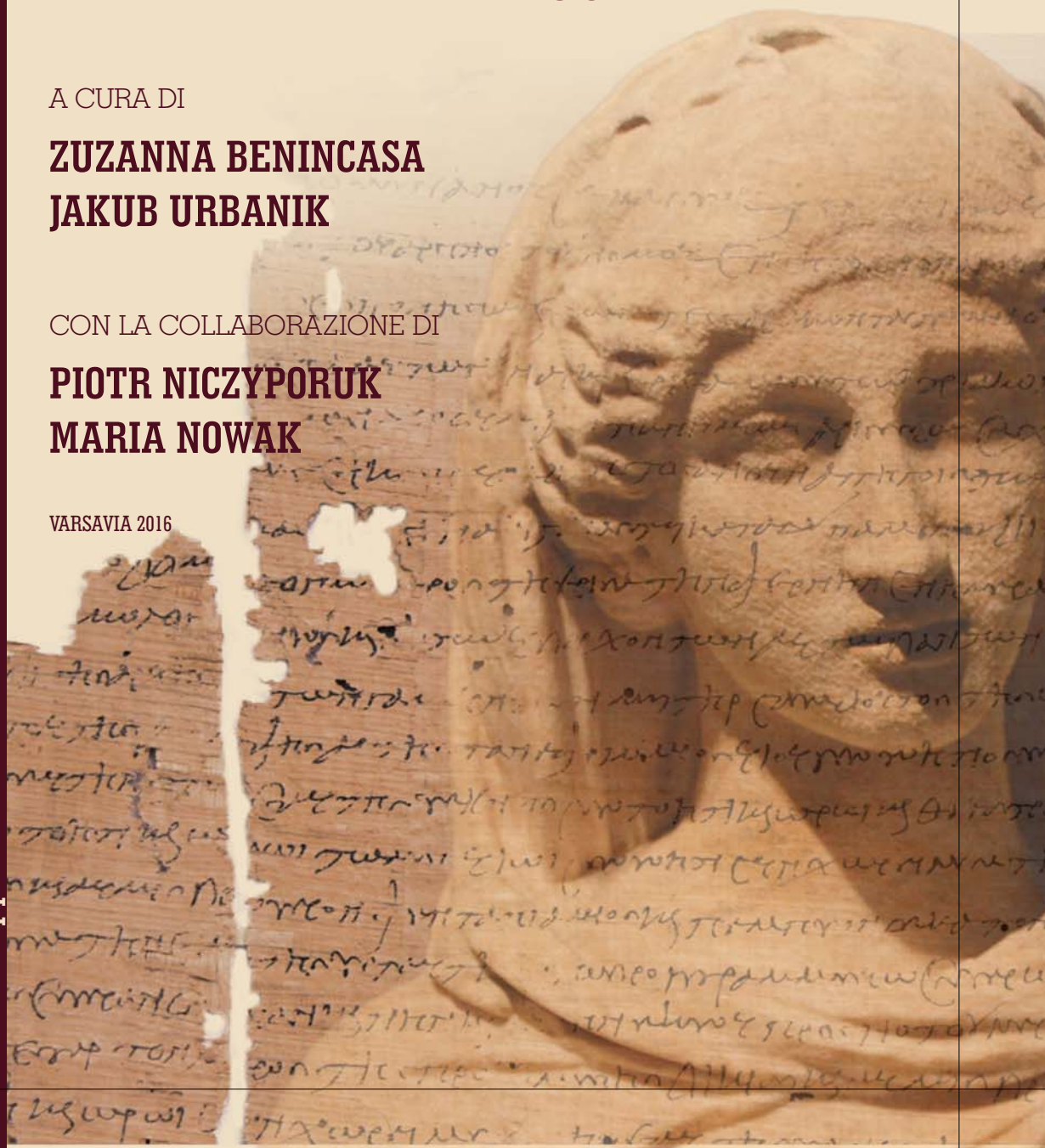
THE JOURNAL OF JURISTIC PAPYROLOGY
Supplement XXIX

