

Book V.
Title LXX.

Concerning the curator of an insane person or of a prodigal.
(De curatore furiosi vel prodigi.)

Bas. 38.10.18; D. 27.10; Inst. 1.23.

5.70.1. Emperor Antoninus to Mariniana.

Curators are usually appointed for prodigals or insane persons when they reach legal age.

Promulgated July 29 (214).

5.70.2. Emperor Gordian to Anicius.

The benefit of the oration of the divine Severus, by which it was forbidden to sell or hypothecate rural possessions of minors under or over the age of puberty without decree of the president, is not without justice extended also to the statutory (agnate) curators of an insane person.¹ 1. If, therefore, the farm of an insane person was pledged to you without a decree of the president by an agnate relative of his, the pledge is not valid, but you can have a personal action (utilis) against him, if the loan was made for his benefit.

Promulgated January 1 (238).

5.70.3. The same Emperor to Aurelianus.

If your father is not sane, seek curators for him through whom if any act of his should be rescinded, he may, upon trial, be restored to his former rights.

Promulgated April 7 (239).

5.70.4. Emperors Diocletian and Maximian and the caesars to Asclepiodotus.

When you indicate that a husband, who alone could send a bill of divorce, repudiated an insane wife not in her father's power, and the mother of the insane woman made some written contracts with the former husband (as to property of the insane person), you know that such mother could not dispose of any property against the interest of the insane woman, since the protection of the latter did not devolve upon her.

Subscribed April 13 (293).

5.70.5. Emperor Anastasius to the People.

Lest we appear to have granted to an emancipated child or to emancipated children the right to inherit which they did not previously have,² without having provided anything as to their burdens of guardianship, we, by this sanction, decree that they shall, though emancipated, nevertheless be statutory curators of their insane brothers and sisters, in accordance with the laws of the 12 tables.

5.70.6. Emperor Justinian to Julianus, Praetorian Prefect.

¹ [Blume] See C. 5.71.

² [Blume] C. 5.30.4; C. 6.58.15 note.

Since some men are visited by the misfortune of continuous insanity, while other men are not without occasional relief from this disease, having lucid intervals at certain times, and since there is a great difference even in the latter situation, some men having short, others having longer intervals of lucidity, antiquity debated whether the intercession of a curator was necessary during these intervals, or whether the necessity thereof would cease during such times, to be renewed with the renewal of the sickness.

1. Settling this doubt, we accordingly ordain that since it is uncertain when such insane persons might have a lucid interval, whether after a long or a short lapse of time, and it is (not)³ unlikely that he may often be on the confines of sanity and insanity and long be in such doubtful condition so as often appear to some to be healed of his disease, the curatorship shall not cease, but the one appointed shall continue as curator while such insane person lives, because there is hardly any time during which such sickness may not exist. But in the intervals when lucidity is perfect, the curator shall not do anything, but the ward himself may, during such time, enter on an inheritance and do all other things that sane men do; but if the insanity reappears, the curator must authorize all contracts, so that he shall have the name of the curator during all of the time, but the duty as such only whenever the sickness reappears, lest frequent appointments of a curator be necessary which would be ludicrous and lest such curator spring into existence at one time and disappear at another.

Given September 1 (530).

5.70.7. The same Emperor to Julianus, Praetorian Prefect.

When an insane person, attacked by a lasting disease is in his father's power, he cannot have a curator appointed because his parents' solicitude in managing his property will suffice, whether he acquired such property as his special-military property (*castrensis peculium*) or otherwise, before or during the insanity, and though only the ownership (but not the usufruct) thereof belongs to him.

1. For what stranger has a love exceeding that of a father? Or, to what other person should the management of the property of the children be entrusted leaving out the parents? Although Tertullianus, interpreter of the ancient law obscurely stated the same opinion, in treating this subject in a book written specially concerning special-military property, still we have made the point clear.

1b. If it shall happen that parents have been taken from the light of day, our constitution (C. 6.26.9) which we have promulgated as to what is to be left in the testament (of such parent) to such insane person, and as to substitution (of heirs) in relation to such property, shall remain in full force.

2. If the insane person is not under paternal power (*sui juris*), then no doubt exists in the law of the ancients as to the paternal inheritance, which falls to posterity, as though owing, since it is clear that he is an heir of the body to his parents.

3. But in case an inheritance or succession should come to him from any other source, a great and inextricable doubt exists in the ancient law as to whether or not the insane person may enter on an inheritance or claim the right to the possession thereof, and as to whether or not his curator should be permitted to claim the right to possession thereof. The ancient jurists vehemently discussed this point, some on one side, some on the other.

³ [Blume] It would seem that "not" lacking in the text, should be supplied.

3a. We, restraining both sides of authors be a definite settlement, ordain that an insane person may neither enter on an inheritance nor claim the right of possession thereof, but we give power to his curator, nay, we rather impose on him the duty, if he shall deem the inheritance advantageous, to lay claim to the right to the possession thereof, which right of possession was formerly given by a decree, and to hold such property as it was formerly held pursuant to such decree, since the formal claim thereof has been abolished by a Constantinian law and a certain formality (*observatio*) was introduced by the law which suffices in place of such ancient claim.

4. But since antiquity fixed many round-about ways for a curator of a mad man, as to how a bond or security should be given by him, or for what things or persons, and whether every curator should furnish such security, it appeared best to us, in looking out for the interests of human kind, to clear up every obscurity and do away with every circuitous path, and to provide a complete and clear remedy for everything. And after first providing for the appointment of a curator for insane persons of both sexes, we then shall make definite provisions also as to other things.

