THE WOMAN IN THE ROMAN SOCIETY

Ideals – Law – Practice

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Meetings 5–6

Legal standing of a woman in Roman law. Women under authority and autonomous. Guardianship. Succession. Mothers on behalf of their children. Women acting in business relations. (Capacity to Legal Transactions / Legal Capacity)

Suggested readings:

1. Gaius, Institutions, book 1
2. Lefkowitz & Fant, Chapters IV & V

A3: LEGAL STANDING IN THE CLASSICAL TIMES

1. Familia
   A. D. 50.16.195.2; 5 (Ulpianus, Commentary on the Edict, book 46): Strictly speaking we call a familia several persons, who are subjected under the power of one person, either by nature or by law, as for instance the father of the family (paterfamilias), the mother of the family (materfamilias), the son of the family (filiusfamilias), the daughter of the family (filiafamilias) and those who follow them in succession, ad for instance, the grandsons and granddaughters and so on. However, he who has dominion in the home is called paterfamilias, and he is called by this name correctly, even though he does not have a son, for we are describing not only the person, but also the legal status (...) And when paterfamilias dies all persons (capita: heads) that were his subjects begin to have their individual families: for individuals succeed to the name of fathers of family. And it will happen likewise in the case of he who has been emancipated, for even this one, having been legally made independent (sui iuris, autonomous), has his own family (...) 5. However, a woman is both the beginning (caput: head) and the end (finis) of her family.

B. Gaius 1.55. In like manner, our children whom we have begotten in lawful marriage are under our control. This right is peculiar to Roman citizens, for there are hardly any other men who have such authority over their children as we have, and this the Divine Hadrian stated in the Edict which he published with reference to persons who petitioned for Roman citizenship for themselves and for their children, for he said: 'It does not escape my knowledge that the Galatians hold that children are in the power of their parents.'

2. Deterior/Melior condicio?
   A. D. 1.5.9 Papinianus 31 quaest.: In multis iuris nostri articulis deterior est condicio feminarum quam masculorum. Dig.1.5.10 Ulpianus 1 ad sab. Quaeritur: hermaphroditum cui comparamus? et magis puto eius sexus aestimandum, qui in eo praevalet. Papinian, Questions, book 31: There are many points in our law in which the condition of females is inferior to that of males. Ulpian, Sabinus, book 1: Question: with whom is a hermaphrodite comparable? I rather think each one should be ascribed to that sex which is prevalent in his or her form.

B. Gaius, Institutes 2.112. A Decree of the Senate was enacted at the instance of the Divine Hadrian, by which women were permitted to make a will even without the ceremony of coemption; provided, however, they were not under twelve years of age; and if they were not released from guardianship, they were required to execute their wills with the consent of their guardians.

113. Females therefore appear to be in a better position than males, but a male under the age of fourteen cannot make a will, even with the authority of his guardian; but a female obtains the right of testamentary disposition with the consent of her guardian, after she has reached her twelfth year.

3. Weak in mind? Women before the Law:
   A. D. 1.16.9.5 (Ulpian) A provincial governor should in general grant advocates to those requesting them: to women, or wards or those weak in other respects, or to those who are not in their right mind, if someone else requests on their behalf.

B. D. 2.13.1.5 (Ulpian) Aid will be given to those, who having made a mistake on account of their age or rusticity, or on account of their sex, have not given formal notice
C. D. 2.8.8.2 (Paulus) ... Help must be given to the minor under 25 years, and perhaps also to a woman on account of her inexperience.

D. D. 22.6.9 pr. (Paulus) The rule is that ignorance of the law does hurt a person, but ignorance of fact does not. Let us see therefore, in what types of situation this can hold true, having mentioned in advance that minors under 25 are allowed to be ignorant of the law. This is also said in regard to women in certain cases, on account of the weakness of their sex; and so wherever there is not a delict but ignorance of law they are not harmed.

E. D. 50.17.110.4 Paulus: Aid must be given to woman when they are being defended in court, not so that they more easily practice legal chicanery!

4. Likeness to a man
D. 28.2.6 Ulpianus, On Sabinus, Book III. The question arose whether a man who has not complete power of reproduction can appoint a posthumous heir. Cassius and Javolenus say that he can do so, because he can marry and adopt children. Labeo and Cassius state that one who is temporarily impotent can also appoint a posthumous heir, since in this instance neither age nor sterility can be considered as impediments. (1) Where, however, the individual in question has been castrated, Julianus, following the opinion of Proculus, does not think that he can appoint a posthumous heir. This is the modern practice.

5. Legal gender definitions
A. D. 50.16.1 (Ulpianus, Commentary on the Edict, book 1) This expression ‘if anyone’ embraces males as well as females
B. D. 50.16.152 (Gaius, On the Julian and Papian Law, book 10): There is no doubt that in the name ‘man’ (homo), the feminine as well as the masculine is included
C. D. 50.16.195 pr. (Ulpianus, Commentary on the Edict, book 46) An expression of language in terms of masculine sex is generally extended to both sexes.
D. D. 50.16.84 (Paul, On works of Vitellius, book 2): In the name ‘son’ (filius) we understand all children.
E. D. 50.16.116 (Iavolenus, Letters, book 4): In ‘whatever other son or son of my son be my heir’: Labeo thinks a daughter is not covered, Proculus the opposite. Labeo seems to me to be paying attention to the literal meaning of the words, Proculus to the intention of the testator. He replied ‘I do not doubt that the opinion of Labeo is not true’.
F. D. 50.16.52 (Ulpianus, Commentary on the Edict, book 46): In the name ‘patron’, a patroness is also included.

