

Book VI.
Title XXVI.

Concerning substitution for minors under the age of puberty and for others.
(De impuberum et de aliis substitutionibus.)

D. 28.6; Inst. 2.15.16; Bas. 35.13.25.

Headnote.

Substitution is merely the appointment of another heir for one who for some reason or another did not become heir, i.e. enter on the inheritance. Substitution was naturally introduced in order that appointments of heirs, or legacies or trusts given, might not lapse, but that there might be someone who would accept the benefits granted under the will, so that these benefits might not escheat to the state. C. 6.51.1.1a. If a testator provided: "Let A be my heir; if A does not become my heir, then let B be my heir" - making as many such substitutions as he wished - this was known as the common substitution. A father (or grandfather), however, could not only make the same substitution for a minor child in his power, but he could also provide for a substitution if the minor died below the age of puberty, for instance in this form: "Let A be my heir; if A dies before reaching the age of puberty, let B be my heir." This sort of substitution is called pupillary - from pupillus, a minor under the age of puberty, which in the case of boys was fourteen and in the case of girls was twelve years. Both substitutions were generally made for such minor. Thus, as already heretofore stated, the father could dispose of all the property of the minor, both what he received from the father as well as other property that he - such minor - might have. This was in effect making a will also for the minor. This right of pupillary institution was confined to a parent - father, grandfather or great-grandfather - who had the minor in his power, and where a substitution for such minor was made in either the common or the pupillary form, it took place, without specific mention, both when the minor did not become heir or died before the age mentioned. In other words, the one implied the other, unless the contrary appeared. Buckland 301. A soldier had still greater rights. He might make a direct substitution not alone for a minor but for anyone else, even though the inheritance had been entered on by the heir, or second heir, as the case might be, and might limit the estate conferred on any heir or substitute for any term of years. C. 6.21.8 and note. These substitutions were called direct substitutions. The rights under the common and pupillary institutions were limited. If the heir entered under the first, or the minor entered under the second and lived till he reached the age of puberty, the substitution became void. Mackeldy §720. But there was, as already stated in headnote C. 6.25, an indirect method of substitutions. The limitations on the former were practically abolished by virtue of the power of a testator to create trusts, and which placed any testator in substantially the same position as a soldier, provided he did not merely use the phraseology commonly used in direct substitutions. Thus if he e.g. provided: "When A, my heir, shall be dead, I wish the inheritance to belong to B," this created a trust, and B was entitled to the inheritance when A died. The testator might in this manner provide that the inheritance should be surrendered by the first heir to the second, by the second to the third, and so on. Hence when in this and the following titles the limitations in

common and pupillary substitutions are observed, it must be borne in mind that only the technical, common-law substitution is referred to and that the testator did not in such cases make manifest by language approved by legislation, that the estate of the heir or substitute was to be limited beyond what was permitted by direct substitution. For further details see Mackeldy §§720-723, 782; Hunter 788-794; 822-24; 941; Inst. 2.20.35; C. 6.42, dealing with trusts.

6.26.1. Emperor Titus Aelius Antoninus to Secundus.

If heirs are appointed for unequal portions and were substituted for each other reciprocally and mention was made of any portions in the provision for the substitution, it must be considered that the testator impliedly referred to no other portions in connection with the substitution than that specifically mentioned in connection with the original appointment of heirs.

Given (146).

Note.

Supposing that A was appointed as heir to 6/12th, B to 4/12ths, and C to 2/12ths of the estate, and supposing A died. Inasmuch as B received twice as much of the estate in the first place as C, he received, under the reciprocal substitution, without mention to the contrary, twice as much of the property of A as a substitute. Or, again, supposing that B died. Inasmuch as A received three times as much as C, the former received three times as much of the property of B as substitute.

6.26.2. Emperor Severus and Antoninus to Phronima.

It is not to be doubted that the inheritance of your intestate son belongs to you. For substitution made in the testament of the father can not apply after the age of puberty is reached, since reason dictates and the Emperor Marcus provided that even in a case where a son is appointed as heir in conjunction with others not of the same status (i.e. not minors), and they are substituted as heirs for each other, the rule that applies to the others for whom only one substitution may be made (i.e. if they should not become heirs) should also apply to the son.

Promulgated July 27 (204).

Note.

A similar situation as here mentioned has already been referred to in note C. 6.21.6. In the present case a minor son had evidently been appointed as heir by his father, and it had been provided that if the son should die before reaching the age of puberty, another person should be substituted for him as heir. Now the son lived beyond the age of puberty and accepted the inheritance and then died. The substitution provided for him, accordingly, failed.

