

Book V.
Title XXXIII.

Concerning guardians and curators of persons of illustrious and honorable rank.
(De tutoribus et curatoribus illustrium vel clarissimarum personarum.)

Bas. 37.5.29.

5.33.1. Emperors Valentinian, Theodosius and Arcadius to Proculus, City Prefect.

The illustrious prefect of the city shall summon ten men from the august senate, and the honorable praetor who presides at hearings for the appointment of guardians, and shall cause suitable guardians or curators to be nominated by them without regard to rank. And they may give their judgment freely and without responsibility for damage.

1. And if one person is not sufficient for looking after the minors property, it is proper that, according to ancient laws, several shall be appointed for the purpose and the one whom the meeting (of senators, etc.) considered the most competent shall by the decision of the prefect be appointed to the active management of the property, and such decision shall thereafter be confirmed by the customary praetor's decree.

2. In this manner those present at the meeting may remain free from fear of responsibility (for the acts of the guardian) and at the same time proper protection is extended to minors under and over the age of puberty of honorable rank, by the deliberation of prudent men.

3. It is understood that we make these provisions concerning persons who have neither testamentary nor statutory guardians of suitable mode of life or with sufficient property. For when there are, perchance, men of that kind, we rightly direct that they may be called to perform such duty if their privileges give them no lawful excuse.

4. We devise that all other provisions, however, which are made concerning minors in the ancient laws, shall remain unaffected.

5. And in the provinces the curials must furnish the proper guaranty (debitam cautionem) in nominating guardians and curators of persons of honorable rank, and mindful of their risk, must know that hereafter their property will be liable to make good the loss of minors.

Given at Milan December 20 (389).

C. Th. 3.17.3.

Note.

The present law as originally enacted applied to the selection of guardians and curators for all minors in the city of Constantinople. As it appears in the Justinian Code, it applied only to minors of honorable rank—clarissimi—which probably was used in a general sense and was meant to include the two higher ranks of worshipful and illustrious as well. The children of men of rank were known by the same rank as their fathers; this was true also as to wives.

The members of the senate in Constantinople, called in to deliberate on the appointment of guardians and curators were expressly exempted from responsibility for the selection. Where it was necessary to make such selection for minors in the provinces, the municipal senate was required to act, and the members participating were held responsible for the guardian selected by them. They were required to furnish a guaranty-cautio—as here stated, which probably consisted of a written promise guarantying the faithful performance by the guardian of his duties. Only those present at the meeting of

the municipal senate were responsible. D. 27.8.1 pr. Hence it was evidently deemed advisable to have a written guaranty, or promise, so that it might be definitely known who was responsible for the acts of the guardian.

It is certain that the members of the municipal senate in cities of the province at times acted in other than ordinary cases of appointing guardians. D. 26.5.19; D. 28.8.1pr. Generally, however, the magistrates acted alone, at the request of the governor of the province; they either merely made a recommendation, in which case they were not responsible for the acts of the guardian, except for fraud, or they made the appointment themselves, if requested to do so by the governor, in which case they were responsible for the acts of the guardian, if they had not required sufficient sureties. D. 28.8.1.2 and 3. Inst. 1.20.5. At Rome the appointment was made by the city prefect or the praetor. In 531 Justinian enacted a law that in Constantinople the praetor should make such appointment in the ordinary cases, which probably had been the rule previously. In the provinces such appointment, if the minor's property was not to exceed 500 solidi, was required to be made, without waiting for the order of the governor, by the defenders of the city along with the bishop of the place and the magistrate or magistrates, security being taken, and those who took it being responsible if it was insufficient. Inst. 1.20.5; C. 1.4.30. See generally Gothofredus on C. Th. 3.17.3; 9 Cujacius 522; headnote C. 5.42; note C. 5.59.5; C. 5.75. For official responsibility in other cases see C. 6.62.5 note; C. 8.13.11 note.¹

5.33.2. Emperors Valentinian, Theodosius and Arcadius, City Prefect.

It is provided by general law that no one occupied in curial duties² shall be called to guardianship of illustrious senators.
Given July 25 (393).

¹ Blume has penciled in at the top of the note: "Note imperfect I think; does not mention all cases."

² [Blume] See C. 10.32 and subsequent.