6. Male/Female inclusive?
A. D. 31.45. Pomponius, On Quintus Mucius, Book VIII. Where the following was inserted into a will, "I give a hundred aurei to my daughters," will the legacy be considered to have been equally bequeathed to the male and female children? If it had been written as follows, "I appoint So-and-So guardians of my sons", it has been held that guardians were also appointed for the daughters. Yet this is not to be extended to the contrary situation: it should be understood that males are not included under the term "daughters," for it would establish a very bad precedent for males to be included in a word which designates females.

A certain man who had two mules bequeathed them as follows, Let my heir give to Seius my two male mules, when I die. The testator had no male mules, but left two female mules. Servius rendered the opinion that the legacy should be paid, because female mules are included in the term 'mules', just as female slaves are generally included in the term 'slaves.' Hence it comes that the male sex always includes the female

C. D. 34.2.33 (Pomponius, Quintus Mucius 4): There is no difference between the expressions male attire and male garments, yet the intention of the testator sometimes creates difficulty, if he himself was accustomed to make use of some garment which was also suitable for women. Therefore it should, by all means, be ascertained whether the garment bequeathed was the one which the testator had in his mind, and not that which was actually destined for the use of women, or for men. For Quintus Mucius says that he knew a certain Senator who was in the habit of wearing women’s clothing at the table, and who, if he should bequeath a garment used by women, would not be considered to have had in his mind one which he himself was accustomed to make use of as male

D. D. 45.1.110: Pomponius, Quintus Mucius 4 (1) If I stipulate with you as follows, "Do you promise to give me any women’s clothing which belongs to you?" the intention of the stipulator rather than that of the promisor should be taken into account, and attention should be paid to whatever was in existence, and not to what the
promisor had in his mind at the time. Therefore, if the promisor was accustomed to wear a woman’s garment, it will still be due.

E. D. 9.2.2 pr.1 Gaius, On the Provincial Edict 7
It is provided by the first section of the Lex Aquilia that, “Where anyone unlawfully kills a male or female slave belonging to another, or a quadruped included in the class of cattle, he shall be condemned to pay a sum equal to the greatest value that the same was worth during the past year”. (1) And then the statute further provides that, “An action for double damages may be brought against a person who makes a denial”.

F. D. 50.16.116 (lavoelenus, Letters, book 4): In ‘whatever other son or son of my son be my heir’: Labeo thinks a daughter is not covered, Proculus the opposite. Labeo seems to me to be paying attention to the literal meaning of the words, Proculus to the intention of the testator. He replied ‘I do not doubt that the opinion of Labeo is not true’.

7. Succession according to the Edict (compare XII Tables)
A. D. 38.6.1. Ulpianus, On the Edict, Book XLIV.
The Praetor, after speaking of the possession of the property of those who execute wills, passes to intestate estates, following the same order adopted by the Law of the Twelve Tables; for it is usual to first treat of the wills of testators, and afterwards of intestate succession. 1. The Praetor, however, divided intestate succession into four classes. Of the various degrees, the first he establishes is that of children, the second that of heirs at law (legitimi, i.e. the order of succession according the Law of XII Tables, chiefly agnati), the third of cognates, and the fourth of husband and wife.

B. D. 38.11. Concerning praetorian possession with reference to husband and wife.
C. D. 38.11.1. Ulpianus, On the Edict, Book XLVII. Pr.
In order that praetorian possession of an estate may be demanded in case of the intestacy of either the husband or the wife, there must be a lawful marriage. On the other hand, if the marriage is unlawful, praetorian possession of the estate cannot be demanded. In like manner, the estate cannot be entered upon under the will, nor can praetorian possession, in accordance with the terms of the will be claimed; for nothing can be acquired where a marriage is illegal. 1. In order that praetorian possession of this kind may be obtained, the woman must be the wife of her husband at the time of his death. If a divorce has occurred, even though the marriage still exists according to law, this succession will not take place. This may happen in certain instances; for example, where a freedwoman is divorced without the consent of her patron; as the Lex Julia relating to the marriages of different orders still retains the woman in the matrimonial condition, and forbids her to marry another against the consent of her patron. The Lex Julia with reference to adultery renders a divorce void if it is not obtained in a certain way.

The changes introduced by Senatusconsulta Orphitianum (Orfitianum), ca. 180s CE, and Tertulianum, ca. 130s CE modifying the order of succession.

