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LEGAL POSITION OF WOMEN IN THE ROMAN LAW OF SUCCESSION – ANALYSIS OF D. 5. 2. 28.

This paper deals with some issues concerning the position of women in the Roman law of succession. It provides an analysis of Paulus's fragment D. 5. 2. 28. regarding a testament of a mother who under a mistaken assumption of her son's death appointed other heirs; it raises a series of questions, especially since when and under what circumstances could a woman have drawn up a will, what were the inheritance claims of children based solely on cognatic kinship etc. The aim is to explore to what extent did the rights and duties of women differ from those of men in the examined aspects of classical Roman law.

Key words: *Roman law of succession. – Position of women in Roman law. – Testamentary capacity. – Compulsory heirs of women. – Fiduciary coemption. – Error in inducement.*

1. INTRODUCTION

D. 1. 5. 9.: *In multis iuris nostri articulis deterior est condicio feminarum quam masculorum.*[1]

Roman law was not secretive about the fact that in Roman point of view, not all humans had the same value. As for the position of women, in

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1 D. 1. 5. 9.: In many parts of our law the condition of women is worse than that of men. (Sources of all the Latin fragments as well as of the translations are listed at the end of the paper in the section „Primary sources and List of fragments".)

today's terminology they were discriminated in many ways. However, this distinction from the position of men did not come from men generally despising women as a gender, it was merely the result of the opinion that women were reckless and needed to be more protected and controlled.[2]

The law of succession represented an important part of life of every Roman. The role of this particular field of law was enhanced by the Roman approach. The essence of the Roman law of succession, unlike modern law, went far beyond the matter of property transmission. The heir succeeded the legal position of the testator, even the rights that were otherwise non-transferable; the succession had also significant religious implications.[3] Due to this stance, it was considered a duty of every decent person to draw up a will.[4] A certain proof of the importance of the law of succession can be seen in the number of preserved sources, with one quarter of the 50 books of the Digest dealing with this particular branch of law.[5]

The aim of this article is to explore to what extent did the legal position of women differ from the position of men in some aspects of the law of succession as such a crucial part of life. The core of the paper is an interpretation of the fragment D. 5. 2. 28. derived from the works of Paulus.[6] It deals with a particular situation regarding the law of succession that will be used as a starting point to depict some specifics of the position of women. . The aim of this analysis is to answer to what extent does the fragment D. 1. 5. 9. apply in the field of the examined aspects of the law of succession.

Roman law, just like the laws of many other states, underwent a major development throughout the centuries and the position of women was changing alongside with it. In this paper, I will focus mainly on the classical period[7] of Roman law and on the prior development and its tendencies.

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2 *Cf.* Gai. 1. 144.: (...) *veteres enim voluerunt feminas, etiamsi perfectae aetatis sint, propter animi levitatem in tutela esse.* (...) for the ancients required women, even if they were of full age, to remain under guardianship on account of the levity of their disposition.

3 Pavel Salák, „Zásady římského práva dědického a jejich odraz v novodobých kodifikacích", *Časopis pro právní vědu a praxi* 20/2012, 232.

4 Otakar Sommer, *Učebnice soukromého práva římského, 2. díl,* Wolters Kluwer ČR, Prague 2011, 260.

5 Franciszek Longchamps de Bérier*, Law of Succession. Roman Legal Framework and Comparative Law Perspective*, Wolters Kluwer Polska, Warsaw 2011, 23.

6 Iulius Paulus (2nd–3rd century AD) was a lawyer and a writer of the late classical period of Roman law; the importance of his work is emphasised by the fact that one sixth of the Digest is derived from him.

7 The classical period of Roman law, the time of a significant progress and a rise of Roman jurisprudence, begun shortly after the origin of the principate. Reaching its peak at the turn of the 1st and 2nd century, it lasted until the half of the 3rd century when a crisis arrived and, alongside with it, a serious decline in the quality of law.

2. FRAGMENT D. 5. 2. 28.

Cum mater militem filium falso audisset decessisse et testamento heredes alios instituisset, divus hadrianus decrevit hereditatem ad filium pertinere ita, ut libertates et legata praestentur. Hic illud adnotatum quod de libertatibus et legatis adicitur: nam cum inofficiosum testamentum arguitur, nihil ex eo testamento valet.[8]

In this fragment, a mother left a formally valid will in which she did not mention her son based on false information about his death. The will was declared invalid by a decree of the emperor Hadrian because of an error in inducement – the invalidation was based on the fact that she would not have left him out had she known he was still alive. The following chapters will answer questions connected to this fragment – under what circumstances could a woman have made a will, what possibilities did the son have to invalidate his mother's will, whether he would have inherited from her had there been no testament and what were his rights, if any, in the law of succession based simply on their mother-son relationship. The issue of the error of inducement will also be briefly mentioned.

3. LEGAL REQUIREMENTS OF WILLS OF WOMEN

3.1. Legal Capacity to Own Property (The *sui iuris* Status)

The crucial requirement that one has to fulfil in order to dispose with property in a testament is to be legally able to own some property in the first place. This general rule was a matter which considerably influenced and reduced the possibility of women to make wills in Roman law, especially in the oldest times; this was due to the concept of agnate family relations itself. The only person in an agnate family endowed with full legal capacity (the person *sui iuris*) was the *pater familias*; and only a person *sui iuris* was able to own property and subsequently to enter into legal relations regarding that property.[9]

In the oldest times, it was common for women never to gain the *sui iuris* status. They were subjected to *patria potestas,* power of their fathers (or other male relatives), and later on to *manus,*[10] as the common form of marriage

8 D. 5. 2. 28.: Where a mother has heard a false report that her son, who was a soldier, was dead, and appointed other heirs by her will, the Divine Hadrian decreed that the estate should belong to the son on the ground that testamentary grants of freedom and bequests should be maintained. What was added with reference to grants of freedom and bequests should carefully be noted, for where a testament is decided to be inofficious, nothing it contains is valid.

9 Otakar Sommer, *Učebnice soukromého práva římského, 1. díl*, Wolters Kluwer ČR, Prague 2011, 157.

10 Power of men over women; traditionally connected to *matrimonium cum manu;* however, Roman jurisprudence developed later another use (such as fiduciary coemption

was marriage *cum manu*;[11] women were thus unable to be *sui iuris* and married at the same time. This was, on the contrary, possible in a marriage *sine manu*[12] which started to prevail in the late republican era and as a result, the amount of *sui iuris* women increased rapidly.[13] According to some calculations, 57% of grown women were *sui iuris* at the time of emperor Augustus[14] and it can be safely assumed that this percentage grew even more in the classical period, as marriages *cum manu* were becoming still more rare.[15]

In order for a woman to become *sui iuris*, she had to be freed from either the power of her *pater familias* or her husband. There were multiple ways to achieve this, one of them being the death of *pater familias* to whom she was directly subordinated.[16] Other than death, *capitis deminutio maxima*[17] and *media*[18] of *pater familias* also resulted in a loss of his *manus* and paternal power.[19] Women also became *sui iuris* right after

– see below) for this legal instrument as well. Leopold Heyrovský, *Dějiny a system soukromého práva římského*, J. Otto, Prague 1910, 833.

11 Woman who entered into this type of marriage transferred from the family of her father to the family of her husband maintaining still the *alieni iuris* status. Had she been *sui iuris* before the marriage, she became *alieni iuris* anyway. O. Sommer, I., 163–164.

