CHAPTER 3

Family and inheritance

This chapter gives a sketch of the Roman family, slaves, and succession.

I THE FAMILY

1. Paternal power

Roman law divided free citizens into two classes: those who were independent (*sui iuris*) and those who were dependent on another (*alieni iuris*). The Roman family was patriarchal: all power was vested in the paterfamilias, who was the senior male ascendant. So a child (at least as long as he or she was legitimate) was subject to the power of his or her paterfamilias, whether father, grandfather or great-grandfather. Paternal power (*patria potestas*) was in principle lifelong, so that in principle a man who had already become a grandfather might still be subject to his father's power, and become independent only late in life.

It is true (as we shall see below) that there were ways of mitigating the consequences of the fact that all power was vested in a (possibly) elderly male. None the less, this was power of an extraordinary degree, and for those subject to it represented impotence of an extraordinary degree. *Patria potestas* goes back at least to the Twelve Tables (*c.* 450 BC), and it is clear that in the early republic the powers of the paterfamilias were extreme: a power of life and death over those in the family; power to decide whether newborn babies should be accepted into the family or exposed; power to sell surplus children. Even by the later republic such primitive barbarisms no longer survived. But paternal power remained significant because of two much more practical considerations: the paterfamilias owned all the family property, and none of his dependants could own anything; everything acquired by them automatically vested in the paterfamilias.

This is very remarkable. As has been pointed out, if you had a long-

lived paterfamilias, you might still be in his power when sixty-five and he was eighty-five (Daube 1969: 75–91). Still you would be able to own nothing. This seems surprising by comparison with the ages laid down for the holding of public office: in the later republic the minimum age for election to the praetorship was thirty-nine and to the consulship forty-two (both ages were later reduced). Leading public figures might therefore still have been in paternal power and unable to own anything (Paul, *D.* 1.7.3). The question arises how the Romans coped with this apparently inconvenient legal rule.

In general – to recall chapter 2 – it seems highly unlikely that the Romans would have retained this system unaltered if it really caused extraordinary inconvenience; let alone that they would have boasted of it, as Gaius does (*Inst.*, 1.55), as an institution peculiar to Roman society.

The problem will have been less universal than the picture presented so far may suggest. Recently historians have made use of funerary inscriptions recording ages at death as well as demographic tables to work out questions of life expectancy and mortality in Roman society. These investigations suggest that life expectancy was low, as is generally the case in pre-industrial societies. Estimates are that probably only a quarter of men in their early thirties were still in power; and only one in ten forty year-olds would still be in power and so unable to own any property (Saller 1994). So this is a corrective to the basic picture, and indicates that the consul who was still in power must have been the exception rather than the rule. None the less, such cases did occur. The jurists are careful to explain that paternal power applied only to matters of private law, so that a magistrate who was in his father's power had no obligation to obey him in official matters (Pomponius, *D.* 1.6.9).

Two other factors are worth mentioning. The first is the *peculium*, a fund of property made available to the dependent son or daughter (or to a slave). It is fundamental to the *peculium* that it remained the property of the paterfamilias and could be withdrawn at any time. But the person to whom it was granted had full powers of disposal over it until such time as it was withdrawn. *Peculia* could be large: they were not just pocket money or allowances. There are plenty of texts in the Digest which speak of *peculia* which contained slaves who themselves had *peculia* which contained further slaves: the highest *peculium* in this hierarchy might be of very significant value. Indeed precisely because *peculia* might be large and employed in the workings of Roman commerce, most discussion of them is left until chapter 5. It is clear that the grant of a substantial

peculium would render more or less nugatory the fact that, strictly speaking, a person still in paternal power could own nothing.

A further significant development was the creation by the emperor Augustus of the *peculium castrense*, a fund consisting of any earnings or booty acquired by a son in the course of military service. This was a radical break with principle, since the father had no interest in this type of *peculium*, at any rate during the son's lifetime, and the son could even leave it by will. Clearly, this was a piece of social engineering rather than the coherent development of private-legal principle; and it has been suggested that the aim of this innovation was to encourage recruitment to the army. If that is right, however, it does rather suggest that the inability to own property as a dependent son was a genuine difficulty. The principle of *peculium castrense* was extended in the fourth century AD to earnings from public service (*peculium quasi castrense*) and to property inherited by a child on the maternal side (*bona materna*). The trend was therefore slowly but decisively in favour of increasing the dependent child's proprietary capacity.