D. Tituli ex corpore Ulpiani 26.7-8 (?). By the Law of the Twelve Tables, the estate of a mother who died intestate did not belong to her children even if she did not come into the hand of her husband, because women have no proper heirs; but subsequently, on account of an address of the Emperors Antoninus and Commodus delivered in the Senate, it was enacted that her estate shall belong to her children, to the exclusion of blood relatives and other agnates. (SC.Orfitianum)

8. By the Law of the Twelve Tables, the estate of a son dying intestate does not belong to his mother, but if she enjoys the privilege derived from having had children, and, being a free woman, has three, or a freedwoman, has four, she becomes his heir under the Tertullian Decree of the Senate; provided, however, that there is no proper heir to her son, and that no one of the proper heirs is called to the possession of the estate by the Praetor, and that the son has no father to whom the estate or the possession of the property actually belongs by law, nor any full brother; if, however, a full sister survives, the estate shall belong to her and her mother.

E. D. 38.7.2.4 Ulpianus, On the Edict, Book XLVI. Moreover, this kind of praetorian possession includes everyone who can succeed to the inheritance on the ground of intestacy, whether the provision of the Twelve Tables, or some other enactment, or a decree of the Senate constitutes him an heir at law. Finally the mother, who is entitled to the succession under the Tertullian Decree of the Senate, and also the children, who, under the Orphitian Decree of the Senate, are admitted to the succession of their mother as her heirs at law, can demand praetorian possession.
F. D. 38.17.1 pr. Ulpianus, On Sabinus, Book XII. Under the Orphitian Decree of the Senate children can be admitted to the succession of their mother whether she is freeborn or manumitted.

G. D. 38.17.2. Ulpian, On Sabinus, Book XIII. A mother is entitled to the benefit of the Tertullian Decree of the Senate, whether she is freeborn, or has been manumitted. (1) We should understand the law referring to the son or the daughter to apply to either such as are lawfully begotten or illegitimate. Julianus, in the Fifty-ninth Book of the Digest, adopts this opinion with reference to children born out of wedlock. (2) If the son or the daughter has been freed (from slavery), the mother cannot claim his or her estate as heir at law, for she has ceased to be the mother of children of this kind. This was the opinion of Julianus, and it has also been decided by our Emperor. (4) When a woman is of infamous reputation, she will, nevertheless, be entitled to the estate of her child as heir at law. (6) The children of the deceased, whether they are of the male or female sex, or natural or adopted, if they are proper heirs, stand in the way of their mother, and exclude her from succession as heir at law;

(1) We should understand the law referring to the son or the daughter to apply to either such as are lawfully begotten or illegitimate. Julianus, in the Fifty-ninth Book of the Digest, adopts this opinion with reference to legitimate children.

(3) Where, however, a woman conceived a child while in slavery, and it was born after she was manumitted, it will be entitled to her estate as her heir at law. The same rule applies if the slave conceived while serving out a sentence, and the child was born after she was restored to her rights. This will also be the case where she was free when she conceived, but was serving out a sentence when the child was born, and afterwards was restored to her rights. If, however, she was free when she conceived, and the child was born after she had been reduced to slavery, and she was subsequently liberate, the child will be admitted to the succession as her heir at law. Likewise, it must be said that she will be entitled to the benefit of the law, if she was manumitted while pregnant. The mother will inherit the estate of her child born in slavery, as its heir at law; for instance, if it was born after the heir was in default in granting her freedom, in compliance with a trust; or where it was born while she was in the hands of the enemy, and returned with her from captivity; or if it was born after she was ransomed.

(4) When a woman is of infamous reputation, she will, nevertheless, be entitled to the estate of her child as heir at law.

8. On guardianship
A. Gaius, Institutes 1. 144-5, 190-1. Tr. Gordon and Robinson. L)
(144) Where the head of a family has children in his power he is allowed to appoint guardians for them by will. That is, for males while under puberty but for females however old they are, even when they are married. For it was the wish of the old lawyers that women, even those of full age, should be in guardianship as being scatterbrained (propter animi levitatem). (145) And so if someone appoints a guardian in his will for his son and his daughter and both of them reach puberty, the son ceases to have a guardian but the daughter still continues in guardianship. It is only under the Julian and Papian-Poppaean Acts that women are released from guardianship by the privilege of children. We speak, however, with the exception of the Vestal Virgins, whom even the old lawyers wished to be free of restraint in recognition of their priesthood; this is also provided in the Twelve Tables.
(190) There seems, on the other hand, to have been no very worthwhile reason why women who have reached the age of maturity should be in guardianship; for the argument which is commonly believed, that because they are scatterbrained they are frequently subject to deception and that it was proper for them to be under guardians’ authority, seems to be specious rather than true. For women of full age deal with their own affairs for themselves, and while in certain instances that guardian interposes his authorization for form’s sake, he is often compelled by the praetor to give authorization, even against his wishes. (191) For this reason, a woman is not granted any action against her guardian on account of the guardianship; but where guardians are dealing with the affairs of male or female children, when the wards grown up the action on guardianship calls the guardians to account.

B. Tituli ex corpore Ulpiani 11.11–27
Guardians are appointed for males as well as for females, but only for males under puberty, on account of their infirmity of age; for females, however, both under and over puberty, on account of the weakness of their sex as well as their ignorance of legal matters. The authorization of the guardian is necessary for women in the following instances: when they sue someone on a basis of a statute or a statutory claim, when they oblige themselves, when they transact a legal
transaction based on ius civile, when they allow their freedwoman to stay in an informal relation with a slave belonging to someone else, when they alienate a mancipable thing. Minor wards need authorization in more cases: as well in the case of alienation of non-mancipable things.