MATER FAMILIAS
SCRITTI ROMANISTICI PER MARIA ZABŁOCKA



A CURA DI

ZUZANNA BENINCASA
JAKUB URBANIK

CON LA COLLABORAZIONE DI

PIOTR NICZYPORUK
MARIA NOWAK

VARSAVIA 2016

THE JOURNAL OF JURISTIC PAPYROLOGY
Supplement XXIX

MATER FAMILIAS
SCRITTI ROMANISTICI PER MARIA ZABŁOCKA

A CURA DI

ZUZANNA BENINCASA
JAKUB URBANIK

CON LA COLLABORAZIONE DI

PIOTR NICZYPORUK
MARIA NOWAK

VARSAVIA 2016

Supplements to *The Journal of Juristic Papyrology* are jointly published by the Faculty of Law and Administration of the University of Warsaw, the Institute of Archaeology of the University of Warsaw, and Fundacja im. Rafała Taubenschlaga, Krakowskie Przedmieście 26/28, 00–927 Warszawa 64
tel. (+48 22) 55 22 815 and (+48 22) 55 20 384, fax: (+48 22) 55 24 319
e-mails: g.ochala@uw.edu.pl, t.derda@uw.edu.pl, kuba@adm.uw.edu.pl
web-page: <http://www.taubenschlagfoundation.pl>

Cover design by Maryna Wiśniewska
Computer design and DTP by Jakub Urbanik

Warszawa 2016

ISBN 978–83–938425–9–9

Wydanie I.
Druk i oprawa: Sowa Sp. z o.o., Piaseczno

Mater Familias
Scritti per Maria Zabłocka

INDICE

Mater Familias
Scritti per Maria Zabłocka
pp. 415–423

Sławomir Kursa

CAPACITY OF WOMEN TO MAKE TESTAMENTUM PARENTIS INTER LIBEROS

To date, the will defined by scholars as *parentis inter liberos* raises doubts. Although its existence in Roman law is acknowledged, there is no agreement in the scholarship as to the numerous issues connected with it (an active and passive subject, an object and a form), and even as to its name.[1] One of the problems concerning *testamentum parentis inter liberos* is an issue of the women's capacity to make such type of a will. The present article is an attempt to explain this problem, in particular the requirements which had to be met in order for a woman to make it, and an attempt to determine since when a woman had such capacity. The content of the sources of Roman law relating to this problem allows setting the hypothesis that a woman could make such a will already in times of the emperor Theodosius II, however, only the sources of the Justinian law (*CJ*. 6.23.21.3 and *Nov*. 107 *pr*.) clearly refer to the possibility of making this will by parents of both sexes.

[1] Sometimes it is defined in the literature as *testamentum parentum inter liberos*. See: P. F. Girard, *Manuel élémentaire de droit romain*, Paris 2003, p. 865; B. Biondi, *BSuccessione testamentaria. Donazioni*, Milano 1943, p. 70; M. Talamanca, *Istituzioni di diritto romano*, Milano 1990, p. 730; María Luz Blanco Rodríguez, *Testamentum parentum inter liberos*, Valladolid 1991. Such term is not accurate enough because it may cause confusion as if it regarded a common will of both parents, as well as it does not take the evolution of an active subject of this will into account.

I. TESTAMENTI FACTIO ACTIVA OF WOMEN

The Romans did not have a general concept or terms that would suit the contemporary distinction between the active and passive testamentary capacity.[2] The capacity to make a will and a capacity to be appointed as an heir in it were contained in a term *testamenti factio*. Roman jurists treated it as a right of a public legal character.[3] The Romanists associated an expression *testamenti factio cum herede* (*legatario*) occurring in the sources with a term *testamenti factio activa*, and an expression *testamenti factio cum testatore* with the term *testamenti factio passiva*.[4]

It should be added that an expression *testamenti factio cum herede* (*legatario*) was not the only expression found in the sources of Roman law used to define *testamenti factio activa*. In a fragment deriving from the fourth book *fideicommissorum*, in which an issue of a testamentary capacity was raised, Ulpian used an expression *ius testandi* to define it.[5] Similarly, in place of *testamenti factio* he used this expression in the thirty-ninth book of the commentary *ad edictum*, where he made granting of *bonorum possessio* dependent on the testator's possession of *ius testandi*.[6] However, Ulpian did not treat the expression *ius testandi* as an exclusive expression to determine *testamenti factio activa*, as in the same book in a fragment placed in *D.* 37.11.1.8, he used the expressions *ius testamenti* and *testamenti factio* interchangeably.