12 Woman in this type of marriage did not become a part of the agnate family of her husband. She either stayed in her former family as a person *alieni iuris* or stayed *sui iuris*. – *Ibid.*

13 Saskia Hin, *The Demography of Roman Italy: Population Dynamics in an Ancient Conquest Society 201 BCE-14 CE*, Cambridge University Press, Cambridge 2013, 289.

14 The number is based on an assumption that at the time, there were no *cum manu* marriages anymore. – *Ibid.*, 290. This is however not likely since Gaius (a 2nd century lawyer) was working with *cum manu* marriage as with a living instrument. – Gai. 1. 112, 1. 113. The percentage was therefore probably a little lower at the time.

15 By the time of Justinian, the *cum manu* marriage definitely went out of use. – L. Heyrovský, 832. One way of entering into a *cum manu* marriage was *confarreatio* (see Gai. 1. 112); however, already at the beginning of the 1st century AD, subjecting to *manus* was no longer a feature of *confarreatio* – Gai. 1. 136 (taken from Heyrovský, 843). Tacitus (*Annales* 4.16.) suggests that c*onfarreatio* had already become quite rare during the reign of Tiberius (first half of the 1st century AD) as it was problematic to find candidates for the position of the priest *Flamen Dialis* who had to have been born from a confarreated marriage. – Judith Evans Grubbs, *Women and the Law in the Roman Empire. A sourcebook on marriage, divorce and widowhood,* 22. Another way of entering into a *cum manu* marriage was by *usus* which stopped being used by the classical period (see Gai. 1. 111) – Heyrovský, 843. On coemption, the third way of entering into this form of marriage, see below.

16 Gai. 1. 127.

17 Loss of freedom. – O. Sommer, I., 182.

18 Loss of citizenship. – *Ibid.*; *cf.* Gai. 1. 128.

19 Pietro Bonfante, *Instituce římského práva,* ČS. A. S. Právník v Brně, Brno 1932, 165. Of course, *ius postliminii* applied here also. – Gai. 1. 129.

being admitted among the Vestal virgins.[20] Another way to be freed from the agnate bond was to be emancipated.[21]

Women who were under *manus* were in the position of daughters (*filiae loco*). *Manus* could therefore be eliminated by *remancipatio*.[22] Bonfante mentions that *remancipatio* could be conducted by allowing the woman to be sold fictitiously to herself,[23] therefore she did not have to wait for further actions of the mancipee. Divorce (and subsequently dissolution of manus) could have also been executed by *diffareatio*.[24]

The mother in the examined fragment must have been a person *sui iuris* as this particular rule never lost its importance. At the time (in Hadrian's times), it was already very common for women to be making wills. As mentioned above, the number of women *sui iuris* was quite significant in the classical period; these women thus fulfilled the key requirement for making a testament, and, due to the fact that Romans were very keen on will-making in general, it is also very probable that most of these women used this opportunity.

3.2. Testamentary Capacity

In order to draw up a valid will, one has to have the legal capacity to draw up a will (*testamenti factio activa*). It was necessary to be a Roman citizen (or a Latin),[25] to not suffer from a mental illness (apart from the so-called *dilucida intervalla* – moments of clear mind enabling a person to be in control of his will and actions)[26] and to be free from various other impediments, such as for example being a *prodigus*.[27] These questions will not be subjected to further examination in this paper as they bear no significance when it comes to the legal standing of women.

To have testamentary capacity, it was also necessary to be of full age. Women were of full age earlier than men; women were able to make wills

20 Gai. 1. 130.

21 Emancipation of women consisted of a fictitious sale of her to another person who then set her free. Therefore, emancipation of women (and men other than sons) was easier than the one of sons because sons had to be mancipated three times in order to get emancipated. *Cf.* Gai. 1. 132. Due to numerous advantages of the manumittor, the manumitted person was often remancipated back to *pater familias* (who then set her/him free). – L. Heyrovský, 923.

22 Gai. 1. 137; *cf.* also Gai. 1. 137a.

23 P. Bonfante, 165.

24 Formal procedure opposed to *confarreatio,*the formal way of entering into a marriage. – P. Bonfante, 165. .

25 L. Heyrovský, 991.

26 O. Sommer, II., 262.

27 O. Sommer, II., 262; *prodigus* was a legally recognized spendthrift.

when they reached the age of twelve.[28] Men were of full age first when they were fourteen or rather when they reached a sufficient level of physical adulthood.[29]

Furthermore, to gain testamentary capacity, according to Gaius, women were at first required to undergo a coemption.[30] It was a formal procedure usually used to enter into a *cum manu* marriage, which consisted in being mancipated (sold fictitiously) to a man. Later, at the end of the republican era,[31] an institute of fiduciary coemption was developed. Contrary to the "general" coemption, in case of fiduciary coemption the *manus* was merely a formality;[32] right after the fictitious sale, the woman was manumitted (freed).[33] Therefore, this institute, nowadays called by scholars *coemptio fiduciaria testamenti faciendi gratia*, enabled women to get testamentary capacity without having to get married (*cum manu*) and divorced first; it also reflects nicely on the fact that at this time, *cum manu* marriages were becoming obsolete. The obligation to formally undergo the coemption in the first place was later abolished on Hadrian's command.

The reasoning behind the need to undergo coemption lies within the approach to agnatic relationships, since former family members were considered agnates as well (those who used to be "properly" agnate related but then they ceased to be due to the death of their *pater familias*).[34] Therefore, these agnates had the right to inherit even from a woman *sui iuris* in

28 As an exception to the general rule, Gaius states that the position of women in this respect is more favourable – Gai. 2. 113.

29 The age limit of men was first fully acknowledged in Justinian's law. Until then, it was disputable whether the age line is sufficient or whether physical examination must be conducted (cf. Gai. 1. 196.). This was however not the case for women – the age line there had been drawn a lot earlier in accordance with „the old rule" as physical examination of women was considered unchaste. – I. 1. 21. *pr.*

30 Gai. 1. 115a.: *Olim etiam testamenti faciendi gratia fiduciaria fiebat coemptio: Tunc enim non aliter feminae testamenti faciendi ius habebant, exceptis quibusdam personis, quam si coemptionem fecissent remancipataeque et manumissae fuissent; sed hanc necessitatem coemptionis faciendae ex auctoritate divi Hadriani senatus remisit.* Formerly a fiduciary coemption took place for the purpose of acquiring the power to make a will, for women at the time, with some exceptions, did not have testamentary capacity unless they had made a *coemptio* [transl. altered by the author], and after having been resold, were manumitted; but the Senate, at the suggestion of the Divine Hadrian, abolished this necessity of making a fictitious sale. *Cf.* P. Bonfante, 630; Max Kaser, *Das Römische Privatrecht. Erster Abschnitt. Das Altrömische, das vorklassische und klassische Recht*, Verlag C. H. Beck, Munich 1971, 683; Henry John Roby, *Roman Private Law in the Times of Cicero and of the Antonines, Book 1,* The Lawbook Exchange, New Jersey 2000, 73.

31 P. Bonfante, 630; L. Heyrovský, 844; William Warwick Buckland, *Elementary Principles of the Roman Private Law*, Cambridge University Press, Cambridge 2013, 33.

32 L. Heyrovský, 844; Federica Bertoldi, *Il negozio fiduciario nel diritto romano classico*, Mucchi Editore, Modena 2012, 134.