A second possible corrective to our picture is emancipation, voluntary release from paternal power. The Twelve Tables contained no provision for ending paternal power voluntarily; they only provided that a son should be freed of his father's power if his father had sold him three times. (Three sales of the same son were possible because each time – until the third – he was released from the buyer's control, he would automatically fall back again into his father's power.) The Roman jurists devised a method of bringing paternal power to an end by arranging with a compliant buyer for the sale of a son three times in succession.

Accordingly, it was possible to terminate paternal power prematurely, although this would have to be with the paterfamilias's own agreement. While the juristic invention of this scheme for emancipation may suggest a social demand for it, there is not much more evidence to support that. (One might imagine that the real tyrants would neither grant a *peculium* nor agree to emancipation.) Such evidence as there is is finely balanced. Some makes it sound as if emancipation was a punishment: it broke the family tie, a fact which may have been of great consequence in a society as obsessed as Rome was with family pedigree and ancestors. It had the additional disadvantage that, if the paterfamilias died without making a will, the emancipated children had no claim on the estate (although this restriction was removed by the praetor). But there are also signs that emancipation was used as part of a strategy of planning for the future of the family as a whole, by making separate provision for, rather than

punishing, emancipated family members, and this strategy was not necessarily associated with financial embarrassment (Gardner 1998: 6–113). So, although we have no way of knowing how common emancipation actually was, there is no reason to assume that it was routine. Instead, it might be called into service for any of a variety of purposes, positive or negative.

2. Adoption

It was possible to adopt people into paternal power. There were two different procedures, depending on whether the person to be adopted was at the time in power or independent. Where the adoptee was in power, it was necessary to go through emancipation proceedings in order to terminate the first power, and then for the adopter to claim the adoptee as his own. This was done in an undefended legal action, judgment in which established the new paternal power.

Where the adoptee was independent, the adoption (*adrogatio* was the technical term in this case) affected the whole property and any dependants of the adoptee; in essence it was the takeover by one family of another. This was allowed only after inquiry by the pontiffs, and only if the acquiring paterfamilias needed an heir and successor and could not provide his own (a requirement which was interpreted as meaning that he was aged sixty or over, or unable to reproduce). This background explains too why anyone would agree to such a thing: the prospect of succession was the allurement. Adoption, like emancipation, is therefore to be seen as one of the devices open to a paterfamilias to plan for the future of his family and his estate: just as emancipation could be used to reduce the number of those in paternal power, so adoption could be used to increase it (Gardner 1998: 114–208).

In each case the point of adoption was to create a new paternal power. For that reason women could not adopt.

3. Marriage

Marriage in classical Rome was more a secular than a religious matter. Its main legal effect was that children born within it were legitimate, Roman citizens and subject to the paternal power of their father; that is the context in which Gaius's Institutes discusses it (*Inst.* 1.55–6). It will be enough to summarize the requirements for valid marriage very briefly. First, there must be capacity (*conubium*), which most Roman citizens and

certain others had once they were of age, twelve in the case of girls and fourteen for boys, provided the marriage did not fall within the prohibited degrees of relationship. Second, there must be consent by the parties to the marriage, and any party who was still in paternal power needed the consent of the paterfamilias. The need for his consent was gradually watered down, so that he could not obstruct the marriage, although the dates are a matter of uncertainty. In any event, demographic considerations suggest that, when they married, women would typically be in their late teens and probably half of them would by then be free of paternal power; while only a quarter of men, who typically married in their late twenties or early thirties, would when they married still be in power (Saller 1994: 25–41; Treggiari 1991: 398–403).

A striking difference between modern and Roman expectations is that in Roman law marriage had no effect on property. A strict regime of separation of the spouses' property was preserved. Just as husband and wife, if still dependent, remained in the power of their respective patresfamilias, so too, whether the spouses were dependent or independent, marriage had no effect on the ownership of property on the two sides of the family. Legislation, the *lex Cincia* of 204 BC, made gifts between spouses void. The purpose of this was clearly not to discourage birthday or anniversary presents but to prevent large capital settlements being made from one side of the family to the other. The jurists expended a good deal of effort on exploring the ramifications of this prohibition (*D.* 24.1).

