Abba Shaul as to which type of *epitropos* must be made to swear an oath: according to *Tanna Kamma* it only applies to a guardian appointed by the father, whereas

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[73] PT. *Gittin* V:8, 47b; BT. *Gittin* 59a.

[74] Many medieval decisors have argued on the basis of this *Tosefta* that any activity which the *epitropos* is forbidden to do shall be permitted if the latter receives the court's permission. See sources in LIEBERMAN 1992, vol. 1, 302 n. 29.

[75] M. *Bava Bathra* III:3. Possession is a presumption in favour of the possessor of an asset, if certain conditions have been fulfilled, that the asset indeed belongs to him.

[76] Above, nn. 15-16.

[77] Both the date of the oath and its content have not been explicated in Talmudic literature, however logic dictates that this was the intention, and thus it has been elaborated upon in the literature of the medieval decisors and in Halakhic literature. Some researchers also accepted this interpretation. See REINITZ 1984, 199; FALK 1978, 331; GULAK 1922, 152 and especially n. 196 regarding the content of the oath; KAPLAN 2009, 37-38.

[78] Above, nn. 15-16.

according to Abba Shaul it is precisely that person who was appointed by the court who should swear an oath. According to the version in the *Tosefta*, Abba Shaul appears to hold that both types of guardians should be obligated to take an oath.[79] But the commentators of the *Tosefta* as well as some modern scholars[80] have claimed that the word "also" which appears in the *Tosefta* was erroneously inserted and therefore the words of Abba Shaul are identical to his words in the *Mishnah* (only the guardian who was appointed by the court should swear). The third source is a *Beraitha* cited in the Babylonian Talmud, presenting the opinion of R. Eliezer ben Yaakov[81] stating that both types of *epitropos* must take the oath. This last source, however, has no parallel anywhere else and the Jerusalem Talmud does not mention it at all.

Prima facie the logic in the more expansive opinion that always requires an oath is more obvious. Because of its serious ramifications, Jews generally tried to avoid an oath. If the *epitropos* is required to swear, he will probably be deterred from embezzling the orphans' property. However it emerges that *Tanna Kamma* and Abba Shaul (certainly according to the version of the *Mishnah*) thought that it is not always correct to take an oath. The Talmuds[82] have tried to understand their opinions against the backdrop of the purpose of the *epitropos*' role and against the backdrop of the method of his appointment.

No one disputes the reason of Abba Shaul that an *epitropos* who was appointed by the court should swear, since apparently it has already been explained (for example in the *Tosefta*) that one who is appointed by the court is a "paid bailee" (the Jerusalem Talmud explicitly mentions this reason for Abba Shaul's words). The explanation of both Talmuds for this salary is that one who has been appointed by the court has "profited" by the fact that he has obtained the reputation of being a trustworthy person, and therefore he will not refuse to be appointed even if he shall be required to take an oath. In contradistinction the *epitropos* who has been appointed at the request of the orphans' father, is doing it only as a favor to the father, without profiting, and will not agree to accede to the request if he would then be compelled to take an oath at the end. It should be noted that the Babylonian *Amora* Shmuel, who, as we have already seen, played a relatively important role in creating the laws of guardianship in the Babylonian Talmud, held that the law follows Abba Shaul.

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79 T. *Bava Bathra* VIII:16 "Abba Saul says: Also one whom a court has appointed is required to take an oath, because he is in the status of a paid bailee".

80 EPSTEIN 1957, 93 and 162; LIEBERMAN 1992, vol. 10, 430.

81 Above n. 16.

82 PT. *Gittin* V:4 47a, and see also *Bava Kamma* IV:2, 4b; BT. *Gittin* 52b.

In contradistinction, regarding the opinion of *Tanna Kamma* there is a dispute between the two Talmuds. The Babylonian Talmud uses similar logic to that which was used in the case of Abba Shaul and assumes that a reasonable person would not accede to the father's request unless he owed him a favor. In such a case an oath would not deter him from fulfilling his obligation. Yet the *epitropos* does not owe the court anything and therefore would not accede to its request if he will be compelled to take an oath. But the Jerusalem Talmud explains this differently. In its opinion the father has no tools to examine whether the *epitropos* whom he appointed is a trustworthy person, and because of the fear that he may not be such an honest person – he should take an oath at the end of his job. However the court will select a person who has the reputation of being trustworthy and therefore there is no need to make him swear.

The dispute on the opinion of *Tanna Kamma* illustrates the tension between the need, on the one hand, to deter an *epitropos* from abusing his position and, on the other, not to discourage him from accepting this role. The Jerusalem Talmud's interpretation of *Tanna Kamma*'s opinion places an emphasis on the fact that the oath is administered where there is a concern over trustworthiness, whereas the Babylonian Talmud when addressing both opinions (and the Jerusalem Talmud when addressing the opinion of Abba Shaul) in practice says that it would always be appropriate to administer the oath, but because there is a concern that people will refuse to take upon themselves such a demanding position, it behooves us to exempt them from the oath, unless there is another incentive or compensation to accept the position.