33 F. Bertoldi, 133.

34 P. Bonfante, 167; *cf.* D. 50. 16. 195 (2) *in fine* (taken from L. Heyrovský, 155).

the *proximus agnatus* inheritance class (see below). After the coemption, however, the agnate ties were cut,[35] and women could thus decide freely about their estate[36] (once they regained the *sui iuris* status by divorce, if coemption was used to enter the *cum manu* marriage).

It is unclear how wide the exception to the coemption rule mentioned in Gai. 1. 115a is. The obvious exception were the Vestal virgins.[37] Apart from them, given the probable reasoning of the coemption, it can be assumed the exception might also have included women who did not have any agnatic bonds, such as freedwomen or women who were emancipated from paternal power.[38]

Some authors seem to be of the opinion that prior to the development of *coemptio fiduciaria testamenti faciendi gratia* (in the 1st century BC) it was not possible for women in general to draw up wills.[39] Nevertheless, the oldest known testament that was made by a woman comes from 186 BC, as reported by Titus Livius in *Ab Urbe Condita*.[40] From other sources we can also derive that it was already quite common for women to make

35 *Cf.* Gai. 1. 136.

36 Edward Poste, E. A. Whittuck, *Gai Institutiones: Or, Institutes of Roman Law with a Translation and Commentary*, Clarendon Press, Oxford 1904, commentary to 1. 115a.; *cf.* also John Anthony Crook, „Women in Roman Succession", Beryl Rawson (ed.), *The Family in Ancient Rome: New Perspectives*, Cornell University Press, New York 1987, 64 and F. Bertoldi, 133–134.

37 P. Bonfante, 630; *cf.* Gell. 1. 12. 9.: *Virgo autem Vestalis, simul est capta atque in atrium Vestae deducta et pontificibus tradita est, eo statim tempore sine emancipatione ac sine capitis minutione e patris potestate exit et ius testamenti faciundi adipiscitur.* Now, as soon as the Vestal virgin is chosen, escorted to the House of Vesta and delivered to the pontiffs, she immediately passes from the control of her father without the ceremony of emancipation or loss of civil rights, and acquires the right to make a will. (– taken from M. Kaser, 683). This advantage of the Vestal virgins was balanced by the fact that intestate succession from them was not possible – their property transferred to the state after their death. Also, they were not able to be intestate heiresses. – L. Heyrovský, 1036.

38 *Cf.* Gai. 3. 21.; 1. 162; *cf.* also Jane F. Gardner, *Women in Roman Law & Society*, Indiana University Press, Bloomington 1986, 167 with reference to freedwomen. Gardner also mentions that a woman who was widowed after a *cum manu* marriage was free to make a will without further *coemptio*. – J. F. Gardner, 12. However, it can be assumed that in this case the woman would have to indeed undergo some form of *capitis deminutio* again, as the reason was to break the agnatic ties (as Gardner also mentions, 19) and if she had become *sui iuris* through the death of *pater familias* (in this case the husband), the agnatic ties would have remained there (see above).

39 P. Bonfante, 630, *cf.* M. Kaser, 683.

40 See Liv. 39. 9. *in fine*. However, there are many unanswered questions concerning this fragment as there is only information that a freedwoman drew up a will and nothing else about it. In Liv. 39. 19., there is also information that she had gained all sorts of privileges from the assembly, one of which being the right of alienating her property (probably without a tutor's consent). Drawing up a will, although not mentioned, could have been one of those privileges; *cf.* J. A. Crook, 70. Crook mentions without further arguments that although not mentioned by Titus Livius, the coemption must have already taken place in 186 BC in order to draw up a will; however, as explained

wills in the 2nd century BC.[41] If *coemptio fiduciaria testament faciendi gratia* had been the only coemption that resulted in the acquirement of testamentary capacity, it would have had to come to existence sooner.

Already Cicero mentions the necessity of *capitis deminutio* in order for a woman's will to have full legal impact.[42] We can only guess what the discrepancy between Cicero's and Gaius's terminology means. Given the above-mentioned reasoning of the coemption rule, it seems that *capitis deminutio* achieved by other means would suffice; for example, after undergoing a divorce through *diffareatio* at the time when the *confarreatio* resulted in subjecting women to manus,[43] a woman would be also free of any remaining agnatic bonds. The reason why Gaius mentions only coemption might simply lie in the fact that by his time, a vast majority of women did not go through any *capitis deminutio* whilst entering marriage (most marriages had already been *sine manu*) and therefore, women had (until Hadrian's time) only one suitable option to gain testamentary capacity – through fiduciary coemption. Moreover, Gaius is not exploring the testamentary capacity of women thoroughly – he mentions this rule whilst dealing with the position of people in general.

Women were probably excluded from the possibility to make the oldest two types of testaments[44] (*testamentum calatis comitiis*[45] and *testamentum in procinctu*[46]). Women were not allowed to participate in assemblies; therefore, they could not have had their testaments authorized by one. Women were also not allowed to be soldiers, thus it was not possible for them to draw up a will designated for soldiers only.[47] The first testament which could have been made by a woman was therefore *testamentum per aes et libram*.[48]

above, it may not have been a requirement given that she was a freedwoman and therefore had no prior agnatic ties.

41 See fn 107.

42 Cic. Top. 4. 18.: *Ab adiunctis: Si ea mulier testamentum fecit quae se capite nunquam deminuit, non videtur ex edicto praetoris secundum eas tabulas possessio dari (...).* An argument is derived from adjuncts, thus: „If a woman who had never undergone *capitis deminutio* has made a will, it does not appear that possession ought to be given by the edict of the praetor under that will (...)" [transl. altered by the author].

43 See fn 15.

44 L. Heyrovský, 992.

45 Testament authorized by the *comitia calata,* assembly held for this purpose twice a year. – L. Heyrovský, 994; *cf.* Gai. 2. 101. Women were not only excluded from making this type of will, it was also not possible to appoint them as heiresses in it. – J. A. Crook, 63.

46 A testament that had basically no formal requirements other than that it had to be made by a soldier right before a battle. – L. Heyrovský, 994.

47 F. Longchamps de Bérier, 43; John Andrew Couch, „Women in Early Roman Law", *Harvard Law Review* 8/1894, 43.

48 This type of testament was derived by the jurisprudence from *Lex duodecim tabularum*. – L. Heyrovský, 994. The two earlier types later went out of use; *cf.* Gai 2. 103.

Later on, there were no special conditions for women regarding the types of testaments, with the exception of *testamentum militis* (the military testament) – similarly to *testamentum in procinctu*, the inability to make this sort of testament lied in the inability of women to be soldiers.

According to Bonfante, the reason why there were at first these restrictions for women was that given the original aim of making a testament, it should have been a privilege of the *pater familias*.[49] The aim of a testament was always, logically, to appoint an heir; the so called *heredis institutio* was a crucial requirement of every testament in all stages of its development.[50] Originally, the succession merely had the character of a sovereignty transfer, rather than a property one. The heir gained via the death of the testator the power over the wide agnatic family[51] and, consequentially, he also obtained the property.[52] Later on, as property relations were coming to the foreground, it started to make more sense that women should also be able to decide about their estate. Even in a very patriarchal society as Rome was,[53] women could still have accumulated wealth.[54]

Looking at the examined fragment, the question whether the mother had undergone coemption remains unanswered; both this case and the abolition of the coemption rule happened during the rule of emperor Had-

49 P. Bonfante, 630.

50 *Ibid.*, 641.

51 In the oldest times, the agnatic family was not divided into smaller families after the death of *pater familias*; instead, the family simply gained a new *pater familias* (the heir). – *Ibid.*, 582.