The only exception to the rule that no property must pass from one side of the family to the other was the dowry (*dos*; Treggiari 1991: 323–64). This was property provided by or on behalf of the wife, for example by her paterfamilias or by relatives or friends. It appears to have been regarded as a social duty, incumbent presumably on close family, to provide a dowry (Julian, *D.* 12.6.32.2). The dowry was owned by the husband during the currency of the marriage, but a number of restrictions were placed on his free use of it. The first of these – which is also interesting as an illustration of the sort of property a dowry might contain – was a statute of Augustus, the *lex Iulia de fundo dotali*. It provided that the husband could not sell land in Italy which belonged to the dowry without his wife's consent (Gaius, *Inst.* 2.63).

The Digest gives a good deal of detail about the rules for dowries. The key point, however, is that the rules laid down by the law were only residual: they applied in the absence of contrary agreement by the parties. The size of the dowry, according to the jurists, ought to reflect the standing and wealth of the husband and wife (Celsus, *D.* 23.3.60; Papinian, *D.*

23.3.69.4). But it is clear enough that negotiation of the amount of a dowry and the terms on which it was to be returnable reflected the relative statuses, and therefore the bargaining positions, of the families which were being linked by the marriage. For example, one possibility was that the dowry would be valued at the outset of the marriage (*dos aestimata*) and the husband would be under an obligation to return that value at the end. Ulpian points out that, at least so far as items which suffered wear and tear were concerned, this was an unfavourable arrangement for the husband (*D.* 23.3.10 pr.). But he might have no choice but to agree to it. (Incidentally, it is interesting that Ulpian's view of this as an unfavourable agreement apparently assumes a low rate of inflation.)

While it is therefore not possible to generalize about the value of dowries, there is at least some reason to think that the typical dowry was a relatively small, though not negligible, contribution towards supporting the wife, her children, and her slaves in the matrimonial home (Saller 1994: 204–24). It was not, for example, as in some early modern societies, an advance to the daughter at the time of her marriage of her whole prospective share of her parents' estate. But the evidence that dowry was sometimes paid in instalments certainly makes it clear that it was a settlement of significant capital, and Cicero's difficulties in raising the necessary funds are well documented (Alfenus, *D.* 23.4.19; Cic., *Att.* 11.2.2; 11.23.3; 11.25.3). A further pointer towards the dowry's being significant but less than a daughter's full entitlement is the fact that, if she made a claim on the intestate estate of her father, the amount she had already (indirectly) received by way of the dowry was taken into account. If it is right, then, to take Roman dowries to have been relatively modest, this may have been not least because marriage was not necessarily a stable relationship, and it therefore did not make much sense to put substantial amounts of property at stake. Which brings us on to divorce.

4. Divorce

The Roman notion of marriage was that of a continuing contract entered into by consent; the corollary was that when consent came to an end, so did the marriage. Agreements to other effect were void (*C.* 8.38.2 of AD 223). Although initially the paterfamilias of the husband or the wife was able to initiate their divorce, by the second century AD his power to terminate a harmonious marriage was evidently limited (Ulpian, *D.* 43.40.1.5).

Moralists probably exaggerate how common divorce was. The facts are hard to ascertain (Treggiari 1991: 435–82). But it may well be that divorce in classical times was relatively common. No stigma apparently attached to it. Unilateral repudiation of the marriage was enough to end it; approved words for divorce were such things as 'keep your things to yourself' or 'look to your own things' (Gaius, *D.* 24.2.2.1). Under Augustus a requirement of seven witnesses to a divorce was introduced. The grounds for this seem to have been primarily so that it could be ascertained whether children were legitimate; whether the conduct of either spouse constituted adultery, as to which Augustus introduced strict penalties; and whether Augustan statutory rules penalizing the unmarried (or those who did not remarry quickly enough) were applicable. After the rigid and sometimes bizarre rules of the archaic period, classical law made no attempt to list the grounds on which divorce could be sought. In Britain and elsewhere the trend is in the same direction: the law has moved from insisting on fault as a ground for divorce to founding on the irretrievable breakdown of a marriage as grounds for terminating it. Although the Roman jurists do not spell out any rules about grounds for divorce, literary sources do suggest that a substantive reason for divorce would usually be expected (Treggiari 1991: 461–5). The effect of divorce on the dowry might anyway reduce the attraction of divorcing your spouse without any reason at all.