Reporting

In the last generation of *Tannaim,* many generations after the dispute over the oath, another dispute erupted regarding the duties of an *epitropos* upon the termination of his position:[83]

> "Guardians must make account with the orphans [of all business dealings they have engaged in] at the end [of their tenure as guardians]", the words of Rabbi.[84] Rabban Simeon ben Gamaliel says, "Orphans have nothing other than that which the guardians have left them[85] [i.e. no accounting need be made]".

[83] T. *Terumoth* I:11; *Bava-Bathra* VIII:15; BT. *Gittin* 52a.

[84] The last two words do not appear in most manuscripts of the Babylonian Talmud. However one may see these words as a continuation of what Rabbi said in the previous sentence, see *ibid*.

[85] Babylonian Talmud: "Rabban Simeon Ben Gamaliel, however, says that this is not necessary".

In the opinion of Rabbi the *epitropos* must file a report of his activities and must justify the value of the property which exists at the time of the termination of his position. His father, Rabban Shimon ben Gamliel, thinks that there is no need for this, and the *epitropos* simply transfers the property remaining in his possession to the orphans. Obviously the question arises whether there is a connection between the oath and the report, and the medieval decisors indeed disagreed about this.[86] Nonetheless the fact that the oath is not mentioned at all in *Tosefta Terumoth*, and the fact that even in *Tosefta Bava-Bathra* these two subjects appear very far from, and with no apparent connection to, one another, show that even without a connection to the dispute between the early *Tannaim* in relation to the obligation to make an oath, Rabbi held that every *epitropos* must file a report on the value of the assets, whereas Rabban Shimon ben Gamaliel held that he will always be exempt from having to do so.

THE TERMINATION OF THE *EPITROPOS'* POSITION

The duty of the guardian commonly comes to an end as soon as the orphans have reached the age of maturity. In all probability this is what Rabbi was referring to in the *Beriatha* which was discussed above: "Guardians must make account with the orphans at the end",[87] and as Rashi says in the parallel case in the Babylonian Talmud *Gittin* "at the end – when they grow up". Beyond this situation Talmudic law recognizes two other possibilities for the termination of guardianship: the retraction of the position by the guardian and his removal by the court. The possibility of the *epitropos* retracting his position is very limited. According to the only source discussing this in the Talmudic literature, the *Tosefta Bava Bathra* VIII:12, one may only do this very soon after one's appointment, before beginning to actually administer the orphans' assets:

> Guardians before they have made possession of the estate of orphans can retract. Once they have made possession of the estate of orphans, they cannot retract.

It is reasonable to assume that this passage refers to a person who was requested by the father or the court[88] to fulfil the role and that in practice he was

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[86] For a summary of the views see REINITZ 1984, 232-241; CHOMEY 2008 144-147.

[87] T. *Terumoth* I:11.

[88] This is how the decisors understood it. In this regard and likewise for various explanations as to why he cannot retract at more advanced stages, see REINITZ 1984, 143-144. *Ibid*. later on there is a broader discussion of the opinion of the medieval and modern period decisors who tried to deal with this harsh restriction of his inability to resign even in justifiable circumstances, for example creating

permitted to decline,[89] however he could not retract if he already began his activity as *epitropos*. While there is no straight forward explanation for this distinction, one can spectulate that in light of what we saw above, finding a suitable *epitropos* is not always an easy task, so the search process for another appropriate *epitropos* would take time during which the property would be left unsupervised and would be harmed, or there may be a fear that the orphans' property would be harmed when transferring the management thereof from the possession of one *epitropos* to the other.

While the removal of an *epitropos* is not mentioned in the Tannaitic sources, common sense dictates that there is no reason to leave an *epitropos* in his position if he abuses his position and does not act in the best interests of the orphan, and *a fortiori* if he damages their property. Indeed in the Babylonian Talmud the possibility of a removal is accepted, however it emerges that it was not always sanctioned:[90]

> Amram the dyer was the guardian of [some] orphans. The relatives came to R. Nahman and complained that he was [buying] clothes for himself from the property of the orphans. He said: [He dresses so] in order to command more respect. [But, they said,] he eats and drinks out of their [money], as he is not a man of means. I would suggest, [he replied], that he had a valuable find. [But, they said,] he is spoiling [their property]. He said: Bring evidence that he is spoiling it and I will remove him.
>
> For R. Huna our colleague said in the name of Rav: If a guardian spoils the orphans' property we remove him. For it has been stated: If a guardian spoils the property, R. Huna says in the name of Rav that we remove him, while the School of R. Shilah say that we do not remove him. The law, however, is that we remove him.

From the end of the excerpt one may see that at the beginning of the *Amoriac* period a dispute took place over the question whether one may remove an *epitropos* who forfeits the orphans' assets.[91] Nevertheless it was accepted that the Halakhah follows Rav, in all probability as the result of the story involving

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a distinction between a guardian appointed by the father and that appointed by the court.