52 *Ibid.* In these archaic times, it seems that women were not able to be heiresses because the succession also contained *potestas* and a woman could never have been a *pater familias*. Later on, however, in the intestate succession, men and women were equal, although probably since the middle republican era, there was a restriction that women could have succeeded only from a father (in the first civil inheritance class – see fn 83) or brother and sister (in the second one); with regards to others, the succession went only to men. – Crook, 60. This was later remedied by the establishment of the praetorian class *unde cognati* (see fn 80) and, for example, the Senatus consultum Tertullianum (see fn 88). As for testamentary succession, the legal position of women and men was equal, with the exception of Lex Voconia (169 BC) which disabled women from being appointed heiresses by a testator who according to a census owned more than a hundred thousand sestercies – Gai. 2. 274. Already at the end of the republican era, it does not seem like the law was applied. – Crook. 74.

53 *Cf.* Richard Saller, *Patriarchy, property and death in the Roman family*, Cambridge University Press, Cambridge 1994, 2.

54 J. A. Crook, 79; Julie Dodds, „The Impact of the Roman Law of Succession and Marriage in Women's Property and Independence", *Melbourne University Law Review* 18/1992, 901–902; *cf.* Liv. 34.1.-3. In these fragments, Titus Livius reports about Cato opposing the derogation of *Lex Oppia* (215 BC) which considerably limited the possible wealth of women. According to these fragments, women were „demonstrating" against this law; in 195 BC, the law was repealed. Therefore, this is a rare case of women possibly influencing the public life with some public actions.

rian. The form of the testament was probably written (*testamentum per scripturam factum*)[55] as it was the most common testament at the time.[56]

3.3. Consent of a Tutor

Other limitation concerning *sui iuris* women was that they only could perform certain legal transactions[57] *tutore auctore* (with a consent of their tutor);[58] originally, only Vestal virgins were free from this duty.[59] Since *Lex Julia et Papia Poppaea* (9 AD), women who gave birth to three children (four children in case of freedwomen) gained the so called *ius liberorum* and were thus no longer required to conduct legal transactions only with a tutor's cooperation.[60]

Women were able to change their tutors by fiduciary coemption with the consent of both tutors (the present one and the future one – *tutor fiduciarius*).[61] The exchange of tutors was of course possible without consent in serious cases, for example when a tutor was missing[62] or when he was not of sound mind.[63]

55 This testament was concluded in writing in front of seven witnesses. The advantage of this form was the fact that the content could have remained hidden until the death of the testator. – Milan Bartošek, *Škola právnického myšlení*, Karolinum, Praha 1993, 152.

56 *Ibid.*, 151.

57 E. g. drawing up a will, entering into a marriage *cum manu*, setting up a dowry or manumitting a slave. Since the *tutor* did not administrate her entire property but only authorised some of her legal actions, no *actio tutelae* was applicable. – L. Heyrovský, 965.

58 The institute was called *tutela mulierum*; a tutor was either established by a testament or by law (then he was called *tutor legitimus*). In this case a tutor of a woman was either her former agnatic relative who manumitted her (*parens manumissor*) or her patron or, before *lex Claudia,* her proximate agnate. *Cf.* Gai. 1. 175. (and Gai. 1. 157. about the abolition of agnatic *tutela* by *Lex Claudia*). If neither of the ways of establishing a tutor applied, the tutor was appointed to the woman by a magistrate. – L. Heyrovský, 965–967. The tutor was usually not the woman's husband as it was believed that a possible conflict of interest might cause a rupture in a marriage. – J. E. Grubbs, 24. The abolition of agnatic tutela was a big step forward in the independence of women's will making – tutors other than agnates were surely more open to consent to *coemptio fiduciaria* and making a will itself, since when agnates did that, they deprived themselves of the inheritance rights in the intestate succession.

59 Gai. 1. 145.

60 *Ibid.*; L. Heyrovský, 968. As *ius liberorum* was an imperially granted honour, women were quite proud of gaining it. It was in some cases carved in their tombstones and used even during legal transactions for which the *auctoritas tutoris* was not needed, as it gave women more esteem. – J. E. Grubbs, 38.

61 Gai. 1. 115.

62 Gai. 1. 173.

63 Gai. 1. 180.

Already in the republican era, the consent of the tutor could have been forced by a magistrate,[64] except for *tutores legitimi* whose cooperation could not have been forced even in the classical period.[65] This was an exception to the general weakening of the importance of *tutela mulierum*. By the second century AD, it was already considered by some as an outdated formality;[66] it was, for example, criticized by Gaius.[67] The legal duty to have a tutor's consent went out of practice around two hundred years before Justinian, and was therefore not included in the Digest. The last mention of this institute is said to be in 294 AD.[68] At the time of the examined fragment, the mother must have still handled her property with a tutor's consent in case she had not gained *ius liberorum*.

The development in the area of legal independency of women came a long way. At first there were almost no women *sui iuris*, and if there were, they were under the tutelage without many means of protection against the tutor. Later on, as the number of women *sui iuris* grew, the *tutela mulierum* was losing importance as it was becoming more socially acceptable for women to handle their own matters by themselves. The independence of women was of course always relative – even in the older times, there could have been at the same time on one hand a woman *sui iuris* with a compliant tutor who could basically have freely decided about her private life; and on the other hand a woman in a *cum manu* marriage with a despotic husband, not allowed to own any property.[69]

4. CONTESTING A TESTAMENT

In the examined fragment, the will was invalidated via a decree of the emperor because he assumed the mother would have appointed her son as her heir (more on that below).[70] A *decretum principis* represented a

64 L. Heyrovský, 967.

65 Gai. 1. 192.

66 L. Heyrovský, 967. The original purpose of *tutela* (apart from the general reasoning that women were reckless by nature – see fn 2) was to protect the property which the woman inherited from her father, as her heirs would be (most commonly) her father's relatives (– J. E. Grubbs, 24) as her proximate agnates. Later on, however, as it was more and more common for women to make wills, this particular purpose lost its importance.

67 Gai. 1. 190.: *Feminas uero perfectae aetatis in tutela esse fere nulla pretiosa ratio suasisse uidetur; (...) mulieres enim, quae perfectae aetatis sunt, ipsae sibi negotia tractant et in quibusdam causis dicis gratia tutor interponit auctoritatem suam (...).* But why women of full age should continue in wardship there appears to be no valid reason, (...), for women of full age administer their own property, and it is a mere formality that in some transactions their guardian interposes his sanction, (...).

68 H. J. Roby, 102.

69 J. Dodds, 900.

70 There are more examples of cases when wills were nullified by the emperor; already Augustus invalidated a will in which a woman left out her two sons. Augustus gave

type of constitution enacted by the emperor, it was a binding decision that the emperor made based on a court session and advice of his consultative body. The proceedings started when a party turned to the emperor with a request to solve a dispute (preces).[71] No overruling of the *decretum* was possible. Decrees had on one hand the function of a judicial decision; on the other hand, they were also treated as potential sources of law.[72]

The son in the fragment had another option to invalidate the will. He could have used *querella inofficiosi testamenti*,[73] an action which was mostly used to protect compulsory heirs (see below). The term "*inofficious*" described that someone was "undeservedly and therefore improperly passed over"[74] and the party harmed had to prove that "the testator does not appear to have been of sound mind when he executed an unjust will".[75] As a result, the will would have been invalidated as a whole and the son would not have to fulfil grants of freedom and bequests because they would not have been legally enforceable before the decree in the examined fragment reached the opposite solution. Nevertheless, stating and proving that the testator (in this case his mother) was insane (in the state of so-called *color insaniae*), which was necessary for this claim, would not have been considered appropriate with regard to her commemoration.[76] However, this form of contesting a testament was used anyway.[77]

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the inheritance to them as he probably considered their omission unjust. – Val. Max. 7. 7. 4. (taken from J. A. Crook, 75).