9. Capacity to Legal Transactions and Court Proceedings

A. D. 451.121.1. Papinian, 11 of Replies

In order to create an effective stipulation, a woman, who was about to marry a man, stipulated two hundred from him, if he should resume cohabitation with his concubine during the marriage. I gave an opinion that there was no reason why, if the condition was fulfilled, the woman should not sue on the stipulation, since the promise was based on sound morals.

B. G. 280. We must next call attention to the fact that neither a woman nor a ward can alienate property by mancipation without the authority of their guardians, but a woman can alienate property not subject to mancipation without such authority, which a ward cannot do. 

81. Hence, if a woman lends money to anyone without the authority of her guardian, for the reason that she transfers it to him, and as money is not subject to sale, the borrower contracts an obligation. 82. If, however, a ward should do this, as he does not transfer the money to the borrower, the latter does not contract an obligation; and therefore the ward can recover his money, provided it is in existence; that is to say he can claim it as his under Quiritarian right, but a woman can only recover the money by an action for debt. Hence the question arises whether the ward who lent the money can, in any action whatever recover it from the person who borrowed it if it has been expended, as recovery must be had for a party in possession.

84. Hence if a debtor pays any money to a ward, he transfers the ownership of the same to him, but he himself is not released from liability, for the reason that a ward cannot release a debtor from an obligation without the authority of his guardian, as he is not permitted to alienate any property without his guardian’s consent; still, if he receives any benefit from the money, and continues to demand payment of the debt, he can be barred by an exception on the ground of fraud.

85. A woman, however, may be legally paid without the authority of her guardian; and he who makes payment is released from liability, because, as we have previously stated, women can, even without the authority of their guardians, alienate property not mancipable. Although this rule only applies where she actually received the money, still if she did not receive it, but merely says that she has, and wishes to discharge her debtor by giving him a formal release without the authority of her guardian, she cannot do so.

9. Getting rid of a guardian:

A. G. 1.114. By this act of sale a woman can not only make a coemption to her husband but also to a stranger, that is to say, the sale takes place either on account of marriage or by way of trust; for a woman who disposes of herself in this way to her husband for the purpose of occupying the place of his daughter is said to have done so on account of matrimony; but where she does this for some other purpose, either to a husband or to a stranger, as for instance in order to avoid a guardianship, she is said to have made a coemption by way of trust. 115. The method by which this is done is as follows: if anyone wishes to get rid of the tutors, she has and find another, she makes a mock sale with their authorization. Then having been transferred back again from the other partying the sale to the man whom she wants and having been mancipated by him, she begins to have as her tutor the man by whom she was manumitted, who is called a fiduciary tutor.

B. Cf. Cicero, Pro Murena 27: For though many things have been excellently settled by the laws, yet most of them have been depraved and corrupted by the genius of the lawyers. Our ancestors determined that all women, on account of the inferiority of their understanding, should be under the protection of tutors. These men have found out classes of trustees, whose power is subordinate to that of the women. Through their invention, old men have been used for coemptiones to abolish the holy rites.

C. G. 1.157 Indeed in the past, so far as pertains to the law of the XII Tables, even women had agnate tutors. But afterwards, the Claudian law was enacted, which, as pertains to women, removed the tutela of agnates. And so indeed a male minor has his grown brother or uncle as a tutor, but a woman is not able to have such a tutor (Evans-Grubbs) (145) And so if someone appoints a guardian in his will for his son and his daughter and both of them reach puberty, the son ceases to have a guardian but the daughter still continues in guardianship. It is only under the Julian and Papian-Poppaean Acts that women are released from guardianship by the privilege of children. We speak, however, with the exception of the Vestal Virgins, whom even the old lawyers wished to be free of restraint in recognition of their priesthood; this is also provided in the Twelve Tables.
D. G. 1. 173: Besides it has been permitted to women by a decree of the Senate to request another tutor in place of one who is absent, and when this is requested, the first one ceases to be tutor. It does not make any difference how far away that first tutor is.

10. Mothers and other women as protectors of their children’s interest

A. D. 26.1.16. Gaius, On the Provincial Edict, Book XII. Guardianship is generally an office whose duties are exercised by men.

B. D. 26.1.18. Neratius, Rules, Book III. Women cannot be appointed guardians, because this is an office which belongs to men unless they obtain the guardianship of their children through an express application to the Emperor.