Major questions which arise in modern divorces did not do so in Rome. Since the husband (or his paterfamilias) had power over the children, he was in principle responsible for the custody of the child. This was reflected in the rules about return of the dowry, discussed immediately below. In practice other arrangements might no doubt be made; but the legal responsibility was clearly that of the paterfamilias.

Since marriage itself had no effect on the spouses' property, divorce had none either. There was only the case of the dowry to resolve. As already mentioned, agreements about the fate of the dowry are likely to have been common. Two types of agreement frequently mentioned are *dos recepticia*, an agreement that all the dowry was to be returned to the donor whatever the circumstances of the end of the marriage; and *dos aestimata*, already mentioned, where the husband (or his heir) was under an obligation to return property to the value of the initial dowry at the end of the marriage.

In the absence of agreement, the rules were complicated and will not be discussed here. What matters is the broad principle that, if the wife survived, the dowry should go back to her (Paul, *D.* 23.3.2). The notion

lying behind this is that she should have a fund to provide a dowry for her in the event of remarriage. Since the dowry was the property of the husband, it was necessary to have an action to recover it from him when the marriage was over. This was called the *actio rei uxoriae*. In that action, account would be taken of various deductions which the law authorized the husband to make. The main ones were that the husband could retain a sixth for each child up to three, if his wife had initiated the divorce, but not if he had done so himself; he could also retain a sixth for moral reasons, notably adultery. Lesser misconduct was penalized by the retention of only an eighth.

These rules meant that even a wife who was 'penalized' to the maximum extent by having deductions made for three children and immorality would still get back a third of her dowry. She would need it: she would expect to remarry (and statute imposed penalties if she did not); and given that older women usually had to have rather more attractive dowries, it could well be necessary to top the dowry up at least to the level at which it had started. There is no doubt that this system was very much in the husband's rather than the wife's interests: it did not make it possible to penalize him effectively for immorality.

5. Tutors for those under age

A further consequence of the remarks already made about life expectancy and mortality rates is that there would be a relatively large number of children who were not yet of full age – which was the age of puberty, taken as twelve for girls and fourteen for boys – but who were already independent owing to the death of their paterfamilias (Saller 1994: 181–203). The law required them to have tutors until they came of age.

It seems that the original reason for insisting on tutors had less to do with the welfare of the children than with the welfare of their property. The law of succession is discussed later in this chapter, but it is important to note here that, until a child reached puberty and was therefore capable of producing his or her own children, his or her nearest 'agnate' (relative related through the male line) had an expectation of succeeding to the property in the event of the child's death. It was important therefore to have a tutor to ensure that the property was not squandered or dissipated because the child was cheated or defrauded. It is no accident that the person who would become tutor if nobody had been appointed by the paterfamilias in his will was the nearest agnate. In the

last resort, the praetor would appoint a tutor for a child who did not have one (*lex Atilia*, before 186 BC).

The tutor was responsible for the administration of the child's property: investing property; raising or defending legal actions, and so on. This was serious business: the tutor's duties of investment alone were fairly onerous. As one would expect, the proper objects of investment had to be secure and not speculative: in short, land. It was permissible to have money on deposit, but basically only for the purpose of accumulating it to buy land; failure to take a suitable opportunity to buy land meant that the tutor was liable for interest on the sum he had not invested (Ulpian, *D.* 26.7.5 pr. and 7.3). Since the return on land was not particularly high, it is clear that the point of this liability for interest was not to maximize the child's income but to maximize the safety with which his or her assets were invested.

In addition to duties of administration, in the case of older children the tutor was responsible for authorizing certain actions. Authorization did not apply to young children, since it was possible only if the child was of sufficient age to understand what was involved. The child was able without authorization to perform acts which benefited him, but not any that harmed him, so he could acquire property or benefit under a contract; but no obligation was enforceable against him. In such circumstances, of course, nobody would willingly deal with a child. This disequilibrium was corrected in part by the praetor's preventing a child from enforcing a bilateral contract against the other party, unless he was prepared to perform his own part. For example: in the contract of sale the child could not sue for the price of goods unless he was prepared to deliver them. More generally, however, the solution to this disequilibrium was found in authorization: a transaction authorized by the tutor could be enforced against the child.