The possibility of making a will by a woman is implicitly indicated by a fragment of the second book of Martianus's *institutionum*, according to which a woman may inherit on the basis of a will of a husband but he, as a result of a penalty that he married her as her tutor, may not inherit on the basis of her will (*D.* 30.128). The capacity of a woman to make a will

[2] Biondi, *Successione testamentaria* (cit. n. 1), p. 83.

[3] *D.* 28.1.3 (Pap. 14 *quaest.*): 'Testamenti factio non privati, sed publici iuris est'; P. Leuregans, '*Testamenti factio non privati, sed publici iuris est*', *RH* 53 (1975), p. 225.

[4] *D.* 31.82.2; *D.* 33.3.5; *D.* 34.4.20; *D.* 35.1.55; *D.* 37.4.19; A. Berger, *Encyclopedic Dictionary of Roman law*, Philadelphia 1953, p. 732. Similarly, see: H. Krüger, '*Testamenti factio*', *ZRG RA* 53 (1933), p. 507.

[5] *D.* 36.1.13.2 (Ulp. 4 *fideicom.*): '... ius testandi non habuisse eum qui testatus est ...'.

[6] *D.* 37.1.3.5 (Ulp. 39 *ed.*): '... si modo ius testandi habuit de peculio castrensi vel quasi castrensi.'

is also *implicite* confirmed by the following constitutions comprised in the Justinian's Code: the constitution of Diocletian and Maximian of 294 concerning hindering a mother when making her will,[7] subsequently, another constitution of the same emperors issued two months later providing for a possibility of a woman to dispose of her dowry in a will, the return of which was pledged to her by her husband (*CJ*. 5.12.25) and the constitution of Justinian of 531 referring to a woman who discounted her son in her will (*CJ*. 5.37.26 pr.).

Some fragments of the Digests clearly show that women *sui iuris* (called in these sources a wife, a widow, a kinswoman, a grandmother, a virgin, a nun) may freely make will and appoint testamentary heirs according to their will.[8] A woman may not only appoint an heir but also make use of the institution of a substitution. For example, in his twelfth book of a commentary *ad Sabinum*, Ulpian presents a case of a woman who appointed her son as an heir under a condition.[9] Women might also have appointed legacies (*D*. 34.2.8; *D*. 34.2.18.2.) and trusts (*D*. 22.1.3.3; *D*. 34.2.18.2), as well as guardians (*CJ*. 8.46.1).

The Digests also contain quotations of the wills made by women. A fragment of the seventh book of the Paulus's *responsorum* contains a part of a will made by certain Seia who, when dying, gave a legacy to her husband (*D*. 33.4.11). Similarly, in his seventeenth book of *digestorum* Scaevola talks about a certain woman who established a bequest for her friend Seia and gave dispositions to her husband concerning the arrangement of her funeral (*D*. 34.2.40.2). Subsequently, in his ninth book *ad Plautium* Paulus mentions that some woman established in her will a legacy by damnation (*D*. 34.2.8).

[7] See. Olga E. Tellegen-Couperus, *Testamentary succession in the constitutions of Diocletian*, Zutphen 1982, pp. 164–165; S. Kursa, *La diseredazione nel diritto giustinianeo*, Bari 2012, pp. 107; 207.

[8] *D*. 20.4.19 (Scaev. 5 *resp*.): 'Mulier in dotem dedit marito praedium pignori obligatum et testamento maritum et liberos ex eo natos, item ex alio heredes instituit.'; *cf*. also: *D*. 5.2.16 *pr*.; *D*. 22.1.3.3; *D*. 34.2.8.

[9] *D*. 38.17.1.7. For further information see Marianne Meinhart, *Die Senatusconsulta Tertullianum und Orfitianum in ihrer Bedeutung für das klassische römische Erbrecht*, Graz – Wien – Köln 1967, pp. 302–303.

Justinian adopted a constitution of the emperors Valentinian III and Martianus of 455 concerning the women's capacity to make a will or a codicil, as well as to bequest legacies or universal trusts for churches and *piae causae* by women. All women had a capacity to make them (*CJ*. 1.2.13). The capacity to make a will by a woman results *a contrario* also from the constitution of Theodosius II and Valentinian III of 434 (*CJ*. 1.3.20 *pr*.).

However a woman possessing *testamenti factio activa* might have made ordinary wills, a question arises as to whether and since when a woman could make *testamentum parentis inter liberos*.