71 L. Heyrovský, 48.

72 *Ibid.*, 49. Max Kaser, *Römische Rechtsquellen und angewandte Juristenmethode,* Verlag Böhlau, Vienna, Cologne 1986, 52. *Cf.* I. 1. 2. 6. Gaius mentions that imperial constitutions (including the decrees) had the force of law in Gai. 1. 5. Furthermore, Callistratus reported in D. 1. 3. 38. that emperor (Septimius) Severus stated in a rescript that the decisions similar to one another should obtain the force of law. *Cf*. also later Ulpian, D. 1. 4. 1.

73 Ulpian D. 5. 2. 27. (4.): *De testamento matris, quae existimans perisse filium alium heredem instituit, de inofficioso queri potest.* A complaint can be filed on the ground of inofficiousness in the case of the will of a mother who, thinking that her son was dead, had appointed another heir.

74 D. 5. 2. 5.

75 *Ibid.*

76 Marrone suggests that this was just a formal motive, a tool to approximate *querella* to the civil law invalidation through *hereditas petitio* based on a lack of mental capacity – Matteo Marrone, *Querela inofficiosi testamenti*, Tipografia Michele Montaina, Palermo 1960, 8. *Querella inofficiosi testamenti* was a so called *actio vindictam spirans*; it was used for personal vengeance by offended relatives who felt themselves passed over. – P. Bonfante, 681; *cf.* also L. Heyrovský, 1056; M. Bartošek, 153; M. Marrone, 8–9, *cf.* D. 5. 2. 2.

77 O. Sommer, II., 310; *querella* was for example used by a son who felt unjustly disinherited by his mother. – Pliny's (1st century AD) Ep. 5. 1. (taken from J. A. Crook, 75); for more on the reasoning that a testator was of unsound mind, for example, in D. 5. 2. 13. (taken from M. Marrone, 8).

Had the will in the examined fragment been invalidated through *querella*, intestate succession would have stepped in,[78] her son would therefore have inherited her estate according to the praetor's third inheritance class[79] (*unde cognati*), in case there were no persons with stronger inheritance claims.[80] This might have also been the reason why he decided to turn directly to the emperor instead – this way, through the error in inducement, the inheritance was given directly to him[81] as this solution was seen by the emperor as being in accordance with *aequitas.*[82]

5. MOTHER-CHILD RELATIONSHIP IN THE INTESTATE SUCCESSION

Similarly to the situation of the invalidated will, had the mother in the examined fragment not left a will at all, her son might have inherited from her as her cognate according to the praetorian inheritance order. In general, *ius civile* also enabled inheritance from a woman, although not in the first civil inheritance class,[83] because women could not have had

78 *Querella* had in this regard basically the same legal effect as *hereditas petitio* – the will was in substance declared invalid even though the terminology was different. – M. Marrone, 7, 12; as to the differences in terminology see Lorenzo Gagliardi, *Studi sulla legitimazione alla querela inofficiosi testamenti in diritto romano e bizantino,* Giuffrè Editore, Milan 2017, 12–13.

79 Gai. 3. 30.: *Eodem gradu (tertio gradu* N. B. author*) vocantur etiam ae personae, quae per femini sexus personas copulatae sunt.* Those are also called in the same degree (third degree N. B. author) who are related through persons of the female sex.

80 There were four praetor's inheritance classes. In the first one (*unde liberi*), the children of the testator inherited (*sui* and *emancipati*); the relations were still agnate based. The second class (*unde legitimi*) contained the heirs of the civil inheritance order (see fn 83). The third one (*unde cognati*) acknowledged cognate relationships and enabled the succession of blood relatives. The fourth one (*vir et uxor*) was designated for the spouse. – P. Bonfante, 666.

81 Martius argues that it can be deduced from the last sentence of the fragment (the juxtaposition to *querella*) that the son would have indeed been an intestate heir and that it is also possible that he did use a *querella*; however, given the extraordinary circumstances, the emperor decided to rule in this innovative way. – Ancus Martius, *Irrtum in den Beweggründen bei letzwilligen Verfügungen nach römischem und nach neuem deutschen bürgerlichen Recht,* Druck von Wilhelm Issleib, Berlin 1898, 21–22.

82 Giovanna Coppola Bisazza, *La successione contra voluntatem defuncti. Tra vecchi principi e nuove prospettive,* Giuffrè Editore, Milan 2014, 24; Nicola Palazzolo, *Potere imperiale ed organi giurisdizionali nel II secolo d. C.*, Giuffrè Editore, Milan 1974, 65. An emperor could have freely decided whether or not he was going to follow the existing law or whether he would decide in accordance with *aequitas* – justice. – Elsemieke Daalder, „The Decreta and Imperiales Sententiae of Julius Paulus: Law and Justice in the Judicial Decisions of Septimius Severus", *The Impact of Justice on the Roman Empire: Proceedings of the Thirteenth Workshop of the International Network Impact of Empire*, Brill 2019, 54–55.

83 In *ius civile*, there were three inheritance classes. In the first one, there were *heredes sui* (heirs directly subordinated to the paternal power, who became *sui iuris* after the

heredes sui. It was possible to inherit from a woman in the class *proximus agnatus,* although not from a mother, because a woman *sui iuris* could not have had any agnate related children.[84] Of course, women *sui iuris* were *stricto sensu* not a part of any agnatic family, they represented isolated subjects of law.[85] However, as it was mentioned above, former family members were still viewed as agnates and it was thus possible to inherit from a woman *sui iuris* as from a proximate agnate.

In 178, around 50 years after the case in the fragment occurred, *Senatus consultum Orphitianum* was issued.[86] In accordance with it, legitimate as well as illegitimate children were prioritised even above agnate heirs.[87]

When it comes to the development of the praetor's inheritance order (especially the class *unde cognati*), *SC Orphitianum* alongside with, for example, *SC Tertullianum*[88] were signs of a continual development towards a higher importance of cognatic relations contrary to the agnatic ones.[89] Therefore, the mother-child relationship was protected in the law of succession no matter what sort of relationship it was. This progress was concluded with Justinian's inheritance order which took only cognatic relations into consideration.[90]

6. WOMEN AND THEIR COMPULSORY HEIRS

The preference of cognate relations found its way also in the issue of compulsory heirs. In earlier times, only *heredes sui* could have been consid-

death of the testator). In the second one, the *proximus agnatus* inherited (the closest agnate). In the third class, there were gentiles – members of a clan; it was basically a wider approach to agnate relationships. – P. Bonfante, 663–664. The importance of *genus* faded through the years, becoming irrelevant even in the law of succession at the end of the republican era. – L. Heyrovský, 157.

84 Exception to this rule may have been the case where a husband *cum manu* and *pater familias* (being one and the same) died. Then, the agnatic bond between the mother (who became *sui iuris*) and her children remained, and had she then died intestate, her children would have probably inherited from her in the praetorian order *unde liberi* or in the civil one, *proximus agnatus*. *Cf.* Gai. 3. 24.

