

Book V.
Title XXXIV.

Who may appoint guardians or curators and who may be appointed.
(Qui dare tutores vel curators et qui dari possunt.)

Bas. 37.5.30; D. 26.5.

Headnote.

The following persons could not be appointed as guardians: 1. Slaves and non-Romans. If a slave was appointed by the testament of the father, he became free. C. 5.28.5 note. 2. Females, except a mother and grandmother as provided by Nov. 118, c. 5; see C. 5.35. 3. Insane persons and judicially declared squanderers. 4. Deaf and dumb. 5. Minors. 6. Soldiers in actual service. 7. Bishops and monks. 8. Enemies of the minor or his father. 9. Everyone attempting to obtain the guardianship with money. 10. Persons forbidden to be such by the father or mother. 11. Persons who had a claim against the minor or owed the minor. Mothers and grandmothers excepted. Nov. 72; Nov. 94. 12. A Jew could not be a guardian of a Christian. Mackeldy §616. See C. 5.62.

5.34.1. Emperor Alexander to Ambibulus.

Since you are of an age, when, if your status were clear, your affairs should be managed by guardians or curators, the fact, which you allege, that there is a controversy as to your liberty, does not prevent, after the case as to your liberty has been commenced,¹ the appointment of a curator for you by whom your case can be defended, since you will be considered a free person in the meantime.²
Promulgated November 1 (222).

5.34.2. The same Emperor to Artemisia.

A husband, although he should look after his wife's property, cannot be appointed her curator.
Promulgated July 1 (225).

5.34.3. Emperor Philip to Dolens.

You are wrongly persuaded that one deprived of his eyes may be appointed as curator.³
Promulgated July 20 (244).

5.34.4. The same Emperor to Emeritus, a soldier.

One occupied with the duties of a soldier may not be appointed as guardian or curator, though he wants to be, and though he may be one of the statutory persons to act as such and though he was designated as such in a testament. But if, through an error, he has managed the property, he may be sued in an action on voluntary agency.
Promulgated July 23 (244).

¹ Blume lined out "commenced" and penciled in an illegible word above it.

² [Blume] C. 7.16 and especially law 14.

³ [Blume] That is the meaning given by 9 Cujacius 524, though the text does not seem to warrant it.

5.34.5. Emperors Diocleatian and Maximian and the Caesars to Aeliana.

It is settled law that a person who is native of another city, and does not have his domicile where he is nominated as guardian, cannot be legally appointed as such by the president of another province or by a municipal magistrate to whose jurisdiction he is not subject. And he will not be answerable for not assuming a duty wrongly enjoined on him.

Subscribed April 20 (290).

5.34.6. The same Emperors and Caesars to Leontius.

Since you say that a mother refuses to ask for guardian for her sons, go before the president of the province with this mother, and if he satisfies himself that she has neglected her duty, he is not forbidden to either appoint guardians on his own initiative or to order that names be sent him, from among whom he may select the appointees by his decree.⁴

Promulgated April 30 (293).

5.34.7. The same Emperors and Caesars to Rufus.

There is no doubt that a slave cannot be appointed as guardian or curator by the president.

Subscribed July 6 (293).

5.34.8. The same Emperors and Caesars to Eulpistus.

It is not doubted that a creditor appointed as guardian for his debtors does not alone not lose his claim, but he can even pay himself.⁵

5.34.9. The same Emperors and Caesars to Maximianus.

If you were appointed guardian for the sons of your sister, who have a statutory guardian in the person of their paternal uncle who is not excused by any privilege, then since the laws forbid a guardian to be appointed for a minor who already has one,⁶ there is no doubt that the duty of administration rests on the paternal uncle, and you are not bound by your appointment.

Subscribed at Sirmium January 30 (294).

5.34.10. The same Emperors and Caesars to Florentinus.

The law is not doubtful that no one who has a curator can be given another without investigation, nor can one curator be substituted for another, unless the first one is removed. And it is certain that you are liable for the damages which happened to the affairs of your ward under the age of puberty while you were absent, since you should at

⁴ [Blume] C. 5.33.1 note.

⁵ [Blume] Such creditor could not act as guardian according to Nov. 72, cc. 1-5; Nov. 94, c. 1.

⁶ [Blume] This shows how strictly the rule was enforced that a statutory guardian was required to act and was the guardian by operation of law. See C. 5.30; see also note to next law.

your own risk have appointed a manager, and the magistrate could not lawfully appoint another guardian in your absence.
Promulgated March 30 (294).

Note.

The previous law states that no guardian can be appointed for one who already has one. The present law applies the same rule to a curator. Cujacius thinks that for “curator” should be read “tutor,” guardian, and that additional curators might be appointed at any time, as shown in title 36 of this book. That is borne out by the fact that the law speaks of managing the property of a minor under the age of puberty. If, however, the present law be construed to mean that no additional curator and that no substitute could be appointed except after investigation, which undoubtedly was the rule, there is, perhaps, reason why the reading of the law may not be accepted as it has come down to us. Bas. 37.7.38 applies the rule to curators just as the law stands in the Code. There is no doubt, as shown in title 36 of this book, that additional or substitute curators might be appointed after investigation. As to manager of a guardian see C. 5.61.

There might be more than one guardian; that was true, for instance, in the case of statutory guardians, as already shown in title 30 of this book; that was true also in case of guardians appointed by the court as shown in C. 5.33.1. They were considered in the light of one person. 9 Cujacius 530. And it was true also that where one of these guardians died, was excused, or removed, another could be substituted for him. Cujacius, supra; C. 5.36.2 and 4. Otherwise, however, no guardian could be appointed if there was one, though, as shown by title 36 of this book, a curator or curators might be appointed to act with the guardian. The distinction lay in the fact that a guardian ordinarily had control not only over the property of the minor under the age of puberty, but over his person as well; while a curator had no control over the person, but was appointed only for the purpose of managing property. The principle, however, appears to be modified by Nov. 72, c. 2, in which an additional guardian was authorized to be added when the original guardian became a creditor of the minor.

5.34.11. Emperor Constantine and Caesar Constantinus to Bassus, City Prefect.

The law which applies to all cases is that a minor over the age of puberty is not a proper defendant till a decree has been entered declaring such minor of age to manage his property, or a curator is appointed for the purpose of a lawsuit, so that a controversy legally in court according to preceding precepts of our Piety may be finished.

Given at Aquileia October 12 (319).

C. Th. 3.17.1.

Note.

As already pointed out in headnote to C. 5.28, no lawsuit could be carried on against a minor over the age of puberty unless a curator was appointed for him to defend the suit. See also C. 5.33.1 and law one of this title. A minor was, however, considered of full age when he obtained what was called the *venia aetatis*; that is to say, if he was declared of age by legal authority; but for that purpose a male was required to be 20 years, a female 18 years, of age. C. 2.44.2. Mackeldy §138 note.

5.34.12. Emperors Gratian, Valentinian and Theodosius to Eutropius, Praetorian Prefect.

A curator appointed for a minor over the age of puberty cannot after the commencement of a lawsuit, either desert the lawsuit or abandon his administration under a pretext of having named a special curator.

Given at Constantinope Sep. 28 (381).

5.34.13. Emperors Honorius and Theodosius to Monaxius, City Prefect.

Lest the license of magistrates proceed too far, we point out more plainly that no patrimonial (imperial) serf (colonus) or anyone who is exempt by reason of privilege, shall be force to perform the duties of a guardianship.

Given (409).