II. CAPACITY OF WOMEN TO MAKE TESTAMENTUM PARENTIS INTER LIBEROS

Since *testamentum parentis inter liberos* was available only to literate individuals benefiting solely their descendants, its formal requirements were much more relaxed. This meant that witness participation, in particular their signatures and seals, were not required for its validity, as opposed to the *testamentum perfectum*, for which the requirements were set out in *Nov.Th.* 16.2. As such, the *testamentum parentis inter liberos* was a legalized case of the *testamentum imperfectum*.[10]

Some authors, when analyzing this kind of a will, identify its active subject exclusively with a father.[11] Others refer more carefully to the will of an ascendant for the descendants.[12] Those who ascribe the capacity to

[10] Blanco Rodríguez, *Testamentum parentum inter liberos* (cit. n. 1), p. 92.

[11] Girard, *Manuel élémentaire* (cit. n. 1), p. 865; I. Koschembahr-Łyskowski, *Prawo rzymskie* III: *Systemu część szczegółowa* [Roman Law III. Specific Part], Warszawa 1931, p. 245; Berger, *Encyclopedic dictionary* (cit. n. 4), p. 734; W. Rozwadowski, *Prawo rzymskie. Zarys wykładu wraz z wyborem źródeł* [Roman Law. An Outline of the Lectures with the Sources], Poznań 1992, p. 216.

[12] L. Palumbo, *Testamento romano e testamento longobardo*, Lanciano 1892, pp. 130–131; R. Sohm, *Instytucje, historia i system rzymskiego prawa prywatnego* [Institutions, History and the System of Roman Private Law], Warszawa 1925, pp. 585–586; J. A. Pokrowskij,

make this type of a will to a parent, thus equally to a father and a mother constitute a separate group.[13]

The beginnings of the *testamentum parentis inter liberos* date back to the times of Constantine the Great.[14] His constitution of 324 concerning this will was included in the Code of Theodosius under the title *De familiae herciscundae* (*CTh.* 2.24.1). Subsequently, the issue regarding this will was addressed by the emperor Theodosius II in the constitution of 439 (*NovTh.* 16.5) which was adopted by Justinian to his code (*CJ.* 6.23.21). Justinian gave his attention to this type of will also in the *Novel* 107 of 541.

The abovementioned sources raise a question whether since the beginning of the existence of such type of a will parents of both sexes, in particular a mother, might have made it if they were entitled to the *testamenti factio activa*. The analysis of the *CTh.* 2.24.1 referring only to civil or praetorian law successors ('cum filiis ac nepotibus civili iure vel auxilio praetoris ut suis heredibus defuncti successio defertur') shows that a *pater familias* (*pater* or *avus paterni*) might exclusively have been an author of this type of will.[15] This thesis may in particular be supported by an interpretation of this constitution placed in the *Theodosian Code*: 'Quando facultas patris inter filios vel nepotes dividitur, specialiter voluntas patris vel avi paterni debet in omnibus custodiri, cuius testamentum etiamsi non fuerit perfectum ...'.[16] This constitution is similarly commented by Maria

Historja prawa rzymskiego [History of Roman Law], Lublin 1928, p. 251; R. Taubenschlag, *Rzymskie prawo prywatne* [Roman Private Law], Warszawa 1969, p. 251; Osuchowski, *Zarys* (cit. n. 1), p. 508; Talamanca, *Istituzioni* (cit. n. 1), p. 730; Blanco Rodríguez, *Testamentum parentum inter liberos* (cit. n. 1), p. 107.

[13] Biondi, *Successione testamentaria* (cit. n. 1), p. 70; G. Impallomeni, *s.v.* 'successioni (diritto romano)', *NNDI* XVIII (1971), p. 723; P. Voci, *Diritto ereditario romano* II. *Parte speciale*. *Successione ab intestato*. *Successione testamentaria*, Milano 1963, p. 101; A. Guarino, *Diritto privato romano*, Napoli 2001, p. 433; S. Beltrani, *s.v. 'Testamentum parentis inter liberos*', [in:] F. del Giudice, *Nuovo dizionario giuridico romano*, Napoli 2003, p. 492.

[14] S. Solazzi, 'L'origine del *testamentum inter liberos*', *SDHI* 10 (1944), p. 361.

[15] Similarly, Voci, *Diritto ereditario romano* II (cit. n. 13), p. 101.

