

Book VI.
Title XXII.

Persons who have and who have not the right to make a testament.
(Qui facere testamentum possunt et non possunt.)

Headnote.

The right to make a will and the manner of making it were privileges granted by and dependent upon the law. In general, any citizen over the age of puberty could make a will. The persons incapable of making a will were substantially the following: 1. slaves; 2. minors under the age of puberty (12 years for girls and 14 years for boys); 3. persons under the power of their father or grandfather, except as to special military or quasi-military property. C. 3. 28.24 and 37; Inst. 2.11; 4. persons who could neither speak nor write, and deaf-mutes. C. 6. 22. 10; C. 6. 23. 29; 5. persons lacking understanding and freedom of will, including insane persons and squanderers. Great age and sickness were no obstacle, so long as there was sufficient understanding. 6. Certain persons deprived of the right to make testaments as a punishment, such as wanton, libellers, persons who had lost their citizenship, and certain apostates and heretics (C. 1.7.1; C. 1.5.4.5; Nov. 115, c. 3.15). Mackeldy §§ 685-688; Buckland 287. In early Roman law, women were, generally, incapable of making wills. Buckland 287.

6.22.1. Emperor Gordian to Petronius, a soldier.

Although your father-in-law and his brother were partners as to all of their property, still this brother had not any the less the right when he neared his end to appoint whatever heir he wanted, in his testament. 1. Nor had he any the less right of making a testament because he possessed an undivided inheritance jointly with his sister. Promulgated July 21 (243).

6.22.2. Emperors Diocletian and Maximian and the Caesars to Viator and Pontia.

If he, who appointed your wife as joint heir with you, was sane when he made his will, and he afterwards killed himself, without being induced to do so by any consciousness of guilt, but by reason of being unable to bear his grief or during an attack of insanity, and his innocence (of crime) can be vouched for by you by clear proofs, his last wish cannot be rescinded by reason of such suicide. 1. But if he thwarted his punishment by a voluntary death, the laws forbid his will to stand. Promulgated December 1 (290).

Note.

C. 9.6.5 and C. 9.50.2 contemplate that if a man committed suicide while conscious of guilt, his property was forfeited to the fisc. Later legislation perhaps modified these laws. See note C. 9.50.2. But the present law, which provides that a man's will shall be invalid, if he commits suicide under these circumstances appears not to be affected.

6.22.3. The same Emperors and the Caesars to Licinius.

It is certain that the right of making a testament is not taken away by reason of old age or disability of the body from those who are of sound mind. But the law is clear that an unemancipated daughter has no right to make a testament.

Subscribed at Sirmium April 2 (294).

6.22.4. The same Emperors and the Caesars to Rhodon.

If the son of your paternal uncle died before his fourteenth year, while he was incapable of making a testament, no rights arise out of his last wish. But if he made his will in lawful manner after he had passed that age, though the signs of manly vigor had not yet appeared, you will try in vain to break it.

Subscribed November 3 (294) at Panticum.

6.22.5. Emperor Constantine to Rufinus, Praetorian Prefect.

Eunuchs, the same as others, may, by observing the rules of law, execute a testament, make a last will and write a codicil.

Given at Sirmium February 25 (352).

6.22.6. The same Emperors to Volusianus, City Prefect.

Anyone who has, perchance, appointed the Emperor as heir, has the right of changing his mind and appointing as heir, according to law, any person he wishes.

Given at Milan February 18 (355).

6.22.7. Emperors Valentinina, Valens and Gratian to Maximus.

When the emperor or the empress are appointed as heirs, they shall have the same rights as others. That applies also to codicils and letters creating a trust, legally executed. And, as has been provided in former law, it is permitted to make a testament in favor of the emperor or empress, and to change it.

Given at Contionacum August 7 (371).

6.22.8. Emperor Justinus to Demosthenes, Praetorian Prefect.

By this well-considered law we ordain that persons who are born blind or who become blind through sickness, may make a nuncupative will in the presence of seven witnesses who are lawfully qualified as witnesses of other wills, and in the presence of a notary. When all that are called are present, the testator must inform them that they are to witness his nuncupative will; he must then specially give the names of the heirs, and the rank and words whereby to recognize of each, so that the giving of the name alone may not give rise to doubt in recollection; he shall also state what portion or how many twelfths each heir shall have of the inheritance, and what he wants each legatee or beneficiary of a trust to have; in a word, he shall plainly state everything, which the law requires, in the orderly course of making last testaments. 1. If all this is properly stated in one and the same place, and at one and the same time, and is written down by the notary in the presence of the witnesses, as has been stated, and is subscribed by them with their own hand, and is then sealed by these witnesses as well as by the notary, the will of the testator shall be of full force and effect. 1a. The same method shall be pursued if the testator, instead of appointing heirs, only wants to arrange for legacies and trusts; in a word, if he wants to make a codicil. 1b. But since the memory of men is weakened when

