

Book V.  
Title XXXV.

When a woman may perform the duties of guardianship.  
(Quando mulier tutelae officio fungi potest.)

Bas. 38.1.46.

5.35.1. Emperor Alexander to Otacilia.

The performance of the duty as guardian is the work of a man, and is unsuited to the weaker, feminine sex.

Promulgated September 22 (224).

5.35.2. Emperors Valentinian, Theodosius, and Arcadius to Tatianus, Praetorian Prefect.

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.

1. Of course, no woman shall be forced to make such choice but must voluntarily agree to the conditions we have laid down. For if women prefer to enter into a second marriage, they cannot have the guardianship of their children.

2. And in order that a woman who has lawfully undertaken a guardianship may not easily violate 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.

3. 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.

4. But if women abstain from guardianship and prefer marriage, then only the illustrious prefect of the city, together with the praetor, who attends to the appointment of guardians, or the judges who administer the laws in the provinces, will, after investigation, direct guardians of another kind to be appointed for minors.

Given at Milan January 21 (390).

C. Th. 3.17.4.

Note.

Women were not considered proper persons to manage a guardianship, and could not do so except by express permission from the emperor. 9 Cujacius 524. Even the present law permitted a mother to be a guardian only where there was no statutory guardian to perform that duty. This was remedied by Nov. 118, c. 5, which gave a mother or grandmother a preference over collateral relatives, and she was required to give way only to a testamentary guardian.

Nov. 22, c. 40, refers to the oath to be taken by a woman not to remarry, in order to become guardian, and further prescribes a penalty in case of violation thereof. The oath, however, was remitted by Nov. 94, which provides for a simple renunciation of a second marriage. Nov. 118, c. 5 is to the same effect. But in addition to renouncing second marriage, women, to become guardian, were also required to renounce the benefit

of the Velleian Senate decree, which is mentioned in the next law of this title. That decree prohibited women from being surety, and making her contract of surety void.

It will be noted by the present law that where a woman who remarried continued as guardian, the law gave a lien on the property of her second husband for any indebtedness arising out of the guardianship. C. 8.14.6 is to the same effect. The law also provided that if a woman had a child under the age of puberty whose property she managed as guardian, and she failed to account as guardian and cause another guardian to be appointed, upon her second marriage, she could not inherit from the child if it died under the age of puberty. C. 6.56.6; Nov. 22, c. 40.

### 5.35.3. Emperor Justinian to Julianus, Praetorian Prefect.

If a father has not, according to our constitution,<sup>1</sup> appointed a guardian for his natural children for the management of the property left them by him, but the mother wants to undertake the guardianship of them, male or female, she shall, as in case of legitimate offspring, be permitted to do so if she, before a competent judge, declares by a statement under oath, made of record, that she will not marry, but remain chaste, and if she renounces the exemption under the senate decree Velleianus, as well as every other legal exemption, and if she pledges her property.<sup>2</sup>

1. We ordain that she may be the guardian of her natural sons and daughters under such conditions. Provisions which have been made in the imperial constitutions as to mothers and their children born in lawful wedlock shall also apply as to mothers of this kind.

2. For if in the case of legitimate children who (ordinarily) have testamentary or statutory guardians, mothers may undertake the care of such children in the absence of such guardians, it is just that another kind of guardianship be provided in cases where there is an entire absence of statutory guardianship.

Given at Constantinople March 18 (530).

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<sup>1</sup> [Blume] C. 5.29.4.

<sup>2</sup> [Blume] For proper administration.