There was a gradual build up of remedies which reflect an increasing concern for preservation of the child's interests against the tutor's. Not only had every tutor (except one appointed by the paterfamilias in his will) at the outset to give security for good administration of the child's property; he had also to produce accounts of his dealings with the property, and, when the child attained full age, was exposed to the possibility of legal action. One action, the *actio de rationibus distrahendis*, applied only where there was fraud, such as embezzlement by the tutor; clearly a fraudulent tutor had only himself to blame. But a much more serious threat was the *actio tutelae*, which dates back to the late republic: here the tutor was liable for fraud but also for gross negligence; and by the late

classical period the tutor might evidently be liable for any careless or negligent act in administering the child's estate (Papinian, *D.* 26.7.39.3, 7, 13–14; Kaser 1971: 365–6).

This being so, it is not altogether surprising that people began to look for excuses not to be tutors, and if at all possible not to accept appointment as tutor in the paterfamilias's will. The jurists wrote books entirely devoted to suitable excuses for not being tutors, such as holding high office, age, chronic ill health, incompetence, or having three children (those killed in battle counted towards the total). The point is that the law of excuses was worked out in detail (see *D.* 27.1). The task was clearly unattractive.

6. Tutors for women

Boys were released from having a tutor at the age of fourteen. Although girls came of age at twelve, they were not then released from having a tutor. A woman of any age had still to have a tutor. What happened at age twelve, however, is that a girl ceased to have a tutor of a serious sort and acquired one whose role was in comparison much watered down. A woman's tutor had no need to administer anything, so his functions were limited to authorization. Even that function was relatively restricted, since a woman could perform many legal acts without it: for example, convey property informally (although not by formal conveyance); give a valid receipt. But she could not make a will, free her slaves, or do any other formal acts.

Authorization in this context was more or less a formality. In almost all cases a woman could compel her tutor to give his authorization; or it was possible, if the tutor was away, for however short a period, to change tutors to somebody more compliant. This is what lies behind the remark in Gaius's Institutes that authorization in the case of women is a mere matter of form (*Inst.*, 1.190). For precisely that reason, the *actio tutelae* was not available against the tutor.

From the time of Augustus a woman could be released from having a tutor by performing her civic duty, which meant having sufficient children (three for a free woman, four for a former slave). This seems to be connected with a concern for maintaining the birth rate and so also the strength of the army. Given that having a tutor was such a modest inconvenience, it is hard to see why this incentive should have had any serious impact.

It is worth making three more points about the position of women.

(1) That women's tutorship was not very burdensome, or that women in significant numbers were now no longer subject to it, is suggested by the *senatus consultum Velleianum*, a resolution of the senate of the mid-first century AD which provided that women should not guarantee the debts of any other person (Crook 1986b). The jurist Paul says that this is because such guarantees imperil the family property (*D.* 16.1.1.1); since that is as true of guarantees undertaken by men, perhaps a better explanation is that entering into guarantees was something that it was thought, for some social or cultural reason, that women simply ought not to do. The *SC Velleianum* was interpreted fairly strictly: it applied only to obligations undertaken on behalf of someone else; and only if the creditor knew that that was the case; and it did not apply where value was given, for instance, if the woman undertook the obligation in reciprocity for an obligation she owed to the creditor (Paul, *D.* 16.1.11–12 and 24; Callistratus, *D.* 16.1.21). For these reasons, it is doubtful whether the existence of this rule prejudiced a woman's freedom to contract to any significant extent.

(2) The traditional view of Roman law was that women had tutors; they could not be tutors (Papinian, *D.* 26.2.26 pr.). But as women increasingly came to be free of their tutors, it was less obvious that they should have nothing to do with looking after the property and interests of their children. There is some evidence that – without their actually becoming tutors – this happened. Some of the evidence is provincial; but there are hints of the same thing in Rome, at least where the father of the children had authorized this (Papinian, *D.* 3.5.30.6; Ulpian, *D.* 26.7.5.8; Chiusi 1994; Cotton 1993).