C. P. Babatha 15 (October 125)
In the ninth year of Emperor Trajan Hadrian Caesar Augustus, in the second consulship of Marcus Valerius Asiaticus and the consulship of Titius Aquileius, on the fourth day before the Ides of October, of the twentieth year according to the numbering of the province of Arabia, the 24 of the month Hyperberetaios called Thesrei in Moaza around Zaaara. In the presence of witnesses concerned, Babatha daughter of Simon son of Menahem produced evidence against Ioannes son of Ioannes son Joseph Eglas and Abdooabad son of Eloutheras, guardians of Jesus son of Jesus, her orphan son, having been appointed guardians for the same orphan by the Council of the Petreans, with the same guardians being present, saying:

“Because of your not having given to my son, the orphan … maintenances according to the value of the interest on his money and his other proprieties, and especially according to a lifestyle which ..., and (because of your) not furnishing him with the interest of the money except one half-denarius per one hundred denarii, I having proprieties sufficient for the money which you have of the orphan’s, therefore I have previously borne witness that, if it seems good to you, you give to me the money on security ... concerning a pledge of my properties, with me furnishing the interest on the money of one and a half denarii per hundred denariii. Whence my son might be splendidly maintainedm gibing thanks for the most blessed times of the governor Julius Julianus, in the presence of whom, I, Babatha, have summoned the afore-mentioend Ioannes, one of the guardians of the orphan, concerning the refusal of rendering of maintenance. If not, this will be a statement on oath for the purpose of supporting the documentation of your profiting from the money of the orphan if giving ...”

Babatha has presented evidence as written above through her guardian for the matter, Judah Kthousion, who being present, signed...

The Proconsul must appoint a curator for those persons who are in such a condition that they cannot manage their own affairs.

(1) There is no doubt that a son can be appointed the curator of his father, although the contrary is stated by Celsus, and many other authorities, who hold that it is unseemly for a father to be subjected to the authority of his son; still, the Divine Pius, addressing Justius Celerius, and also the Divine Brothers, stated in Rescripts that it was better for a son who was well-behaved to be appointed the curator of his father, than that a stranger should be.

(2) The Divine Pius granted the request of a mother for the appointment of a curator for her spendthrift children in the following words: “There is nothing novel in the fact that certain persons, even though they appear to be of sound mind so far as their conversation is concerned, yet squander their property in such a way that, unless relief is granted them, they will be reduced to poverty. Therefore, someone should be chosen who may control them by his advice, for it is just that we should take care of those who, so far as relates to their property, act like persons who are insane.”

E. P. Oxy. VI 907, 276 AD Aurelius Hermogenes, also called Eudaimon, exegetes, member of the
Council and prytianies of the illustrious and most illustrious city of the Oxyrinchites, dictated this will in Greek letters according to the concession (of Roman law):

The Aurelii Hermeinos and Horeion and Herakleides and Ptolemais and Didyme, my five sweetest children [from my ... wedded wife]. Aurelia Isidora, also called Prisca, a matrona stolata, ... by the condition attached below in regard to which each [ ... shall be my heirs, and the rest] shall all be disinherited, and they shall enter on the inheritance from me in regard to the things left to each [whenever they determine and are able to give testimony] that they themselves are my heirs, and they shall be responsible for giving, doing (and) providing all these things [which have been written in this will of mine], and I entrust this to their good faith.

[the 3 sons receive jointly one vineyard, 2 daughters another vineyard, one son gets piece of land and a slave, one already married daughter is bequeathed her dowry and a slave, the other daughter receives some property and a slave, 3 sons and the unmarried daughter get 4 slaves]

To Aurelia Isidora, also called Prisca, my wedded [wife...] who has conducted herself fittingly in respect to our marriage, I leave with full property rights those arouras which I have jointly near the [...] and all the arouras of grainland previously mortgaged to her by me for the purpose of the ... dowry which was brought to me by her.

I make Aurelios Demetrios, son of Dionysotheon, tutor of my three above-mentioned underage children, Horeion and Herkleides and Didyme, until the males [come of age and the female] marries a husband, with my [afore-mentioned-wife] Isidora also called Prisca concurring in the all the things relating to the guardianship, and therefore I do not want a magistrate or anyone acting in place of a magistrate or anyone else to get involved.

F. D. 26.7.47. Scaevola, Opinions, Book II.
A certain man appointed Titius and Maevius guardians, and added the following provision: "I wish and I request that everything be done with the advice of my brother Maevius, and that anything which is done without it be void". Titius alone collected the debts from the debtors; were the latter released from liability? I answered that if the testator committed the entire administration to Maevius, payment was not legally made.

(1) "Marina and Januaria shall fix an amount which will be sufficient for the daily expenses of my son." I ask whether the guardians should be satisfied with the judgment of these two women. I answered that the amount of the expense should be established by the judgment of some good citizen.

G. Digest: 3.5.33

34. Paulus, Questions, Book I.
Nesennius Apollinaris to Julius Paulus, Greeting. A grandmother transacted the business of her grandson, and after the death of both of them the heirs of the grandmother were sued by the heirs of the grandson in an action based on business transacted, but the heirs of the grandmother filed a claim for support furnished the grandson. Answer was made to this that the grandmother had furnished it out of her own property through natural affection, since she had not asked that the amount of the maintenance should be fixed, and that it had not been fixed; and moreover, it has been established that if the mother had furnished maintenance she could not recover that which he had provided out of her own property under the inducement of natural affection. On the other hand, it was stated, and I hold it to be correct, that this is the case where it is proved that a mother had furnished maintenance out of her own property; but in the present instance it is probable that the grandmother who transacted the business of her grandson supported him out of his own property. It was a subject of discussion as to whether the expense should be considered as having been paid out of both estates, and I ask what seems to be the more just conclusion? I answered that the decision in this instance depends upon the facts. For I am of the opinion that what has been established in the case of the mother should not always be observed; for what would be the effect if the mother had positively stated that when she was supporting her son, she did so in order to
bring an action either against himself or his guardians? Suppose, for instance, that his father had
died far from home, and that his mother, while returning to her country had supported her son and
the slaves; in this instance the Divine Pius Antoninus established the rule that a suit on the ground
of business transacted could be granted against the minor himself. Therefore, as the question is one
of fact, I think that the grandmother or her heirs should be heard if they wish an accounting for
maintenance, and especially so if it appears that the grandmother had entered the items in the
expense account. I think that it by no means should be admitted that the expenses should be
charged to both estates.