As already stated in the headnote to this title and in note to C. 6.21.6, a father having a child in his power could make a common substitution for the child the same as he could do for other persons; but he could in addition to that also make a pupillary substitution - that is to say, provide what should become of the property left to the child, in case he or she died under the age of puberty. In fact if a substitution was provided for such minor child, it was construed to include, ordinarily, both substitutions. But if such minor child was reciprocally substituted with another, it depended on who was the other substitute. If two minor children under the age of puberty, were reciprocally substituted

for each other during that age, then if either of them did not accept the inheritance, or either of them died below the age of puberty, the other took his portion. But suppose a brother older than fourteen years of age - over the age of puberty - should be declared a substitute of his younger brother under the age of puberty. In such case a father could provide a substitute for the older brother only by the common substitution - that is, if he should not accept the inheritance, while he could make both substitutions for the younger brother. The latter, therefore, could take only in one case, namely, if the older brother did not become heir. Hence it would have been unjust that the older brother should have been able to take in two cases, both if the younger brother should not become heir as well as in case if he should die below the age of puberty. In such case, therefore, the substitution provided for both was held to apply only in one case, namely if either of them should not become heir, and did not apply to the case if the younger brother should die under the age of puberty. D. 28.6.4. This is what is referred to in the present law, as well as in law 4 of this title. What has been said as to an older brother applied, of course, to an older sister as well as to persons not in the power of the testator, since in all such cases, the testator could provide only the common substitution (saying nothing of trusts, of course).

6.26.3. Emperor Alexander to Achilla.

If you were appointed as heir in your mother's testament, and you refused the inheritance pursuant to the testament but wanted to be granted the right of possession thereof as on intestacy, there is no doubt but that you made way for the substitute. 1. Hence, if the substitute entered on the inheritance, sue him in actions which you had against your mother, but you cannot claim the inheritance on intestacy. Promulgated August 22 (223).

Note.

If an appointed heir refused to accept the inheritance under the testament, and a substitute was appointed, the substitute became immediately entitled to receive the inheritance, although a right of action which might exist against a parent was not at all extinguished. If the first appointed heir was one who was entitled to receive the right of possession under the praetorian law, and no substitute was provided, he was, of course, entitled to take the inheritance either under the will or on intestacy. 9 Donellus 227.

6.26.4. The same Emperor to Firmianus.

Although it has been the accepted opinion that a substitution for a minor below the age of puberty, and in the testator's power, made by the father in the following manner: "If he shall not become heir," applies as well when the son, after becoming heir, dies before reaching the age of puberty, provided a contrary wish of the decedent is not shown, still, since you state that substitution was thus made: "if my son Firmianus and my wife Aelia shall not be my heirs (which God forbid), let Pablius Firmianus be heir in their place," it is clear that the substitution was provided only for a case in which substitution could be made for both of the heirs.¹ Promulgated June 28 (225).

¹ [Blume] See note to law 2 of this title.

6.26.5. Emperors Diocletian and Maximian to Hadrianus.

After entrance on the inheritance, direct substitution made for sons above the age of puberty become void.

Promulgated May 23 (290).

Note.

It has already been noted that if an appointed heir accepted and he was over the age of puberty, the substitution failed completely. But this was true only as here stated in "direct" substitutions. Indirect substitutions were provided by trusts already mentioned in the headnote to this title, and other places.

6.26.6. The same Emperors and the Caesars to Quintianus.

When a testament is made legally and many heirs are appointed and substituted for each other, the portion of those who refuse the inheritance accrues to those who accept their portion, even against the latter's wish.²

Without day or consul.

6.26.7. The same Emperors and the Caesars to Felicianus.

If a father provided for direct substitution in his testament for his minor daughter, under twelve years of age, and in his power, in case she should die before reaching the age of puberty (i.e. twelve years), it is clear that you (as her substitute) became heir under the testament upon the arrival of the condition, thereby excluding intestate succession.

Subscribed at Sirmium January 1 (293).