[89] FALK 1978, 329 notes: "A guardian's duty was difficult and unpaid; people would frequently avoid such an appointment, and if appointed would want to retract: 'Guardians who have not taken possession of the orphan's property may retract, once they have taken possession they may not retract' (T. *Bava Bathra* VIII 12)". However above in the discussion of the oath we saw that there are reasons for why a person would wish to accept this position upon himself. Therefore one may add that it may be possible that the appointment of an *epitropos* brought with it an upgrade in his social status, as perhaps emerges from the story above in n. 69.

[90] BT. *Gittin* 52b.

[91] It is difficult not to be startled by the opinion of R. Shilah and indeed there have been various attempts to explain his opinion: See: REINITZ 1984, 185-192.

Rav Nahman. From this story one may learn that the relatives of the orphans indeed acted according to the simple logic which says that one may remove an *epitropos* from his position if he harms the property of the orphans. While Rav Nahman[92] explicitly accepts such a possibility, he declares that one must be certain that the activities of the *epitropos* were indeed not in the best interests of the orphan, but that for the purpose of removing the guardian from his position there was need for a witnees, as the claims of the relatives are biased in this matter or possibly they are interested in removing the *epitropos* for other reasons.

CONCLUSION

This short article reviewed the institution of guardianship for orphans in Talmudic literature, i.e. the sources from Palestine and Babylon, mostly from the second to the fifth centuries CE. Apparently, the foundations of the institution were taken from the foreign law, and therefore it is no coincidence that it preserves the Greek name *epitropos*. However, after the absorption of the institution in Jewish law, it began to develop its own unique character. Like other legal institutions that were taken from Greek and Roman laws, the laws of the *epitropos* were formed by the *Tannaim* and *Amoraim*, who did not necessarily know the original laws of this institution. Furthermore, in some cases they tried to show that the *epitropos* laws have biblical sources.

The early sages who dealt with the *epitropos* are dated to the first century CE, before the destruction of the Second Temple. However, the main design of the institution was made by the *Tannaim* of the second century. The two main compositions that are summarizing the Tannaitic law (mostly from the second century) – the *Mishnah* and *Tosefta* – already present a fairly well-developed system of guardianship for orphans. This system was not changed substantially later, but both Jerusalem and Babylonian Talmuds, mainly in the third and fourth centuries, continue to develop the institution, upon the foundations created by their predecessors. The combination of all Talmudic sources presents a well-developed institution. The law deals with all the stages: from the appointment of the *epitropos*, through his duties during his officiation, to the end of his job.

[92] Rab Nahman was one of the greatest rabbinic judges in his period and held that his court was superior to the rest of the Jewish courts in Babylon. See: RADZYNER 2014, 346-348.

BIBLIOGRAPHY

BT. = Babylonian Talmud

M. = Mishnah

MT = Maimondes, Mishneh-Torah

PT. = Palestinian (Jerusalem) Talmud

T = Tosefta

BERMAN 1926
Y. BERMAN, *Shitat Apotropsut beIsrael*, in: *Sefer ha-yovel le-Rabi Yehudah Leb Hakohen Fishman*, Jerusalem, 30-42 (Heb.)

BLOCH 1904
M. BLOCH, *Die Vormundschaft nach mosaisch-talmudischem Rechte*, Budapest.

CHOMEY 2008
O. CHOMEY, *The Institution of apotropous (guardian) in Jewish Law as reflected in Legal Deeds*, Ph. D. Bar-Ilan University (Heb.).

COHEN 1966
B. COHEN, *Jewish and Roman Law, a comparative Study*, New York.

COTTON 1993
H.M. COTTON, *The Guardianship of Jesus Son of Babatha: Roman and Local Law in the Province of Arabia*, «The Journal of Roman Studies» 83, 94-108.

ENTSIḳLOPEDYAH
Entsiḳlopedyah Talmudit; le-'inyene *Halakhah*, vol. 2, "אפוטרופוס", pp. 121a-129b (Heb.).

EPSTEIN 1957
J.N. EPSTEIN, *Introduction to Tannaitic literature; Mishna, Tosephta and Halakhic Midrashim*, Jerusalem & Tel-Aviv (Heb.).

FALK 1978
Z.W. Falk, *Introduction to Jewish Law of the Second Commonwealth*, vol. 2, Leiden.

GILAT 1990
I.D. GILAT, *Ben 13 l'mitzvot*", «Mehqerei Talmud» 1, 39-53 (Heb.).

GILAT 1995
I.Z. GILAT, *Does the Financial Right of a Father over his Children Stem from his Guardianship Role? – Jewish Law Perspective*, «Bar Ilan Law Studies» 12, 119-163 (Heb.).

GULAK 1930-1931
A. GULAK, *The Right of Ownership of Property of a Heathen Slave according to Talmudical Law*, Tarbiz, 1(4), 20-26; 2(2), 246 (Heb.).

GULAK 1922
A. GULAK, *Yesode ha-mishpaṭ ha-*'Ivri*: seder dine mamonot be-Yiśra'el* 'al *pi meḳorot ha-Talmud ṿeha-posḳim*, Berlin (Heb.).