11. Women in business relations: some examples:

A. D. 15.1.27 pr. (Gaius, 9 book on the provincial edict): The action on the peculium is granted on
account of both female slaves, and daughters under paternal control, and especially where the
woman is a tailor or a weaver, or conducts any ordinary trade, this action can be brought
against her. Julianus says that the action on deposit, and also that on loan for use, should be
granted with reference to them, and that the contributory action should be granted if they have
transacted business with merchandise belonging to the peculium to the knowledge of the father or
the master. This is still more certain where property has been employed for the benefit of the
father or master, and the contract was made under his direction.

B. D. 15.1.1. Ulpianus, On the Edict, Book XXIX.
The Praetor judged it to be the proper way to first explain the contracts of those who are subjected
to the authority of another which give a right of action for the entire amount, and then to come to
the present one, where an action is granted on the peculium.
(1) This Edict, moreover, is threefold, for from it arises an action on the peculium, one for
property employed in the affairs of another, and one based upon the order of another.
(2) The words of the Edict are as follows: "Whatever business is transacted with him who is
under the control of another."
(3) Mention is made of him and not of her, still, however, an action is granted by this Edict on
account of one belonging to the female sex.

C. D. 14.3.7. 1 Ulpianus, On the Edict, Book XXVIII. (1) It makes little difference who the
business-agent may be, whether male or female, freeman or slave, your own slave, or that of
another. It is also of no consequence who appointed him; for if a woman made the appointment,
the Institorian Action will lie, just as the Exercitorian Action against the party having control of a
ship; and if a woman is appointed, she herself will be liable. Again, if a woman under parental
control, or a female slave is appointed, the Institorian Action can be brought.

D. Some practical examples:
Apprentice contract with a weaver: SB XVIII 13305 Aurelius Ision, son of Nilammon, a resident
of Karanis(?), has given over to Aurelia Libouke, a resident of the quarter of the Bithynians and
other areas, a weaver, acting without guardian by right of her children, the slave child of the same
Ision, to learn with Aurelia Libouke <OR: the daughter(?) [of the brother(?)] of the same Ision,
Aurelia . . ., to learn> the indicated craft in the period of one year from the first of the ensuing
month Mecheir, the child being fed and clothed by her . . . (several lines too damaged to be
translated) . . . may receive from the weaver(?) . . . . . . . . as many day as she is idle because of
sickness or any other cause she is to remain available an equal number of days as compensation
after the end of the period. When the slave child has completed the agreed time without fault, the
teacher shall return her after she has learned the craft with skill equal to those of her own age.
Neither party shall have authority to alter either one or another stipulation nor to transgress any
part of the written agreement, but let whosoever does transgress give to the one abiding by it, as
penalty, two hundred silver drachmai.;The apprentice contract is valid, and when questioned, they
reciprocally agreed.;Aurelia Libouke, about 58 years of age, with a scar on her left shin: the slave
child is receiving at the end of the time, to the account of Ision, sixty drachmai.;Year one of Lucius
A wet nurse-employment CPG I 14+ P. Ryl 178 , 21. May 26The 12th year of Tiberius Caesar Augustus, Pachon 26th, in the city of Oxyrhynchus, Thebaid. Taseus, daughter of Peteeus, Persian of the Epigone, with her husband Petsiris, son of Horus, Persian of the Epigone, who is also her guardian and surety for the fulfilment of all the terms of this contract, both residents of the village of Tanais in the middle toparchy, enter into an agreement with Paapes, son of Philias, in the street, that they have received from him on the 17th of the present month of Pachon the female child to whom he has given the name Thermoutharion, whom he picked up from a dung heap to rear as a slave. Taseus is to rear and suckle it with her own milk, and is to care for it for a term of 2 years from the present 17th of Pachon, in return for the agreement made by Paapes to provide food and clothing and all other expenses incurred for the child paying therefor 60 drachmae a year. Taseus further acknowledges that she together with her husband Petsiris, who is also her surety, has received 60 dr. in advance for the first year in cash from his house. At the end of this year Paapes will pay at once 60 drachmae in silver for the second year, and further he agrees to provide 2 cotylae of oil per month for the 2 years. Accordingly Taseus will of necessity provide every assistance and care for the child as is incumbent on heris her duty. She will not have intercourses with her husband so as not to harm the milk, nor will she become pregnant, nor suckle any other child nor...

