Book V.
Title XXX.

Concerning statutory guardianship.
(De legitima tutela.)

Bas. 37.4; D. 26.4; Inst. 1.15.17.18.

Headnote.

The second division made in connection with guardianship was statutory guardianship. If not testamentary guardian had been appointed or the one appointed died before the testator, then the nearest male agnate relative had the right to act and was required to act as guardian, a provision which had it s origin at least as far back as the 12 tables (5, 6) if not farther. The rule was based on the theory that such agnate relative was the intestate heir of the minor, and that he who might enjoy the inheritance should bear the burden of the guardianship. Inst. 1.17 pr. A woman might be nearer in degree of relationship than the nearest make agnate, but women except a mother and grandmother could not act, and hence it was not always true that the nearest intestate heir was the guardian. So emancipated males could not act, until Anastasius provided otherwise, as noted in law 4 of this title. The laws of inheritance were gradually changed, and Justinian abolished the difference in agnate relationship—that is to say, relationship through males, as fully outlined in headnote to C. 6.9) and cognate relationship—relationship through females—and since the right and the duty of statutory guardianship was based on the right, or supposed right, of intestate succession, Justinian also required cognate male relatives, as well as agnate male relatives, to serve as guardian for a minor. This is fully set forth in Novel 118, c. 5. By that provision, moreover, a mother and grandmother were given the preference in serving as guardian over the other relatives. If there were several qualified to serve, they shared the guardianship under the old law (Buckland, 146) but under the Justinian law they nominated one or more from among their number, who then acted. It seems that under the old law no order of appointment was made or required by the court (D. 26.4.5 pr.), but under the Justinian law the court doubtless made a record of the persons who were nominated.

5.30.1. Emperor Diocletian and Maximian to Firmina.

Guardianship of sons is not, by the law of the Twelve Tables, given to maternal uncles, since that right is granted only to paternal uncles, if they shall not excuse themselves.
Promulgated May 25 (290).

5.30.2. The same Emperors and the Caesars to Asclepiodotus.

It is clear that the guardianship of a minor under the age of puberty lawfully belongs to the agnate relatives of the minor unless they have suffered a change (loss) in their status.
Subscribed April 3 (293).

Note.

The loss of status referred to was emancipation. An emancipated son was considered as having suffered a diminution in his status. He ceased to be classed as an agnate of his family and thereafter was merely a cognate relative, and as such, under the older law, was not entitled to serve as guardian of a minor who was simply his cognate relative.

5.30.3. Emperor Leo to Erythrius, Praetorian Prefect.

The Claudian law having been abolished by a constitution of Constantine of blessed memory, the right of agnates being thereby restored as it was under the ancient law, a consanguineous brother (one having the same father) as well as a paternal uncle, and other agnates (legitimi) are called to the guardianship of minor girls.
Given July 1 (472).

Note.

According to the Twelve Tables (V), women not under paternal power were, even though of age, under the guardianship of their nearest agnatic relative. The emperor Claudian abolished the right of agnates. Gaius 1.157. Constantine restored it, evidently influenced by Greek custom, based on ancient Greek law, under which the nearest agnate acted as guardian. If a woman was married, however, then under the same custom, she was under the guardianship of her husband. And Constantinte also recognized that custom and enacted it into law, but Julian repealed it. C. Th. 3.1.3. And guardianship of women of age disappeared about that time altogether, except that we know it was continued in Egypt, though not in conformity with Roman law, even after Justinian's time. Mitteis, R.R.u.V.R. 218-220; Taubenshlag, Vormundschaftsrechtlice Studien 69-86.

5.30.4. Emperor Anastasius to Polycarpus, Praetorian Prefect.

We ordain that an emancipated brother, who was by our provision ordered to have precedence in inheriting from his full-blood brother and from his sister over all persons of inferior or more distant degrees of relationship, cognates as well as agnates, will, if he has no other legal excuse, be called to the statutory guardianship of his brothers, sisters, and children of brothers, the same as though he had not been released from his father's power by emancipation, and he will not be permitted to assert that he is free from such burden by reason of the change of his status.
Given April 1 (498).

Note.

Anastasius allowed emancipated brothers and sisters to succeed as agnates, subject, it seems, to a deduction of a third, if there were unemancipated persons of the same class. Inst. 3.5.1; C. 6.58.15 and note. Hence they were burdened with the same duty of guardianship as their unemancipated brothers, in line with the theory already stated in the headnote. The Anastasian law here mentioned is not extant. See Buckland 370, 371.

5.30.5. Emperor Justinian to Demosthenes, Praetorian Prefect.

No brother or other person contemplated by statute shall be called to the guardianship of a free born or manumitted person unless he completes the 25th year of his life. For such person (under that age) has enough risks in managing his own affairs without being weighed down by a foreign burden.

1. For thus the property of minors under and over the age of puberty will be properly managed, and the natural order will be preserved in all things. For it would be intolerable that the same person should be a guardian and be himself under guardianship or should be curator and be himself under curator ship. This would be a strange confusion of names and things.

2. Thus a proper distinction shall be made and only persons who are of an age to whom management of their own property is entrusted, and whose property may be held obligated under a complete right of a lien shall act as guardian or curator, whether statutory or appointed by the court (dativi).

3. All provisions enacted in former laws concerning the right of succession to free born persons and freedmen shall remain in force and shall not suffer any modification by the present sanction, especially as to the right of succession to freedmen, lest persons who do not have the burden of guardianship may seem to have thereby lost the benefit of the right of succession.

Given October 30 (529).

Note.

It seems that prior to the enactment of this law the nearest male agnate was guardian, and had the burden thereof, even though he was a minor, and who, accordingly, might have to carry on the guardianship through someone else. Being a minor, there was no lien on his property to hold him responsible for his conduct as guardian. In ordinary cases the property of the guardian was bound by a lien. The present law provides that only persons who may be fully bound by alien on their property shall be guardians. But since the duty of guardianship was closely bound up with the right of succession to the minor, as noted in the headnote to this title, Justinian specifically provided that the minor who was prohibited from acting as guardian pursuant to the provision of the present law should not for that reason lose any of his rights to inherit from a minor, for whom someone else, in his stead, was appointed as guardian.