disturbed by thoughts of death, blind persons may have their wishes, whether in the form of a testament or codicil, put in writing by whomever they wish, but witnesses and a notary shall thereafter be called in the manner aforesaid. The reason for their presence shall be stated, as above mentioned, the writing shall be produced and read over by the notary to the testator and to the witnesses at the same time, and when the tenor thereof is clear to all, the blind testator must acknowledge that the writing is his last will, and that he disposes of his property according to his intention. Lastly shall follow the subscription of the witnesses and the seal of the latter, as well as that of the notary, as has been stated. 2. Inasmuch, however, as opportunity to have a notary does not exist in all places, we order that when no notary may be had, an eighth witness is to be called, who, instead of the notary, may perform, in the manner aforesaid, what (in other cases) we required the former to do, and give to persons who make their will in the foregoing manner permission to give the writing, subscribed and sealed according to the foregoing rules, to whichever witness they wish, for safekeeping. We are confident that in this manner, not alone is the right to make a testament left to blind persons, but trickery also is forestalled when everything is noticed by so many eyes and is impressed upon the knowledge of so many minds and is entrusted into so many hands. Given at Constantinople June 1 (521).

Note.

As to the manner of making wills, see, generally, the next title. Notice also scarcity of notaries.

6.22.9. Emperor Justinian to Julianus, Praetorian Prefect.

That an insane person may, in lucid intervals, make a testament, though doubted by the ancients, has been accepted as true by past emperors and by ourselves. But we must now decide a matter which also occupied the attention of the ancients, namely what the situation is, if insanity overtakes him while making a testament. 1. We, accordingly, decide that a testament of a man, attacked by this disease in the act of making it, shall be invalid. But if he makes a testament or any last will during lucid intervals, commencing and finishing it without an attack of this disease, such testament or last will shall be valid if all other legal requisites of such proceeding are complied with. Given at Constantinople September 1 (530).

6.22.10. The same Emperor to Julianus, Praetorian Prefect.

Deafness and muteness being separable, since these defects are not always concurrent, we ordain, that if anyone is subject to both diseases, that is to say, when he can neither hear nor speak, and he is born with these defects, he can neither make a testament or codicil, nor leave a trust, nor make a gift in anticipation of death, nor grant liberty either by the rod, or in any other manner. Males and females shall alike be subject to this rule. 1. If, however, such defect of either male or female is not inborn but an intervening sickness takes away the voice and closes the ears, then, assuming that such person knows how to write, he or she may by his or her own hand, write a will, which we have just forbidden to be made. 2. In case these defects do not both exist, which seldom occurs (and a person is merely deaf), such deaf person may, though there is naturally a difference in degree of deafness, make a testament, codicil, gift in anticipation of death and manumission, and do all other things. 3. For if nature has granted him an articulate

voice, nothing forbids him to do whatever he wants to do, because we know, as some jurists have well reasoned and stated, and which is also the opinion of Juventius Celsus, that there is no one so deaf but that he can hear if someone speaks to him from above the cerebrum. 4. There is no doubt in case of a person whose hearing is taken away by sickness, that he can do everything without any difficulty. 5. If a person's ears are open, and he is able to hear but ability to speak does not exist, in such case, though opinion among the ancients differed, there is nothing, if we assume that he is versed in letters, that hinders him from doing everything in writing, whether he is born with this misfortune of it came upon him through in intervening sickness. No discrimination must be made under this constitution between males and females.
Given at Constantinople February 20 (531).

6.22.11. The same Emperor to Johannes, Praetorian Prefect.

No one must think that we made any innovation by the law which we recently promulgated¹, as to property which children do not acquire for their father, and that unemancipated descendants of any degree of relationship or of either sex are permitted to make testaments, whether, according to the distinction made by our law, they possess property without or with the consent of their father. 1. For we in no manner allow them to do this, but the ancient law shall remain in force which does not permit unemancipated children to make testament, except in certain cases, and except persons who have heretofore been granted such power.²
Given at Constantinople July 29 (531).

6.22.12. The same Emperor to Johannes, Praetorian Prefect.

All those who have been given the right to have quasi-special-military property³ as their own, may dispose of that, and that only, by testament, according to the tenor of our constitution, which makes such testaments exempt from complaints of being undutiful.
Given at Constantinople September 1 (531).

¹ [Blume] C. 6.61.6.

² [Blume] Soldiers, e.g.

³ [Blume] Quasi castrensia pemia - salary of officials.