[16] It is also indicated by *D.* 50.16.201 (Iul. 81 *dig.*): 'Iusta interpretatione recipiendum est, ut appellatione "filii", sicuti filiam familias contineri saepe respondebimus, ita et nepos videatur comprehendi, et "patris" nomine avus quoque demonstrari intellegatur.'

Luz Blanco Rodriguez. She states that it refers to s*ui et emancipati* and hence it may not be applied to a mother and her ascendants who did not have *patria potestas*, could not have *sui heredes* and could not emancipate them. Therefore, she concludes that by the power of this constitution, Constantine excluded a possibility of a mother to make a will *inter liberos* in a relaxed form.[17] She also remarks that in his subsequent constitution placed in the *CTh*. 2.24.2, Constantine allowed a mother only to make division of her own assets for her children (*divisio parentum inter liberos*).[18]

Testamentum parentis inter liberos is also referred to, as mentioned above, subsequently by the constitution of Theodosius II and Valentinian III of 439 (*NovTh*. 16.5), adopted in the *CJ*. 6.23.21.3 and the *Novel* 107 of 541.

The original version of the constitution of Theodosius II uses the term *defunctus* in the context of the phrase *nisi inter solos liberos*.[19] Although the invoked novel does not use the term *parens*, the context provides that it concerns a deceased person who disposed in his testament for the benefit of his offspring (descendants), and therefore was a parent. Biondo Biondi,[20] Pasquale Voci,[21] as well as María Luz Blanco Rodríguez[22] hold that the *NovTh*. 16.5 broadened the scope of persons entitled to make this kind of will to the parents of both sexes. Such an assertion is not, however, justified by the reading of the original version of the constitution. The expression *a parentibus utriusque sexus* in the context of *nisi inter solos liberos* appears in *CJ*. 6.23.21.3, which adopts *NovTh*. 16.5. Thus, the

[17] Blanco Rodríguez, *Testamentum parentum inter liberos* (cit. n. 1), pp. 75; 156.

[18] Blanco Rodríguez, *Testamentum parentum inter liberos* (cit. n. 1), p. 156.

[19] *NovTh*. 16.5: '... ex imperfecto autem testamento voluntatem tenere defuncti, nisi inter solos liberos habeatur, non volumus.'

[20] Biondi, *Successione testamentaria* (cit. n. 1), p. 70, n. 2: 'Il Codice giustinianeo (c. 21, 3 C. h. t.) aggiunge a *parentibus utriusque sexus*; ma non si tratta di novitá.'

[21] Voci, *Diritto ereditario romano* II (cit. n. 13), p. 63: 'Ma la legge di Teodosio e Valentiniano estende la disposizione in genere ai genitori, che testino in favore dei propri figli. Con questa ampiezza la norma è accolta da Giustiniano, in C. (6, 23) 21,3'.

[22] Blanco Rodríguez, *Testamentum parentum inter liberos* (cit. n. 1), p. 77: 'Con Teodosio II (C. 6,23,21,3) se amplía la posibilidad de realizar este testamento a los ascendientes maternos, por tanto si los liberi naturales siguen a la madre y a estos les compete un derecho a la sucesión *ab intestato*, en este momento podrán englobarse dentro del concepto de liberi y ser beneficiados cuando este testamentum sea realizado por la madre o ascendientes maternos'.

expression *a parentibus utriusque sexus* was interpolated by the creators of the Code of Justinian.

The question arises what the reason of this interpolation was. It seems probable that *NovTh.* 16.5 was not the only constitution in which the emperor Theodosius II addressed the issue of the active subject of *testamentum parentis inter liberos*. Only based on this assumption do the words of Justinian in *Nov.* 107 *pr.*: 'insuper et Theodosii decernit, non in patribus solum haec disponens, sed etiam in matribus et ascendentibus utriusque naturae' seem justified. It is believed that before the time of Theodosius II, only male ascendants were allowed to draw up this kind of testament, while during his time the right was ascribed to parents of both sexes (but not based on *NovTh.* 16.5). In this context, Justinian's interpolation in the *Code* did not bring nothing new.

