Meeting 4  Legal standing of a woman in Roman law. Women under authority and autonomous. Guardianship (Capacity to Legal Transactions / Legal Capacity)

Suggested readings:

2. Lefkowitz & Fant, Chapters IV & V

A3: LEGAL STANDING IN THE CLASSICAL TIMES

1. Deterior condicio...

Dig.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 praevalat. 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.

4. Legal gender definitions

D. 50.16.1 (Ulpianus, *Commentary on the Edict*, book 1) This expression ‘if anyone’ embraces males as well as females
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

D. 50.16.84 (Paul, *On works of Vitellius*, book 2): In the name ‘son’ (*filius*) we understand all children.

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’.

D. 50.16.52 (Ulpianus, *Commentary on the Edict*, book 46): In the name ‘patron’, a patroness is also included.

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 (*filusfamilias*), 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 (...). However, a woman is both the beginning (*caput*: head) and the end (*finis*) of her family.

3. On guardianship


(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-Poppean 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.

_Tituli ex corpore Ulpiani II.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.

**Getting rid of a guardian: Gaius, Inst. I.115:** ... 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. 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.

**5. Capacity to Legal Transactions and Court Proceedings (D. 45.1.121.1, Papinian, Book II 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.
6. Weak in mind? Women before the Law:

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.

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

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. 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.

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!

7. The problem of Senatus Consultum Velleianum

D. 16,1,1,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.

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.

8. Women in courts:

Carfania

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:**

### 6. Hortensia against taxation of the Triumvirs

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.

*Appian, Civil Wars IV 32−34*

32 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 state-craft, 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.

**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.

9. **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.