85 P. Bonfante, 168.

86 *Cf.* C. 6. 57. 1.: *Si intestatae mulieris consanguinei existant et mater et filia, ad solam filiam ex senatus consulto orfitiano hereditas pertinet.* When a woman dies intestate, leaving brothers or sisters, as well as a mother and daughter, her estate shall, by virtue of the Orphitian Decree of the Senate, belong to her daughter alone. (taken from L. Heyrovský, 1045).

87 M. Bartošek, 152. See also J. F. Gardner, 199–200.

88 This *senatus consultum* from Hadrian's times privileged a mother in the succession from her children (cognates). – P. Bonfante, 668.

89 Crook argues that testamentary succession always had a cognatic character as it was moral to establish family members as heirs. It was the intestate succession that was stuck in the agnatic kinship and took a long time to overcome it – the class *unde cognati* was developed first in the late republic. – J. A. Crook, 79. *Cf.* J. F. Gardner, 163–164.

90 P. Bonfante, 680.

ered compulsory heirs (and therefore women could not have such heirs – see above). Due to praetorian law, other descendants[91] could also have belonged in this protected group.[92] Furthermore, the rights of compulsory heirs had a formal character.[93] They could not be passed over in a testament; however, if they were mentioned and left with nothing (*exheredatio*), they did not have the right to contest. The position of women at this era was further aggravated by the fact that they could have been disinherited *inter ceteros* (among others – there was no need to name each individual woman).[94]

At the end of the first century BC, this formal approach started to change. The time of the examined fragment (second century AD) was the time when the character of the institute of compulsory heirs had finished changing and when it developed its main principles.[95]

The rights of compulsory heirs were viewed in a materially new way. Not only did they have to be mentioned, they had the right to a certain part of the inheritance (*portio debita* – compulsory share). Earlier, the tendency had a character of moral obligation. The willingness to leave some of the estate to the children should have come from *pietas*, natural family affection, and was not yet enforceable by law.[96] In Heyrovský's opinion, the transition from a moral rule into a legal one might have already happened at the end of the republican era.[97]

Alongside with material rights, there was a visible tendency to widen the sphere of compulsory heirs. The term now contained not only de-

91 The approach to the term „descendants" did not mean that women also had compulsory heirs because it was just like the class *unde liberi* based on agnatic bonds, and the term encompassed even the emancipated. – O. Sommer, II., 307.

92 Jaromír Kincl, Valentin Urfus, Michal Skřejpek, *Římské právo*, Nakladatelství C. H. Beck, Prague 1995, 290.

93 Valerius Maximus reported on a case similar to the examined one approximately one hundred years before (around 30 AD); a father appointed other heirs believing his soldier-son was dead. In this case, in a subsequent centumviral court ruling, the inheritance was also given to the son. As Valerius Maximus was probably a rhetorician, unfortunately not many legal aspects were preserved in the fragment (Val. Max. 7. 7. 1.). Still, the case differed from the examined one by a probable existing agnatic bond between the father and the son and as he was a passed over *heres suus*, it is not at all surprising that the will was invalidated.

94 O. Sommer, II., 308; Gai. 2. 128. Women who were passed over had the right to demand possession of the inheritance (*bonorum possessio contra tabulas*). In the 2nd century AD, Antonius Pius laid down a rule that women were only able to obtain as much inheritance as their share according to *ius civile* would have been, which was only half of the inheritance in case there were some *heredes extranei* (all other heirs who were not *heredes sui* or *heredes neccesarii*; for instance, slaves or descendants who did not become *sui iuris* after testator's death). – J. Kincl, V. Urfus, M. Skřejpek, 293–294; *cf.* Gai. 2. 124.; 2. 125; 2. 126.

95 O. Sommer, II., 309.

96 J. Kincl, V. Urfus, M. Skřejpek, 291.

97 L. Heyrovský, 1056 with reference to Valerius Maximus 7. 7. 1. (see fn 93).

scendants, but ascendants and siblings as well. It applied to agnates as well as cognates[98] and was therefore a big step forward in favouring blood relations.[99] Furthermore, disinheritance had to be conclusively reasoned.[100]

However, even after the change of perception, after admitting the rights of cognatic children, women were not obliged to mention them in testaments.[101] Technically, this meant that women had no compulsory heirs. Still, it was possible for their children to contest a testament on the grounds that it was "*inofficious*"[102] – that it did not respect the *officium pietatis*.

Multiple authors[103] agree upon the fact that the will in the fragment was invalidated due to the error in inducement and not because of the violation of the *pietas*. There was no deliberate violation, the mother simply did not know her son was still alive.[104] Since one of the most important principles of the Roman law of succession says that the will of the testator should be fulfilled as much as possible,[105] the grants of freedom and bequests remained in this case in force, as opposed to the general rule (applicable when the will is invalidated as "*inofficious*").[106]

98 The father technically did not have to respect the rights of children based on cognatic bonds themselves; however, the category of legitimate children, who were compulsory heirs, was very wide; it contained even the emancipated and those adopted to another family – Pasquale Voci, *Diritto ereditario romano. Volume secondo. Parte speciale,* Giuffrè Editore, Milan 1963, 672; therefore, blood relations did in fact play a role, as there were no agnatic bonds left in these cases.

99 L. Heyrovský, 1064; J. Kincl, V. Urfus, M. Skřejpek, 291.

100 O. Sommer, II., 309–310.

101 Gaius 3. 71.; L. Heyrovský, 1061; later in I. 2. 13. 7.: *Mater vel avus maternus necesse non habent liberos suos aut heredes instituere aut exheredare, sed possunt eos omittere. nam silentium matris aut avi materni ceterorumque per matrem ascendentium tantum facit quantum exheredatio patris.* – „A mother, or a maternal grandfather, is not required to either appoint children heirs or disinherit them, but may simply omit mentioning them, for the silence of a mother, a maternal grandfather, or other ascendants on the mother's side has the same effect as disinheritance by a father."

102 The protection of the children contrary to the rule is perceptible from the fragment I. 2. 13. 7 *in fine* where it is probably referred to I. 2. 18. which deals with *inofficious* testaments.

103 L. Heyrovský, 1005; M. Kaser, 241 and 711 fn 17; O. Sommer, II., 294; Pasquale Voci, *Errore. Diritto Romano*, Giuffrè Editore, Milan 1966. 4–5; Bartošek calles it *error probabilis* and says that the son had technically been the heir „*ex tacita voluntate matris*". – M. Bartošek, 152. Arndts says that this is an *error* without which the will would not have been made this way. – Carl Ludwig Arndts, *Učební kniha pandekt, III. díl*, Wolters Kluwer ČR, Praha 2010, 146.

104 Voci argues that the violation of *officium pietatis* would always have to happen in order to use *querella* successfully. Therefore, he considers D. 5. 2. 27. (4.) – see fn 73 – interpolated. – P. Voci, 1963, 701–702

105 M. Kaser, 239–240; *cf.* D. 50. 17. 12.

106 This was due to the assumption that if she knew he was alive, she would have appointed him heir and the bequests and manumissions would have been the same. – Pavel Salák, *Testamentum militis jako inspirační zdroj moderního dědického práva*, Masarykova uni-

Regarding the examined fragment, the development of the importance of cognatic relationships might have significantly influenced the decision of the emperor. He came to the conclusion that the mother would have wanted her son to inherit her property had she known he was alive. Therefore, it had already been considered as just that the mother-child relationship should have its bearing and protection in the law of succession.[107] It is unknown who the other appointed heirs in the fragment were, but they were probably not her sons – otherwise, a decision stating that they should all share the inheritance would make more sense.