5. If the father appoints a curator for a madman in his last testament whether the latter is institutes as heir or is disinherited, the person so appointed shall be called to the curatorship, and a bond shall be unnecessary, since the father's testimonial (as to his fitness, etc.) is sufficient, provided that, in this flourishing city, he shall go before the president, and shall in the presence also of the devout bishop of the place and three of the chief men, declare on the records (*actis interventibus*), while touching the holy scriptures, that he will manage everything properly and to the advantage of the madman, and that he will neglect nothing that he may deem advantageous to the madman, and will do nothing disadvantageous to him.

5a. And after publicly and in detail making an inventory in writing, he shall receive the property and manage it according to his judgment, a lien existing on his own property (for security for proper management) as in case of guardians and curators.

6. But if a father did not make a testament, and an agnate relative is according to law called as curator, or if such agnate relative does not exist or there is none with sufficient property, so that it becomes necessary to appoint a curator by judicial selection, then, according to what has been previously stated, the appointment shall, in this flourishing city, proceed before the glorious prefecture; and if the madman is of the nobility, the flourishing senate is also to be assembled, so that a curator of the best and of unblemished reputation may be nominated after consultation.

6a. And if the curator possesses sufficient means (as guaranty) for managing the property faithfully, the appointment may be made without requiring security; but if such person is not found, then as much security should be asked from him as is possible to be obtained.

6b. The appointment should in every case be solemnized in the presence of the holy scriptures, the curator himself, whatever property he may have or of whatever rank he may be, taking the aforesaid oath as to managing the property advantageously, (for the ward) and publicly making an inventory in writing, so that as far as possible the property of the madman may be managed to the latter's advantage.

6c. These things shall also be done in the provinces; that is to say, the appointment shall be made before the president of the respective province in the presence of the devout bishop of the city and three chief men, and the same rule (above mentioned) shall apply as to taking the oath, making the inventory, giving security and hypothecation of the property of the curators.

7. After such arrangement as to a curator for the madman has been made and any property comes, thereafter, to the madman, whether by inheritance, succession, legacy, or trust, or in any other manner, it shall accrue to the benefit of the madman and shall together with his other property be delivered into the hands of the curator. An inventory of such additional property, too, shall be made; all of it shall be placed under the curator's care until, if the madman becomes sane again and approves of the acquisition (of the new property) it is turned over to him.

8. But if he should die insane, or, while sane, refuses to accept such acquisition, then if such property is an inheritance, it shall go to the substitute heir or intestate successors who are willing to receive it; otherwise, to our treasury. It must be observed that those persons shall (in such case) receive the inheritance who, at the time of the death of the madman are the nearest relatives of the decedent, to the possession of whose inheritance they would be called, in case the madman had not lived, and the requirement of any security or bond, indirectly introduced by the ancient jurists, is entirely dispensed with.

9. Legacies, however, or trusts, or other acquisitions, must be accepted for the madman and added to his property. But if he recovers and does not want to accept such property and refuses it, or if his heir refuses it, it shall be immediately separated from his property, as though it had not fallen to him at all and shall go to the legal heirs, neither burdening nor helping the property of the madman.

10. If the curator of the madman appointed according to law should die, another shall be appointed in the same manner and under like conditions; as shall be true also when a curator is suspected of misconduct and another is substituted, as already provided by the ancient laws.

11. All these regulations, however, which are introduced by the new law, shall apply only to future cases, and curators appointed previously shall neither be removed, nor shall any new burden be imposed on them, but they shall, so far as their appointment is concerned, be governed by the ancient rules. The bond, however, or security, anciently required when any inheritance fell to a madman, need not be furnished in the future.

Given at Constantinople September 1 (530).

Note.

A person who was an heir of the body of a decedent, a self-successor—inherited from the latter (unless disinherited for just cause) by mere operation of law. He was not required to accept an inheritance in order to have the benefit thereof, unless pressed by creditors or substitutes. Other persons, in order to receive any benefit from an inheritance—in order to become actual heirs—were required to accept an inheritance in some manner, which in later times was rather informal. These subjects are fully treated in headnote C. 6.9. and C. 6.30 headnote and C. 6.30.3 and note, and the present law cannot well be understood except in connection with the principles there mentioned. Accordingly, as stated in the present law, an inheritance devolving upon an insane person by reason of being an heir of the body, or self-successor, required no acceptance. But an inheritance coming from outside sources did. Now an insane person could not accept it because of his mental incapacity. It was accordingly customary to have the court having jurisdiction enter a decree granting his curator the right of possession of the inheritance, and such decree operated as an acceptance. But a bond was required to be put up to return the benefit received from the property if the insane person should die insane. Justinian changed this law to some extent, eliminated the bond just mentioned entirely, and provided that a curator of the insane person upon whom an inheritance devolved

should petition for temporary possession of the inheritance for such insane person, and manage it the same as the balance of the property. If the insane person should recover his reason, he was required to declare whether he wanted to retain or refuse the inheritance. If he died insane, or if he expressly refused the inheritance, the curator was required to deliver it to those persons who were called to the inheritance next after the insane person. MacKeldy § 736; C. 6.16 1; 9 Cujacius 623; D. 5.3.51.