HYMAN 1910
A. HYMAN, *Toldot Tanna'im ṿe-Amora'im*, London (Heb.).

KAPLAN 2009
Y.S. KAPLAN, *The changing Profile of the Parent-Child Relationship in Jewish Law*, «Jewish Law Annual» 18, 21-79.

KASOVSKY 1956
CH.Y. KASOVSKY, *Thesaurus Mishnae; concordantiae verborum quae in sex Mishnae ordinibus,* Jerusalem (Heb.).

LIEBERMAN 1992
S. LIEBERMAN, *Tosefta ki-fshuṭah, a comprehensive Commentary on the Tosefta*, Jerusalem (Heb.).

OUDSHOORN 2007
J.G. OUDSHOORN, *The Relationship between Roman and local Law in the Babatha and Salome Komaise Archives*, Leiden-Boston.

OUZIEL 1991
B.M.H. OUZIEL, *Sefer*

Sha'are 'Uzi'*el: ha-shofeṭ halakhot pesuḳot u-ḳetsuvot, ṿeha-mishpaṭ, meḳorot ha-halakhah ba-Talmudim ṿe-shiṭot mefarshav*, vol. 1, Jerusalem (Heb.).

RADZYNER 2014
A. RADZYNER, *Dine qenasot: a Research in Talmudic Law*, Jerusalem (Heb.).

REINITZ 1980
Y.K. REINITZ, *Guardianship by virtue of Orphans Boarding with the Householder*, «Bar Ilan Law Studies» 1, 219-250 (Heb.).

REINITZ 1984
Y.K. REINITZ, *The Guardian of Orphans in Jewish law: his Responsibility, Methods of Supervision and Control over Him*, Ph. D. Hebrew University (Heb.).

REINITZ 1985
Y.K. REINITZ, *Appointment of a Women as a Guardian*, «Bar Ilan Law Studies» 4, 167-203 (Heb.).

REINITZ 1986
Y.K. REINITZ, *The Legal Standing of the Orphan's Relatives in Jewish Law and in the Capacity and Guardianship Law* (1962), «Bar Ilan Law Studies » 5, 151-180 (Heb.).

SPERBER 1984
D. Sperber, *A Dictionary of Greek and Latin legal Terms in rabbinic Literature*, Ramat-Gan.

YARON 1960
R. YARON, *Gifts in Contemplation of Death in Jewish and Roman Law*, Oxford.

Conclusions

Guardianship in Ancient Societies: Concluding Remarks

MICHELE FARAGUNA

The papers collected in this volume represent a valuable attempt to provide a cross-cultural survey on the topic of legal incapacity in a broad-ranging variety of ancient societies, from Old Babylonia and Late Bronze Age Syria to the late Roman Empire and fifth-century Armenia, to Jewish law, and explore whether, and to what extent, guardianship was a characteristic feature of those societies and what were the prevailing models and the specific forms shaping it from an institutional point of view.

As is pointed out in many papers, unlike what we are accustomed to in the contemporary world, at least in Western countries, in ancient societies, where life expectancy was low and famine and wars were endemic, the protection of minor children and, to a lesser extent depending on place and time, of women often became a matter of public concern and required the development of legal principles and practical regulations to enforce control over the activity of guardians and prevent abuse against those they were meant to take care of.

The significance of the issue is highlighted by the sheer amount of the documentation: in Athenian judicial oratory λόγοι ἐπιτροπικοί were recognized as a distinct, well-defined subgenre,[1] while, as emphasised in her chap-

[1] HARRISON 1968, 96-97 n. 1.

ter by E. Jakab, books 26 and 27 of the *Digest* testify in quantitative terms to the central role of *tutela* in the everyday life of the Roman Empire and to the ever growing body of legislation and jurisprudence that was dedicated to it. Likewise, under the influence of the Greek and Roman model, all legal, religious and economic problems arising from guardianship were intensively discussed in Talmudic literature. But already in the Code of Hammurabi a widowed mother could remarry only with the consent of the court, while an inventory of the estate of the deceased had to be drafted.

Of the fifteen chapters, which reflect a plurality of approaches and methodologies, after N. Cohen's introductory paper providing an insight into the questions modern legislation on guardianship has to address while adapting it to the quickly changing needs of contemporary society, three chapters offer an overview of guardianship (or its absence) in Egypt, in Greece and in Rome (Depauw, Maffi, Jakab) and six specifically focus on the guardianship of minors (Fijałkowska, Thür, Chevreau, Kruse, Gagliardi, Radzyner). D. Kaltsas and P. du Plessis, moreover, respectively look into Ptolemaic legislation on the κυριεία of women and perpetual guardianship of women in Gaius and Roman law, whereas E. Cohen deals with the legal incapacity of slaves. On a different plane, K. Buraselis and A. Mardirossian analyse the significance of royal guardianship in the Macedonian and Hellenistic dynastic monarchies and the role of tutorship in creating political and social ties between princely families and clans in Arsacid Armenia. In his stimulating contribution, K. Buraselis in particular shows that the vocabulary of «regency» was drawn from the terminology of guardianship in the private sphere and that, the kingdom being conceived as an *oikos*,[2] even the role of the king could be presented in early Hellenistic literature as a kind of guardianship of the state. Interestingly, the earliest attestation of this linguistic use I am aware of is in Her. 5.30.2 referring to Aristagoras of Miletus, τῆς Μιλήτου ἐπίτροπος, in the *logos* about the Ionian revolt.