6.26.8. The same Emperors and the Caesars to Petronia.

You should have expressed yourself more clearly whether your former husband who died as a soldier and whom you state to have appointed you and his son as his heir, and to have also appointed a substitute (second heir), whether such substitution was the common substitution or a substitution for the son, whom he had in his power, at the time of his death, if he should die before the fourteenth year of this age, or thereafter. 1. For the law is not uncertain that if a substitute was appointed for the son, in his father's power, only in the first case, and he actually became heir, his inheritance, upon his death, belongs wholly to you. 2. But if the substitution made was of the second class (*secundum casum*), either expressed or in short form without fixing any age, then if the son died before the age of puberty, his heirs are the persons whom the father appointed and who entered on the inheritance; if the son died after reaching the age of puberty, and you are in possession of the property, the substitutes may claim so much of it from you, as holder of it in trust, as was the father's at the time of the son's death.

Subscribed April 9 (293).

Note.

Primum casum, here means nothing more nor less than common substitution; that is to say, a substitution provided in case the son should not become heir. The "*secundum casum*" referred to in this law is the substitution provided for the son in case the latter should die during the age of puberty or thereafter. The present law deals with a soldier's will, and, as already noted in C. 6.21.6, the will was not limited, as other wills, in

² [Blume] See full provision C. 6.51.10a and 10b, as to property not desired by heir.

providing for a substitute for a minor, in case of death, only if such death should occur during the age of puberty, but such will could provide for a substitute if the appointed heir should die at any time.

The short form of substitution in such case, here referred to, was something like this: "if he should die" without fixing any age; the long form would be "if he should die during the age of puberty, or thereafter," since both the time before and the time after the age of puberty would be mentioned.

Where, however, a soldier provided a substitute for a son in case of death after reaching the age of puberty, he could not dispose of more property of the son than he received under the will. D. 29.1.5. If substitution was provided by a father for a child under power dying during the age of puberty, the substitute received not only what the child received under the will, but all other property which he or she might have, for, as already stated, a father had, in such case, virtually the power to make a will for the child. Inst. 2.16.4; Buckland 300.

6.26.9. Emperor Justinian to Mena, Praetorian Prefect.

If parents have a child, grandchild or great-grandchild of either sex, and no other offspring, and the son, daughter, grandson, granddaughter, great-grandson or great-granddaughter is permanently insane, or if none of the descendants, if more than one is sane, such parents are, through humanitarian considerations, permitted to provide such substitutes for him, her or them, as they shall wish, as to the legal portion which must be left to him, her or them, so that no complaint of an unjust testament may be made by reason of such substitution; in like manner as when a pupillary substitution is made; provided that, if he, she or they subsequently become sane, such substitution shall fail; or if there are sane children or other descendants of such insane person, such testator or testatrix has the right, in making a testament, to appoint as substitute or substitutes only one, or certain one or all of such children or other descendants. 1. And if there are other descendants of the testator or testatrix who are sane, and there is no descendant of the child or children who is or are insane, then one or certain ones or all of such other descendants of the testator or testatrix should be appointed as substitute or substitutes. Given at Constantinople December 11 (528).

6.26.10. The same Emperor to Johannes, Praetorian Prefect.

When a person appointed his two sons under the age of puberty as his heirs, adding that if both should die before reaching the age of puberty, some other person should be heir, it was doubted among the ancient writers of laws whether the testator wanted the substitution to apply only when both should die before reaching the age of puberty or whether, if either should die before that time, the substitute would inherit his portion. Sabinus thought that the substitution would take place only if both should die before that time; for the father must have meant that the brother would succeed to the portion of the one who should die before such time. 1. We think the opinion of Sabinus the better, and order that the substitution shall only apply if both should die before reaching the age of puberty.

Given at Constantinople July 27 (531).

6.26.11. The same Emperor to Johannes, Praetorian Prefect.

We find in Ulpian's works that a testator appointed two persons as heirs and added that these two, together with a third person, should be substituted to his son under the age of puberty, in the following words of his testament: "Whoever will be my heir, and Titius shall be heirs of my son." When the son died before reaching the age of puberty, the question arose in what proportion the three substitutes should participate in the inheritance; whether the first two, who were also heirs of the father, should receive one-half and Titius the other half, or whether the three should each be substitute for one-third? Another doubtful case arose where a testator appointed heirs in these words: "Titius, together with his sons and Sempronius shall be my heirs." In such case, too, according to Ulpian, it was questioned whether it was the wish of the testator that Titius, together with his children, should have one-half and Sempronius, the other half, or whether each of them should have an equal portion? It appears to us that in the first illustration each of the three should have a third; in the second illustration, Titius together with his children should have one-half, and Sempronius the other half, since father and son are, by nature, almost considered as one.

Given at Constantinople July 30 (531).