III. CAPACITY OF WOMEN TO MAKE TESTAMENTUM PARENTIS INTER LIBEROS: THE PASSIVE SUBJECTS

Only children and further descendants of a parent, as indicated by the name, *testamentum parentis inter liberos*, may have been its passive subjects. However, as pointed out earlier, the constitution of Constantine the Great limited their circle exclusively to civil or praetorian law intestate successors. That is why any other descendant, apart from children under the paternal authority and descendants emancipated by the *pater familias*, may not have been considered as a passive subject of this will. Described as above by Constantine the Great, a passive subject indicates unequivocally that a woman may not have made this type of a will although *senatus consultum Orphitianum* admitted the woman's children, also being under someone else's authority,[23] to the intestate succession after her.[24]

[23] E. Volterra, *Il senatoconsulto Orfiziano e la sua applicazione in documenti egiziani del III secolo d.C.*, [in:] idem, *Scritti giuridici* II. *Famiglia e successioni*, Napoli 1991, p. 539.

[24] *I.Just.* 3.4 *pr.*–4; *CJ.* 1.17.2.7; *CJ.* 6.57.1; *CJ.* 6.57.6.1; G. La Pira, *La successione ereditaria intestata e contro il testamento in diritto romano*, Firenze 1930, p. 293 accurately notes that 'era

In a text of the *NovTh.* 16.5 no reservations connected with the understanding of a passive subject of this will may be found. A term *liberi* occurs there independently, without any limiting context. In view of *D.* 50.16.56.1 and *D.* 50.16.220 *pr.*, *liberi* was understood to mean not only those who are under authority, but also *sui iuris* persons, whether male or female, including descendants of the female line. This term included their grandchildren and great-grandchildren, as well as all their descendants (*D.* 50.12.15).

It should be noted that the category of *liberi*, who were the passive subjects of *testamentum parentis inter liberos,* was a broader one than the category of *liberi* entitled to *ab intestato* succession. It included not only *liberi legittimi*, but also those *liberi naturales* admitted to a limited extent to testamentary inheritance by the Valentinian, Valens and Gratian constitution of 371 AD. These offspring were not included in the category of *sui heredes*, nor in the pretorian *ordo unde liberi*, and could therefore not be passive subjects of the *parentis inter liberos* testament, as indicated by the expression *inter suos heredes* used in the constitution of Constantine the Great.[25]

Such an understanding of *liberi* allowed a woman possessing *testamenti factio activa* to appoint each of her children or her other descendants as an heir in her will. It gives a basis to presume that already in times of Theodosius II a woman was allowed to make a will *parentis inter liberos* in a relaxed form.

naturale che, dopo ammessa la chiamata della madre alla successione dei figli, venisse in conseguenza ammessa la chiamata dei figli alla successione della madre. Ciò fu opera del senatusconsulto Orfiziano emanato ai tempi di Marco Aurelio (178 a.C.).'

[25] A partial modification of the constitution of Valentinian, Valens and Gratian on the subject of parts of inheritance which could be passed via testament to *liberi naturales* occured in *Nov.* 89.12. Justinian upheld a provision according to which the testator could dispose of one ounce of his assets to his natural offspring, if he also had legitimate offspring. If, however, the testator had ascendants, but had no legitimate offspring, he could dispose of up to six ounces of his assets to his natural offspring. This was three ounces more than envisaged by the constitution of Valentinian, Valens and Gratian. If the testator had neither legitimate offspring or ascendants, he could ascribe his entire estate to his natural offspring. *Cf.* VOCI, *Diritto ereditario romano* II (cit. n. 13), p. 58.

The above allows the conclusion that the validity of *testamentum parentis inter liberos* drawn up by a woman depended on the combined occurrence of four preconditions: 1) a woman had to possess *testamenti factio activa*; 2) a woman literate; 3) a woman had to be a mother; 4) heirs appointed in her will had to fall within a category of *liberi* comprising her descendants, even if they were under the authority of other persons.

Conclusions reached about both the active and passive subject of this testament allow for the determination that the legal status which allowed a woman to draw up a *testamentum parentis inter liberos* arose during the time of Theodosius II, which is mentioned by Justinian in *Nov*. 107 but cannot be associated with *NovTh*. 16. It is highly probable that this possibility was created by some other constitution of Theodosius II known to Justinian, but not included in the *Code of Justinian*.

Sławomir Kursa

Faculty of Law
Chair of Roman LawHistory and Theory of Law
SWPS University of Social Sciences and Humanities
ul. Chodakowska 19/31
03–815 Warsaw
Poland
e-mail: *slawomirpatrycjusz@wp.pl*