(PRyl 178) and she shall give back the child to Paapes well nourished as is incumbent upon her. If the child suffers any fatality which is plainly accidental, Taseus will be held blameless, and if Paapes picks up another child to put in her care, she shall nurse it for the remaining period on the aforesaid terms; but if she does not wish to do so, she shall repay whatever she appears to owe for the term of nursing which still remains. If she violates the contract made in these terms she shall repay to Paapes what she has received from him in silver, with an addition of 50% and 200 dr. as compensation for damages and penalty and an equal sum to the fiscus. Paapes shall have the right of exaction from the aforesaid parties and from whichever one he chooses and from all their property. This agreement is valid. (2nd hand) I, Taseus, daughter of Peteeus, have concluded the agreement. I shall nourish the infant Thermoutharion for 2 years. I have received 60 dr. in silver for its support, and I shall perform all the provisions of the aforesaid contract. I, Petosiris, son of Horus, have subscribed to this document as guardian of my wife and I am her surety for the fulfilment of the above conditions. Heraclides, son of Theon, wrote on their behalf as they are unlettered. (3rd hand) Paapes, son of Philias, consents to the above contract. (4th hand) ... honey-coloured, roundfaced, with a scar on the right knee.

Bronze owner's stamp (signaculum) of a woman importer of wine and oil; second half of the second century CE. The image has been reversed so that the letters read in the order that they would appear on the stamped item; tiny amphorae act as word dividers. The outer circle gives her name in Latin, "[belonging to] Coelia Mascellina, daughter of Gnaeus," while the inner circle is an abbreviated version of her name in Greek. Another inscription referring to this woman was found in Rome: "Coelia Mascellina, a woman of incomparable chastity, a businesswoman importing oil and wine from Baetica [in Spain], made this for her father Gnaeus Coelius Masculus and for her most devoted parents" (AE 1973, 71) Rome, Terme Diocleziano (National Museums). Credits: Barbara McManus, 2004

http://www.cnr.edu/home/sas/araia/work.html

6. CIL IV.8203: Faustilla the pawnbroker
IDIBUS IULIIS

On the 15th of July

INAURES POSTAS AD FAUSTILLA(M)

earrings deposited with Faustilla.

PRO (DENARIIS) II USURA(M) DEDUXIT AERIS A(SSEM)

For a [loan] of 2 denarii she deducted a fee of an as.

12. The problem of Senatus Consultum Velleianum

A. D. 16,1,pr.-1: Paul, Edict, book 30. The Velleian Decree of the Senate very fully provides that women cannot become sureties for anyone. For just as by custom the undertaking of civil duties by them has been denied to women, and these [undertakings] for the most part are not valid by operation of law, so much the more had that power to be taken away from them in which not only their work and mere employment was concerned but even the risk of the family property.

B. D. 16,1,2pr.-3: Ulpian, Edict, book 29.: Now, first in the reign of the deified Augustus, and then soon afterward in that of Claudius, it was forbidden by imperial edict for women to intercede on behalf of their husbands. Thereafter a senatus consultum was enacted by which help was given in a very full manner to all women; the wording of the senatus consultum follows: "Because Marcus Silanus and Velleus Tutor, the consuls, had written what ought to be done concerning the obligations of women who became debtors on behalf of others, the senate lays down the following: Although the law seems to have said before what pertains to the giving of verbal guarantees and loans of money on behalf of others for whom women have interceded, which is that neither a claim by these persons nor an action against the women should be given, since it is not fair that they perform male duties and are bound by obligations of this kind, the senate considers that they before whom the claim would be brought on this matter would act rightly and consistently if they took care that with regard to this matter the will of the senate was observed".

And so let us examine the terms of the senatus consultum, having first praised the foresight of the most distinguished order [the senate], because it brought help to women, seduced and deceived in many cases of this kind, on account of the weakness of their sex.

But relief is only granted to them if they have not been guilty of deceit; for this the deified Pius and Severus have laid down by rescript. This is because relief is given to those who have been deceived, not to those who deceive. This has also been stated in a Greek rescript of Severus in the following terms: "The decree of the senate does not give assistance to women who are guilty of deception"; for it was the vulnerability of women, not their cunning that deserved assistance.

C. P. Sent. II.11. On the Velleian Decree of the Senate. It is forbidden for women to provide a guarantee in any kind of obligations, both for men and for women. 2. Yet the privilege of the Senatus Consultum is not granted to the woman who has guaranteed for her children’s guardians. 3. If a woman has guaranteed either in order to deceive or knowing that she would not be obliged, she shall be not given the defence of Senatusconsultum: the Highest Order (Senate) does not exclude the action which is given in case of woman’s fraud. 4. If a procurator, upon woman’s command, has guaranteed for someone, he shall be aided by the defence of the senatus-consultum.

13. Women in courts:

A. Valerius Maximus, VIII 3.2.1-2

Nor should I be silent even about those women whose nature and matron’s sense of shame did not avail them so that they would be silent in the forum and in legal cases.

1. Maesia of Sentunum, a defendant, pled her own case with the Praetor Lucius Titius, convening the court and a very great gathering of the people being present. She pursued all the manners and points of her defence not only diligently but also bravely, and she was acquitted on the first actio
and by almost all voted. They called her Androgyne, because she bore a manly spirit under the appearance of a woman.