7. ERROR IN INDUCEMENT AND INTERPRETATION OF THE TESTATOR'S INTENTION

As it was already mentioned above, the fragment contains a rather rare case of inducement that bears relevance in a legal transaction.[108] The term "error in inducement" means a mistake regarding a wider scale of expectations and motives according to which a person makes a certain legal transaction.[109] In a vast majority of various legal relations, this has no legal impact whatsoever[110] because it would make legal transactions much less trustworthy and one could not really rely on contracts and other legal transactions to stay in force.

However, in Roman law of succession, the true intention of the testator was above almost everything else. It can be said that it was emphasised even more than in modern times; the interpretation of the will had

verzita, Brno 2016, 203. When a will was not in force due to *bonorum possessio contra tabulas,* the only bequests that had to be fulfilled were the ones to descendants and ascendants. – L. Heyrovský, 1062–3; *cf.* D. 37. 5. 1. (1), D. 37. 5. 3. (2).

107 According to Saller, from Polybius's work (2nd century BC), it is clear that wealthy women have already in his time been expected to make wills and to honour the rights of their children in them. – R. Saller, 166; in Cicero's work, it is also implied that a child should have the right to inherit from a mother (*Cf. De re publica* 3. 17.). – J. A. Crook, 71–72; Valerius Maximus states that a mother who passed over her two sons in a testament had handled things contrary to the normal order of succession. – Val. Max. 7. 7. 4. (taken from J. A. Crook, 75). Later, Septimius Severus decided that if a woman dies in a childbirth, this child is considered her heir without any further actions on its part, based purely on maternal affection, if the mother had already appointed her other children as heirs. Had there been other appointed heirs, the child would have a legitimate right to use *querella.* – C. 3. 28. 3. (taken from J. F. Gardner, 187).

108 Forcing someone to do something through violence and fear (*vis ac metus*) or through fraud (*dolus*) can also come under the term „inducement". These situations have, of course, an impact regarding the validity of a testament, but they will not be further examined in this paper.

109 Lukáš Pauldura *et al.*, *Slovník právních pojmů – občanský zákoník.* Wolters Kluwer ČR 2014, „mylná pohnutka zůstavitele".

110 L. Heyrovský, 197. *Cf.* for example D. 12. 6. 65. (2.).

a different character – the real intention of the testator was interpreted rather than the words.[111] Sometimes it meant that a lot was based on assumptions (a case was decided according to what the magistrates were convinced must have been the intention of the testator).[112] Therefore, the law of succession is, contrary to other fields of law, somehow more suited for considering inducements.[113]

On the other hand, there was also the principle *falsa causa non nocet*.[114] However, this principle did not apply in some cases; namely in those, where it would have been in contradiction to the true intention of the testator as to a higher principle.[115] The idea was that if a testator had made a mistake, it should not make the will invalid as long as the mistake was not so serious as to go against his real intentions.

One of the situations when *falsa causa non nocet* did not apply, was exactly the case when an heir was appointed under the false assumption of another (probable) heir's death.[116] Inducement was also relevant, for example, in cases where the testator appointed as his heir someone who he believed was his son[117] or when it made the will immoral, e. g. appointing an heir provided that he appoints a certain designated person as his heir.[118]

Apart from the above mentioned case described by Valerius Maximus (7. 7. 1.),[119] there is another one similar to the examined one. Paulus reported on it in the fragment D. 28. 5. 92.[120] In this fragment, a woman was

111 F. Longchamps de Bérier, 237.

112 *Ibid.*, 241. This approach was connected to the notion of a good housefather standard (*bonus pater familias*) – the magistrates tried to interpret the will according to reason; to give the actions of the testator a reasonable explanation. – *Ibid.*, 247. To the last point *cf.* Seneca's Ep. 64. 7.: *Sed agamus bonum patrem familiae; faciamus ampliora, quae accepimus. Maior ista hereditas a me ad posteros transeat*. Let us act as the *bonus pater familias*. Let us increase what we received. Let that inheritance pass enlarged from me to my descendants. – R. Saller, 155.

113 Scialoja stresses the importance of intention when interpreting the words and the will of the testator. – Vittorio Scialoja, *Responsabilità e volontà nei negozi giuridici*, Stabilimento tipografico italiano, Rome 1885, 19–20.

114 If the testator acted according to „*untrue reason, motives or grounds*", it had no impact on the validity of the disposition. – F. Longchamps de Bérier, 233; *cf.* Ulp. Ep. 24. 19. concerning bequests (taken from *Ibid.*).

115 F. Longchamps de Bérier, 234, P. Voci, 1966, 4–5.

116 L. Heyrovský, 1005; This exception found its application also with regard to *testamentum militis*. The general rule, stating that someone who was omitted in a military testament was automatically disinherited, did not apply in the situation when the testator-soldier omitted someone he incorrectly presumed was dead. *Cf.* C. 6. 21. 10. (taken from C. L. Arndts, 146).

117 *Cf.* C. 6. 24. 4. and C. 6. 23. 5. (taken from C. L. Arndts 146).

118 *Cf.* D. 28. 5. 70; L. Heyrovský, 1006.

119 See fn 93.

120 Taken from C. L. Arndts, 146.

appointed as heir by a man. Later, after hearing rumours of her death, he instituted other heirs instead. Nevertheless, he added these words to the new will: "Let Novius Rufus be my heir, for the reason that I have not been able to retain those heirs whom I desired to have."[121] The woman turned to the emperor and it was decided that she should become the heir "as this was in compliance with the wishes of the testator".[122] However, this case differs from the examined one; the inducement of the testator was expressly stated, which made the proving much easier. Moreover, the heiress was not related to the testator in any way that would have made it impossible for her to acquire the inheritance through standard procedural tools.[123]

The legal position of daughters passed over due to a wrongful assumption of their death was probably not worse than that of sons. Although Ulpian states that sons were in this case able to complain against the will of a mother,[124] there is nothing that prohibits daughters from doing the same thing, or, for that matter, to complain against a will of a father on the same grounds.[125] Illegitimate children were also protected.[126] Given the casuistic nature of Roman law, Ulpian's fragment cannot be interpreted literally and *a contrario* conclusions cannot be drawn out of it.

As for interpreting objects of testaments, the idea of the generic masculine was already known in the classical Roman law. When a testator bequeathed male mules but only had female mules, the female mules were bequeathed. "Hence it comes that the male sex always includes the female."[127] The same applied, for example, to male/female slaves.[128] Needless to say, Roman law distinguished only two genders – male and female.[129]

121 D. 28. 5. 92. (...) „*quia heredes, quos volui habere mihi contingere non potui, novius rufus heres esto*" (...).

122 *Ibid.*

123 Even if she were able to successfully argue in favour of invalidating the later will, intestate succession would come into effect. Roman law did not use the concept of „resurrecting" the prior will after the later one was invalidated – I. 2. 17. 3., Gai. 2. 144. This makes this imperial decision one of those cases in which the ruling is not at all backed by existing law, which also makes it hard to apply to similar cases later on because it is tightly connected to the exact situation of this particular case. – E. Daalder, 59–60.

124 See fn 73.

125 *Cf.* Eg. D. 5. 2. 1.; 5. 2. 3.; 5. 2. 4.; these fragments (derived from works of lawyers of the classical period) are gender neutral and provide protection to children and both parents. However, the impact of *querella* differed; when a son was passed over, the whole testament was rendered void; when the same happened to a daughter or another compulsory heir, she/he became a co-heir to the appointed one. – P. Bonfante, 676; *cf.* D. 5. 2. 19. (2.); *cf.* fn 93.