(3) Many women would be free of paternal power at an early age. On the whole, they had the same rights of succession as men (Crook 1986a). It is true that a statute of 169 BC, the *lex Voconia*, imposed restrictions to the effect that a woman could not be heir to a person in the first census class; and that nobody could by gift or legacy receive more than the heir under the will. But these restrictions appear to have been evaded (Cic., *de finibus* 2.55) and certainly by Augustus' day they do not seem to have had any effect.

Once free of paternal power and in possession of her inheritance, a Roman woman was constrained only by the formality of having to have a tutor. And that was pure formality. The conclusion is surely that in Rome women were unusually financially independent.

7. Guardians

It remains to say a few words about guardianship (*cura*). Two types are attested early (in the time of the Twelve Tables) but in detail are obscure. The first is care of the insane: they were placed under the care of their nearest agnate. Later on, the praetor was responsible for appointing a *curator* if there were no agnates, or they were for some reason suspect. Once again, considerations about preserving property lay behind this institution. It is tempting to imagine that, as in Victorian novels, the power to have somebody confined as insane would have been abused. But we do not seem to have any evidence about this.

The same aura of mystery surrounds another institution open to risk of abuse: the care of spendthrifts. They too could be placed in care so as to curtail their prodigality. But here too the workings of the institution are deeply obscure.

Better attested in classical law is the *cura* of minors, those who had outgrown having a tutor but were still young. This applies essentially to males, since women were anyway subject to continuing tutorship. Fourteen was an early age to acquire full legal capacity, so something more was needed.

Here too we see a counterpoint between the introduction of rights and remedies. If the law had simply treated minors as adults, and left them to take the consequences of their ill-advised actions, there would have been no need for the *curator*. But in fact Roman law introduced protection for minors under twenty-five, if advantage had been taken of them. Some of this appears to go back to an early *lex Laetoria* (around 200 BC), about which little certain is known. In any event, in his edict the praetor made available to minors, if someone had taken advantage of their inexperience, a remedy called *restitutio in integrum* ('restitution of the status quo', in other words revocation of a transaction). This was not for the case that a minor had made a bad deal, but where there was trickery or genuine exploitation of inexperience. The remedy was not automatically available but was granted by the praetor on a discretionary basis (Ulpian, *D.* 4.4.16 pr.). The problem was that the very existence of this remedy created uncertainty about whether a transaction was really valid or was liable at some future point to be challenged and revoked. While doubt persisted, the only reasonable course can have been to refuse to have any dealings with those who were or appeared to be minors.

At this point the law intervened once again, to create the device of the

curator or guardian. Initially, a guardian was appointed *ad hoc* and only for isolated important transactions, but by the late second century AD it seems to have become common to have one for the whole period until the age of twenty-five. The point of the guardian was to protect not just the minor but the people dealing with him, since if a transaction had been entered into with his advice, it would be difficult or impossible for the minor to get it set aside.

This is an interesting example of legal evolution. The old law seems to have been content with tutorship and to have subjected males over fourteen to the same rules as any adult. This perception changed, and means of relief were introduced in certain circumstances for those over fourteen. But this shift of the law towards protection of the young had ultimately to be balanced by the creation of *cura*, to bring the law back into equilibrium. For without that equilibrium, the minor too was in effect at a disadvantage: nobody will deal with a person who deals on such unequal terms.

II SLAVERY

The modern literature on slavery is so massive that here only the briefest account will be given.

1. Slaves

Roman law enshrines a great contradiction: on the one hand slaves were property, just like a book or a dog; on the other, they were also human, and to make full use of them required that their human characteristics – their intellect and the opportunities it offered – be recognized. These two strands of thought conflict but each can be identified throughout the law.

Slaves were property. They were bought and sold like other goods. Slave dealers had a bad reputation: the seller of a slave was required to warrant that the slave was free of defects; eventually this warranty was implied in the contract of sale (more of this in chapter 5). Much the same regime applied to cattle. Nothing could make it clearer that the slave was property than the elaborate discussions of the jurists about whether an ailment, disease or impairment amounted to a defect in the goods and so a breach of contract (*D.* 21.1).

Since a slave was property, the basic notion was that the owner could do what he liked with it. Yet slaves were not purely labourers but per-

formed much skilled work, for instance as teachers, doctors, and commercial agents. Equally, they were an extremely valuable economic resource, so that one should not get carried away with the idea that they were constantly maltreated: ill treatment of them for its own sake was self-inflicted economic harm. None the less there is every reason to think that some slaves were maltreated or inhumanely overworked.