Several threads connecting the different chapters emerge. I would like to single out five issues as topics of possible future discussion.

The *first*, concerning in particular the Graeco-Roman world, is the importance of institutional mechanisms. They have also been singled out by U. Yiftach in his *Introduction*. In fourth-century Athens, as reflected above all by the speeches of the orators, the guardianship of minors was regulated by an articulated body of laws: ἐπίτροποι could be appointed by the father (*inter vivos* or by

[2] On this point see also FARAGUNA 1998.

will) or as the next of kin or, should there not be legitimate claimants, by the archon – in the same way as in Roman law it is possible to distinguish between *tutela testamentaria*, *legitima* and *dativa*, and in Talmudic literature a person might become *epitropos* either by appointment by the father or by the court (as well as «through performance of an action») –, and the guardian had to be officially registered. He had to provide for the ward's maintenance and education, represent him legally, manage his property either by leasing it out through the archon against adequate real security (the modalities of the auction are discussed by G. Thür) or administering it himself with profit and loss being charged to the ward, and render the accounts once his function expired. As emphasised in the chapters by Thür and Maffi, many procedural and institutional details are illuminated by Hypereides' recently published long fragment of the speech *Against Timandros*.[3] A set of actions was moreover meant to protect the ward's person and property. The papers of E. Chevreau and E. Jakab demonstrate that the same matters, the appointment of guardians, the offering of adequate security, the obligation to present the accounts, the risk of disputes arising from the guardianship and rules concerning exemption, were extensively dealt with, although often with different solutions, in Roman classical law. (A. Radzyner shows to the contrary that in Jewish law the «function of the *epitropos* relates mainly to managing the assets of the wards, and not to raising or to educating them» [p. 247]). But, in a different geographical context and within a different legal tradition, registration of the appointed guardian at least in some, though not in all cases (Kruse notes that «if there was a male person available who was willing to take care of the wards and to assume the role as head of the family it was not necessary to appoint a guardian for these children» [p. 179]), and direct involvement of, and control by, the local authorities also applied in Roman Egypt, where, to quote T. Kruse, leaving aside the general competence of the *praefectus* as «the responsible authority for the appointment (of guardians) of minors in the provinces» (and not only in the case of Roman citizens but also in that of *peregrini*), «the local officials», when prompted or informed, «undoubtedly possessed quite far ranging competences and possibilities to control guardianships of minors» (p. 186).

A *second* strand revolves around historical development. On a long time frame it emerges again in Egypt where, if I have interpreted Table 1 in M. Depauw's chapter correctly, Greek and Roman rule in the course of time gradually led to a loss of independence in legal matters for women who more and more had to rely on their κύριος (significantly not mentioned in Demotic contracts). A si-

[3] HORVATH 2014, 184-188.

milar trend can be detected in P. Eleph.Wagner 1, dated to 241/0 BCE, where, in D. Kaltsas' reading, the father's (or relatives' or possibly legal guardian's) role in giving women in marriage was reaffirmed against alternative practices such as self-ἔκδοσις, reflecting «the change in sociological conditions from the ancient *polis* to the kingdom of the Ptolemies» (p.158). Similarly, evolution is even clearer in the case of Roman *tutela*. As stressed by E. Chevreau, whose analysis from the view angle of *excusationes tutelae* has much broader implications, starting from the Principate guardianship began to be perceived not as a *potestas* designed to preserve the family's property but as a charge (*munus*, *officium*) meant to safeguard the interest of the ward entailing increasing responsibilities and public control and from which it became more and more difficult to be exempted. L. Gagliardi in turn has shown that starting from the second century CE (and not only after 390 CE, as is often held), contrary to Roman legal tradition, lacking testamentary or legitimate guardians, the mother herself could apply to the emperor to be appointed as guardian of her children.