2. But Carfania, the wife of senator Licinius Buccio, quick to engage in lawsuits, always made speeches on her own behalf before the Praetor, not because she lacked advocates, but because she abounded in impudence. And so by her unusual barking in the forum in continually harassing the tribunals, she ended up being the most notorious example of female calumnia, to the point where the name of Carfania is thrown at women of shameless habits and a reproach.

D. 3.1.1.5 (Ulpian) In the second section, an edict is published in regard to those who are not to bring a request on behalf of others. In this edict the praetor made particular mention of sex and misfortune, and likewise he marked with infamy persons conspicuous due to shameful behaviour. In regard to sex: he prohibits women from bringing a request on behalf of others. And indeed there is a reason for prohibiting them: so that women not get themselves mixed up in other people’s lawsuits contrary to the modesty suitable for their sex, and so that woman not discharge men’s duties. But the origin (of the prohibition) was introduced by Carfania, a very wicked woman, who by bringing requests without shame and disturbing magistrate, provided the reason for the edict...

Hortensia against taxation of the Triumvirs

B. VALERIUS MAXIMUS, 8.3.3. Hortensia, the daughter of Quintus Hortensius, when the triumvirs burdened the matrons with a heavy tribute and no man dared take their defence, plead the case before the triumvirs, both firmly and successfully. For by bringing back her father’s eloquence, she brought about the remission of the greater part of the tax. Quintus Hortensius lived again in the female line and breathed through his daughter’s words. If any of her male descendants had wished to follow her strength, the great heritage of Hortensian eloquence would not have ended with a woman’s action.

C. APPIAN, CIVIL WARS IV 32–34. The triumvirs addressed the people on this subject and published an edict requiring 1400 of the richest women to make a valuation of their property, and to furnish for the service of the war such portion as triumvirs should require from each. It was provided further that if any should conceal their property or make a false valuation they should be fined, and that rewards should be given to informers, whether free persons or slaves. The women resolved to beseech the women-folk of the triumvirs. With the sister of Octavian and the mother of Antony they did not fail, but they were repulsed from the doors of Fulvia, the wife of Antony, whose rudeness they could scarce endure. They then forced their way to the tribunal of the triumvirs in the forum, the people and the guards dividing to let them pass. There, through the mouth of Hortensia, whom they had selected to speak, they spoke as follows: “As befitted women of our rank addressing a petition to you, we had recourse to the ladies of your households; but having been treated as did not befit us, at the hands of Fulvia, we have been driven by her to the forum. You have already deprived us of our fathers, our sons, our husbands, and our brothers, whom you accused of having wronged you; if you take away our property also, you reduce us to a condition unbecoming our birth, our manners, our sex. If we have done you wrong, as you say our husbands have, proscribe us as you do them. But if we women have not voted any of you public enemies, have not torn down your houses, destroyed your army, or led another one against you; if we have not hindered you in obtaining offices and honours,— why do we share the penalty when we did not share the guilt?

33 "Why should we pay taxes when we have no part in the honours, the commands, the statecraft, for which you contend against each other with such harmful results? ‘Because this is a time of war,’ do you say? When have there not been wars, and when have taxes ever been imposed on women, who are exempted by their sex among all mankind? Our mothers did once rise superior to their sex and made contributions when you were in danger of losing the whole empire and the city itself through the conflict with the Carthaginians. But then they contributed voluntarily, not from their landed property, their fields, their dowries, or their houses, without which life is not possible to free women, but only from their own jewellery, and even these not according to the fixed valuation, not under fear of informers or accusers, not by force and violence, but what they themselves were willing to give. What alarm is there now for the empire or the country? Let war
with the Gauls or the Parthians come, and we shall not be inferior to our mothers in zeal for the common safety; but for civil wars may we never contribute, nor ever assist you against each other! We did not contribute to Caesar or to Pompey. Neither Marius nor Cinna imposed taxes upon us. Nor did Sulla, who held despotic power in the state, do so, whereas you say that you are re-establishing the commonwealth."

34 While Hortensia thus spoke the triumvirs were angry that women should dare to hold a public meeting when the men were silent; that they should demand from magistrates the reasons for their acts, and themselves not so much as furnish money while the men were serving in the army. They ordered the lictors to drive them away from the tribunal, which they proceeded to do until cries were raised by the multitude outside, when the lictors desisted and the triumvirs said they would postpone till the next day the consideration of the matter. On the following day they reduced the number of the women, who were to present a valuation of their property, from 1400 to 400, and decreed that all men who possessed more than 100,000 drachmas, both citizens and strangers, freedmen and priests, and men of all nationalities without a single exception, should (under the same dread of penalty and also of informers) lend them at interest a fiftieth part of their property and contribute one year’s income to the war expenses.

D. Women in court: the reality
Sent. Pauli 1.2.2: A woman is not prohibited from undertaking a legal representation in the court (cognitoria opera) in her own affair. D. 3.3.41 (Paulus) it is permitted for women to act sometimes on behalf of their parents, when there is a legal hearing, if by change illness or age impedes theirs parents, or they do not have anyone else who can act for them.

E. Husband’s adultery (Codex 9.9.1, Severus & Caracalla to Cassia, ad 197)
The Julian Law declares that wives have no right to bring criminal accusations for adultery, even as regards their own marriage, for while the law grants this privilege to men, it does not concede it to women.