126 D. 5. 2. 29. (1.).

127 D. 32. 1. 62. – taken from F. Longchamps de Bérier, 235.

128 D. 32. 1. 81. *pr.*

129 L. Heyrovský, 167; D. 1. 5. 10.: *Quaeritur: hermaphroditum cui comparamus? Et magis puto eius sexus aestimandum, qui in eo praevalet.* The question has been raised to

8. CONCLUSION

Roman law of succession represented, among other things, a way to pass property over from one generation to another. As women *sui iuris* were able to accumulate a great deal of wealth, reason dictates that they should have had the possibility to dispose with it in testaments. It is clear that in the oldest times, women could not have made wills which was partly due to the character of the oldest types of wills. Later on, as women were no longer excluded from making wills simply because of the nature of their formation, they were still disadvantaged, on one hand by the general structure of the Roman family, on the other by formalities designed especially for women's legal transactions.

Before Hadrian's times, even women *sui iuris* who had not yet gone through *capitis deminutio* (women who were *sui iuris* as a result of the death of their *pater familias*) did not gain testamentary capacity before going through a coemption (or confarreation) which cut the remains of their bonds with their agnatic kinship. This basically meant that in order to get testamentary capacity, these women had to get married (and divorced) first; though gaining testamentary capacity deliberately in this manner would not have been in accordance with the social reality of most of the republican era.

Later on, at the end of the Republic, fiduciary coemption was developed by Roman jurisprudence as a way of enabling women to gain testamentary capacity without having to subject themselves to *manus*. The timing of this new legal instrument is quite logical – it was the time when *sine manu* marriages had already prevailed drastically and therefore it made no sense to force women to go through *cum manu* marriage just to gain testamentary capacity afterwards; fiduciary coemption, as opposed to coemption and confarreation, was conducted with the sole purpose of acquiring the power to make a will and as a pure formality, it lasted until Hadrian's times.

Besides this limitation rooted it the law of succession itself, women were limited by general legal rules. The rule that the testatrix had to be *sui iuris*, logically, never disappeared; after all, the same rule applied with some minor exceptions to men as well. There was also the fact that women needed the cooperation of their tutors, although the cooperation could have been enforced in most cases by the classical period. It is indisputable that in the classical period, it was common for women to draw up wills. After the abolition of the coemption rule and the subsequent extinction of *tutela mulierum*, they were not bound by formalities any more and the testamentary capacity of women became equivalent to that of men. And as there were basically no *cum manu* marriages anymore, the number of *sui iuris* women disposing freely of their property is not to be underrated.

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which sex shall we assign an hermaphrodite? And I am of the opinion that its sex should be determined from that which predominates in it.

Similarly to men, women were also limited in their disposition as they could not have disinherited their children without a just cause; otherwise they risked their testament not having the intended impact regarding the distribution of their wealth. The fact that they were not required to disinherit the children expressly does not change the fact that children were protected, at first only by moral rules, and later, around the beginning of the classical period, also through legal ones.

Children and a woman *sui iuris* were most of the times related only through blood, which, especially in the old times, was a kinship not worthy enough to be legally protected when it came to intestate succession. As time passed, cognatic relationships were also recognized by law as the inheritance class *unde cognati* was developed; later, through the legislation of the 2 century AD, the cognatic relations even exceeded the agnatic ones.

The preference of cognate kinship found its way into interpreting the wills of testators. As it was considered normal and fair, even in older times, that property should be passed on to the descendants, in case of a tacit disinheritance of a child who „came back from the dead", it was considered safe to presume that the intention of the testator had been different; multiple fragments show that a child who was passed over under these circumstances got the inheritance.

It was not intended to cover all angles of the position of women in the Roman law of succession in this paper. It is therefore impossible to draw a conclusion for the topic in general. Nevertheless, it is safe to say that over time women's autonomy and the potential for their independence in the field of testamentary succession grew until it reached a level comparable to the position of men. As for the intestate succession from women, some gender discrepancy was reduced by the dissolution of the superiority of agnatic kinship, as it was built strictly on the power of men. This process was concluded by Justinian, whose inheritance order did not take agnatic relationships into account at all.

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Дита ЧОЛАКОВА*

ПРАВНИ ПОЛОЖАЈ ЖЕНЕ У РИМСКОМ НАСЛЕДНОМ ПРАВУ – АНАЛИЗА D. 5. 2. 28.

Сажетак

Овај рад се бави одређеним питањима у вези са положајем жене у римском наследном праву. Пружена је анализа Пауловог (Paulus) фрагмента D. 5. 2. 28. у коме је једна мајка, под погрешном претпоставком да јој син није жив, за тестаментарне наследнике именовала друге особе; од многих питања која се отварају, нарочито важна су ова: откада и под којим условима је жена могла састављати тестамент и каква су права на заоставштини деца имала на основу когнатског сродства. Циљ рада је да истражи колико су се права и обавезе жена и мушкараца разликовале у датим аспектима класичног римског права.

Како су жене *sui iuris* могле стећи велико богатство, разумљиво је да им је право тестаментарног располагања истим требало бити доступно. У најранијем периоду, жене уопште нису могле састављати тестамент. Премда су касније ту могућност добиле, и даље су биле у неповољном положају, што због структуре римске породице уопште, што због других формалности које су установљене само за случајеве правних послова које предузима жена.

У почетку, чак и жене *sui iuris* су морале проћи кроз *capitis deminutio* да би добиле право тестаментарног располагања, јер су на тај начин раскидале везе са својим агнатским сродницима. Касније, установа *coemptio fiduciaria* је постала начин на који су жене могле стећи тестаментарну способност, а

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да не морају допасти под manus; coemptio fiduciaria је установљена искључиво због тога, те је, као пука формалност, опстала до времена Хадријана (Hadrianus).

Женама је, такође, била потребна сарадња са туторима да би саставиле тестамент; мада се за време класичног периода ова процедура могла изиграти, касније ће институт *tutula mulierum* у потпуности бити напуштен. У класичном периоду, жене су редовно састављале тестамент. Како, практично, cum manu бракова више није било, број *sui iuris* жена које самостално располажу својом имовином није био занемарљив.

Чињеница да женама није тражено да, када би то хтеле, изричито искључе децу из наследства, не мења ништа у погледу заштићености деце од изостављања из наследства – у почетку само нормама морала, а касније, при почетку класичног периода, деца наследници се штите и правним нормама.

Деца и жене sui iuris били су повезани само крвним сродством, што у старије време није била довољно чврста веза да би правом била заштићена. Како је време пролазило, право је когнатско сродство почело да уважава кроз unde cognati правила наслеђивања која су се развијала; касније, у законодавству другог века, когнатско сродство ће постати чак и важније него агнатско.

Фаворизовање когнатског сродства утицало је на тумачење воље тестатора. Како је још у старије време сматрано нормалним и поштеним своју имовину остављати наследницима, у случају да се пређутно изостави из наследства дете које се погрешно сматра умрлим, смело се претпоставити да би права воља тестатора била да изостављено дете буде наследник.

Кључне речи: *Римско наследно ӣраво. – Положај жене у римском ӣраву. – Тесӣаменӣарна сӣособносӣ. – Нужни наследници жене. – Coemptio fiduciaria. – Грешка у навођењу.*

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