A *third* point can be identified in the gap between legal norms and social practices. A case in point is provided by Greek marriage contracts in Ptolemaic Egypt, as described by D. Kaltsas. Despite the need to be represented by a κύριος, the bride's participation in both forms of contracts – formal declaration of the "handing over" (*ekdosis*) of the bride; receipt for the dowry addressed to the person who was giving it – could become remarkably active and women could perform their own *ekdosis* themselves or pay their own dowry. I incidentally note that similar developments can be observed also in early Hellenistic Greece where not rarely women appear to be in control of large sums of money and transact financial operations on their own having the κύριος involved only when his presence was strictly necessary from a legal point of view. A striking example is offered by a honorific decree of Orchomenos in Boeotia collecting a dossier of documents concerning Nikareta, a rich lady from Thespies who had advanced a public loan to the *polis* of Orchomenos. When the city defaulted she never gave up her claims and personally filed five protests until, after extended negotiations, an agreement (and contract) was reached and fourteen citizens of Orchomenos offered personal guarantee that the loan would be reimbursed, this time however παρόντος αὐτῆι κυρίου τοῦ ἀνδρὸς Δεξίππου Εὐνομίδου (*IG* VII 3172, B, ll. 2-4; cf. 49-51).[4] In the same manner, in the late fourth-century register of sales from Tenos, where most of the recorded sales are in fact credit transactions spanning from 100 to

[4] MIGEOTTE 1999.

8000 drachmai, women often appear both as «vendors» and as «purchasers» of real properties and their κύριος is mentioned only in 9 cases out of 24 (*IG* XII 5, 872).[5] The development in legal systems of mechanisms to adapt traditional juridical principles to changed societal reality is also the focus of E. Cohen's paper. He demonstrates how, despite their complete legal incapacity, slaves, and especially some categories of slaves such as those who dwelt separately from their owners, could operate businesses independently of their masters[6] and, for instance, overcome their inability to foreclose on land and buildings by using Athenian citizens as agents.

A *fourth* connecting thread lies in the ultimate objectives underlying the different forms of guardianship in the societies considered. Concerning the widow installed as "father and mother" of the household L. Fijałkowska observes that «the title of "father and mother" is primarily connected with the intention to keep the estate undivided, thus securing the support of the widow… and does not automatically mean that she becames guardian of the children» (p. 34-35). T. Kruse on his part underlines that the administrative control of guardianship in Roman Egypt was intended to «secure the smooth running of economic activity concerning the property of the minors rather than any concern for the minors' own well-being [p. 181]» (similarly Radzyner in his chapter on guardianship in Talmudic literature argues that «all the activities indeed relate to managing the orphans' property and their finances in their best interests» [p. 260]). A relevant example of how public interest in legal issues could be intended to guarantee public order is provided by a second-century CE document where the appointment of a guardian was petitioned by one of the *creditors* of the deceased father (and not by the family) (P.Ryl. II 121, ll. 8-12). As for Greece and Rome, the guardianship of minors was first of all conceived as a device to ensure the protection of their persons and, above all, property, with some different nuances. In Athens, for instance, both adoption and guardianship were primarily a means to keep the number of *oikoi* stable and to prevent them from becoming ἔρημοι, a theme often featuring in Isaeus' judicial speeches.[7]

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[5] ÉTIENNE 1990, esp. 11-50; FARAGUNA (forthcoming).

[6] On the discussed meaning of χωρὶς οἰκοῦντες in Athens see most recently CANEVARO & LEWIS 2014, who make a distinction between slaves who « dwelt in separate residences from their owners and more-or-less ran their own affairs» and χωρὶς οἰκοῦντες, manumitted slaves who had been freed from any obligations towards their former masters (as opposed to those still subject to παραμονή-obligations).

[7] FERRUCCI 1998, 188-200.

My *fifth* point concerns the interaction between different legal cultures and, so to speak, the question of cultural transfers which has been raised in several papers, although with some important exceptions (namely royal *epitropeia* in Macedonia and the Hellenistic kingdoms), almost invariably with an open-ended, if not negative answer. L. Fijałkowska has noted that the widow installed as «father and mother of the estate» in Late Bronze Age Syria shows striking similarities with the «fatherly authority» with which a woman could be entrusted in contemporary documents from Nuzi, a city located east of the Tigris river, and wonders whether this is «just a coincidence, or a result of reception or exchange» (p. 41). Another obvious region where this phenomenon can be observed is Ptolemaic (and Roman) Egypt. Here, in Egyptian tradition «women had the right to appear as parties in contract without a guardian, probably already from the Old Kingdom onwards», but, in M. Depauw's words, «in some contexts», such as land transactions, contracts and the courts, «and perhaps more in later periods under Greek influence, women in fact may not have done the dirty job themselves but relied on men» (p. 51). Literacy, though important, does not seem to be the decisive factor in this respect. Furthermore, the problem features prominently in the papers on law in Rome and the Eastern provinces by E. Jakab and L. Gagliardi. The latter raises the question whether the institutions of the *epakolouthetria* (ἐπακολουθήτρια) attested in documents on papyrus from ca. 130 to the end of the third century CE and the mother acting as administrator of her children alongside the guardian in Rome were in some way connected as for their origin but concludes that they must have been independent, albeit similar developments whose rationale can be explained with the specific contexts of the two legal, and social, systems. Likewise, E. Jakab underlines the inherent contradiction between the tendency in Roman provincial administration to endorse local legal principles in family matters and the fundamental rule in Roman law that *tutela* (with the exceptions illustrated by L. Gagliardi) *plerumque virile officium est*. How flexible was the boundary line beyond which the basic tenets of Roman law could not be renounced was a matter of controversy, although whether the individuals concerned were *cives Romani* or *peregrini* was of course one of the decisive criteria.

We thus inevitably come to the crucial question underlying the objectives of the *Legal Documents in Ancient Societies* series. The aim of our research group is to investigate the legal and administrative systems in a variety of societies and civilizations of the ancient world through a document-based approach *in a comparative perspective*. We therefore have to assess and discuss whether such approach has turned out to be profitable also with regard to the topic of

guardianship. The main question is whether guardianship was an institution that can be found in all ancient legal cultures or whether it is primarily a product of the Graeco-Roman world. In the latter case the usefulness of our comparative approach will for once mainly lie in an analysis *per differentiam* and we shall have to try to explain the reasons for such differences and diversity.

As a matter of fact, the two papers specifically focusing on the Ancient Near East and Egypt have provided little evidence for guardianship in those cultures. In the fourteenth-century Syrian tablets from Emar and Ekalte the widow installed as "father and mother" of the estate was hardly a guardian, while the norm, as can be inferred from wills, seems to have been that at the premature death of a man his widow more or less automatically became guardian of the children and administrator of the husband's estate. Apart from some specific provisions, guardianship is not regulated in the Laws of Eshnunna or the Code of Hammurabi. The same picture emerges from Egypt where women did not need a male guardian to represent them legally and could act as guardians of their minor children (with some limitations until the *Constitutio Antoniniana*, as argued by L. Gagliardi) and where the oldest daughter could take the role of heir in case there were no sons. In both cases, this might be connected with the nature of the sources that have come down to us, but, especially in the case of Egypt, in the light of the rich available documentation that offers a fairly coherent picture over a long span of time it is rather improbable. The inescapable conclusion seems therefore to be that there was no need to appoint guardians because women had legal capacity and could act in their own right.

The next step would be to offer some possible explanations for such societal reality. During the meeting held in Jerusalem S. Demare-Lafont pointed out that as far as women are concerned there is a strong contradiction between the patriarchal nature of Ancient Near Eastern societies and their acceptance of women's legal capacity as a rule and suggested that it had to do with the transmission of the estate within the family. As for orphans she stressed that guardianship could be made unnecessary by adoption or *de facto* upbringing by some relatives.

I am not obviously competent enough about the ancient Near Eastern documentation and social structure and I would never dare to attempt to suggest an alternative hypothesis but my impression is that the patriarchal organization of society hardly distinguishes the Ancient Near East from other Mediterranean societies. Family and property law in Greece, especially in Athens, where the estate could only be controlled by males, were precisely designed to guarantee the continuation of the existence of the *oikos* throughout the generations and the transmission of the family estate from father to son(s), or to grandson(s) via the *epikleros*. Legal institutions such as guardianship, adoption (which

again was controlled by the *polis* through the archon) and the *epikleros* (or *patrouchos*/*patroiokos*) were clearly functional to this aim. In this respect, it needs to be stressed, as U. Yiftach does in his *Introduction*, that the earliest attestation of guardianship takes us to the origins of Greek society, as it is to be found in the *Odyssey* with reference to Mentor, to whom Odysseus, "on leaving, had entrusted (ἐπέτρεπεν) his whole house" and who had to be obeyed and to keep all things safe (Hom. *Od*. 2.225-227: Μέντωρ ὅς ῥ᾽ ᾽Οδυσῆος ἀμύμονος ἦεν ἑταῖρος, καὶ οἱ ἰὼν ἐν νηυσὶν ἐπέτρεπεν οἶκον ἅπαντα, πείθεσθαί τε γέροντι καὶ ἔμπεδα πάντα φυλάσσειν). My own guess, as a Greek historian, is that what made the Greek (and Roman) world different was not a merely economic and/or social factor but a political one, namely the notion of «citizenship», *politeia*, which emerged in Greece probably already in the seventh century BCE,[8] with all the legal privileges attached to it, ἔγκησις, i.e. the legal ability to own immovable properties, first of all. The city for this reason came to exert strict control on its *politai*, among other things with a view to preserving their number and making the political system viable. It is thus not surprising that, in Aristotle's view, Sparta provided a textbook example of a dysfunctional *polis* as in the course of time land came to be concentrated in a limited number of hands to the point that the total number of citizens had plummeted from 10.000 at the beginning of the fifth century to 1200, and women, who for some disputed legal and social mechanisms controlled almost two fifth of the land, significantly contributed to this process (Arist. *Pol*. 1270a15-39).[9] Guardianship, in other words the protection of the property held by women and minor children, was therefore one of the legal tools that made it possible to counter such undesired developments.

If this is correct, a new problem arises, for we have to account also for the case of Egypt, where first the Macedonian and then the Roman rulers took great pain to regulate guardianship. During the discussion at the meeting (and in his *Foreword*), U. Yiftach pointed out that few areas of the administration in Egypt were as closely scrutinised as guardianship. Was this due to the continuing existence of *polis* institutions outside the framework of the *polis* or to some other factor? Was Egypt an exception or does the same phenomenon occur also in other provinces of the Eastern Roman empire? I am obviously not able here to offer an answer to these far-reaching questions and, while once more pointing to the fruitfulness of the cross-cultural, cross-interdisciplinary approach of *Legal Documents in Ancient Societies*, I leave the matter for others to consider in the future.

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[8] Davies 2004; cf. also Faraguna 2015.

[9] Hodkinson 2000, 65-112; 2004.

Bibliography

Canevaro & Lewis 2014
M. Canevaro & D. Lewis, Khoris oikountes *and the Obligations of Freedmen in Late Classical and Early Hellenistic Athens*, «Incidenza dell'Antico» 12, 91-121.

Davies 2004
J.K. Davies, *The Concept of the 'Citizen'*, in S. Cataldi (ed.), Poleis *e* Politeiai. *Esperienze politiche, tradizioni letterarie, progetti costituzionali*, Alessandria, 19-30.

Étienne 1990
R. Étienne, *Ténos II. Ténos et les Cyclades du milieu du IV^e siècle av. J.-C. au milieu di III^e siècle ap. J.-C.*, Athens-Paris.

Faraguna 1998
M. Faraguna, *Aspetti amministrativi e finanziari della monarchia macedone tra IV e III secolo a.C.*, «Athenaeum» 86, 349-395.

Faraguna 2015
M. Faraguna, *Citizen Registers in Archaic Greece: The Evidence Reconsidered,* in A.P. Matthaiou-N. Papazarkadas (eds.), *AXON. Studies in Honor of Ronald S. Stroud*, II, Athens, 649-667.

Faraguna (forthcoming)
M. Faraguna, *Loans in an Island Society: the* Astynomoi-*inscription from Tenos*, in S. Demare-Lafont (ed.), *Legal Documents in Ancient Societies*, VII: *The Loan Contract*, forthcoming.

Ferrucci 1998
S. Ferrucci, *L'Atene di Iseo. L'organizzazione del privato nella prima metà del IV sec. a.C.*, Pisa.

Harrison 1968
A.R.W. Harrison, *The Law of Athens*, I: *The Family and Property*, Oxford.

Hodkinson 2000
S. Hodkinson, *Property and Wealth in Classical Sparta*, London.

Hodkinson 2004
S. Hodkinson, *Female Property Ownership and Empowerment in Classical and Hellenistic Sparta*, in T.J. Figueira (ed.), *Spartan Society*, Swansea, 103-136.

Horvath 2014
L. Horvath, *Der* Neue Hypereides. *Textedition, Studien und Erläuterungen*, Berlin-Munich-Boston.

Migeotte 1999
L. Migeotte, *Affarisme féminin à la haute période hellénistique?*, «Saitabi. Revista de la Facultat de Geografia i Història» 49, 247-257 (repr. in *Économie et finances publiques des cités grecques*, I: *Choix d'articles publiés de 1976 à 2001*, Lyon 2010, 91-100).

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- *Family Court Law*, section 3(d) — 17[15]
- *Trust Law,* 1979, sections 10-15 — 18[18]

Court Rulings, Israeli
- AFC 22050-06-11 R.S. v A.R. (13.5.12) — 21[27]
- CA 2266/93 Ploni v Ploni (22.2.95) — 16[13], 17[15]
- CA 2034/98 Amin v Amin, PD 53(5) 69 (1999) — 21[28]
- CFa 0491230/03 Ploni v Almoni (19.11.2006) — 17[15]
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- FC 21910-02-10 S' v M' (13.8.2013) — 20[26]
- FC 4751/12 Almoni v Almonit (29.8.2013) — 21[27,29]
- FC 37745-03-14 Nili v Orit and Alon (27.4.2014) — 22[30]
- HC 5020/08 Poltoretzky v State of Israel (12.9.2013) — 22[31]

Court Rulings, USA
- Middleton v. Johnson, 633 S.E.2d 162, 595 et seq. (S.C. Ct. App. 2006) — 21[29]
- 09CA0756 (Colo. app. 4-1-2010) — 21[29]
- 217 W.Va. 625,619 S.E.2d 138, 157-158 (2005) — 21[29]

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LEGAL DOCUMENTS IN ANCIENT SOCIETIES

1. THE LETTER
Rome, 28-30.9.2008

2. TRANSACTION COSTS IN THE ANCIENT WORLD
Washington DC, 27-28.7.2009

3. IDENTIFIERS AND IDENTIFICATION METHODS
Leuven–Brussels, 23-25.9.2010

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Trieste, 30.9-1.10.2011

5. SALE AND COMMUNITY
Budapest, 6-7.10.2012

6. ANCIENT GUARDIANSHIP
Jerusalem, 3-5.11.2013

7. THE LOAN CONTRACT IN ANCIENT SOCIETIES
Paris, 27-29.08.2015

8. ACCOUNTS AND BOOKKEEPING IN THE ANCIENT WORLD: QUESTION OF STRUCTURE
Schwetzingen, 22-24 September 2016

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