There were, however, gradual humanitarian developments: the prohibition of excessive harshness; the requirement introduced by Hadrian that an owner should obtain the approval of a state magistrate before killing his slave who had committed crimes. Under Antoninus Pius an owner who killed his own slave was made as much amenable to justice as one who killed someone else's. On the whole, these relaxations of the original stern regime do not alter the fact that slaves are property; they are simply restrictions on the use of property, much as we find nowadays in planning legislation. A more drastic innovation, also of Antoninus Pius, was that owners whose slaves sought refuge because they were being treated excessively harshly could be forced to sell them (Ulpian, *D.* 1.6.2). This was the first time it had been possible for a slave to influence his own fate: he could bring about the expropriation of his owner, admittedly against compensation. This is indeed a recognition that the slave was a person.

There was also more direct recognition of this fact. For example, slaves were able to have quasi-marital relationships (*contubernium*). Recognition was granted to these in law; so, for example, if you bought a 'married' pair of slaves but wanted to return one as defective goods, you must return both (*D.* 21.1.35). At least this is a start. But the main catalyst for recognition of slaves as persons was provided by the self-interest of owners: to make full use of a slave involved recognizing that he or she was a person who could do things.

Here the law came up against a number of difficulties. Slaves were not people (*pro nullis habentur*) and so could neither sue nor themselves be sued. They could own nothing and anything they acquired, whether a piece of property or the benefit of an obligation, they acquired for their owners. They could not make the position of their owners worse: so they could not alienate property which belonged to their owners; nor could they bring their owners under any obligation. Accordingly, their owners could not be sued on account of their dealings either.

These difficulties are similar to those discussed earlier in this chapter in connexion with children without legal capacity and minors. So long as it was possible to sue neither the slave nor the slave-owner, nobody will

willingly have done business with a slave. But that deprived slaves of a huge part of their potential utility. For that reason, the praetor intervened, to create a range of actions which could be brought against a slave-owner arising out of the dealings of his slave. These are discussed in chapter 5.

2. *Freedmen (*liberti*)*

Slaves could be freed by their owners and, if freed in due form by Roman citizens, with their freedom they also obtained Roman citizenship. After the *lex Aelia Sentia* of AD 4, however, only slaves over the age of thirty could be freed and this must be done in proper form; those 'freed' in breach of this statute became only 'Junian Latins', a lesser status which meant in particular that they had no right to dispose of their property on death. If freedmen were already second-class citizens, Junian Latins were third-class. While the size of this class is not clear, it may have been very substantial (Weaver 1997).

Freedmen were, although free, subject to a number of piecemeal and not very interesting restrictions: from the time of Augustus they could not, for example, marry members of the senatorial class. More important for present purposes is that they owed obligations to their former owners (or 'patrons'). In particular, the freedman or freedwoman was under a duty to show respect (*obsequium*) to the patron, which had some practical effects, such as the fact that he or she could summon the patron to court only with the praetor's permission; the freedman or freedwoman also had to provide services (*operae*) to the patron, the extent of which in days per year would normally be agreed at the time the slave was freed. In addition, if the freed slave died intestate the patron had certain rights of succession in his or her estate.

III SUCCESSION

1. *Wills*

It was open to any Roman citizen who was of age to make a will; a woman would require the authority of her tutor. The law of succession is one of the most complex areas of Roman law, and there was a large number of formal requirements which had to be met for the will to be valid. The full details need not be considered here, but included such things as formal words for the appointment of heirs and legatees; the

need for the appointment of the heir to be made before any other dispositions were made; the need for children and certain others, if they were not being appointed as heirs, to be disinherited either by name or in a general clause; and attestation by a number of witnesses. What is important is that all of these requirements were requirements of form and not content. Provided the testator succeeded in complying with the form, which with legal advice need not have been difficult, the will could leave property to anyone the testator wanted.

Non-compliance with the formal requirements meant invalidity and intestacy. An interesting illustration is given by the following text:

> 'I, Lucius Titius, have made this will without any legal expert, observing the reason of my own mind rather than excessive and miserable pedantry; if I have done anything without due legality or skill, let the wishes of a sane man be treated as valid in law.' He then appointed his heirs. A question arose when the property was claimed on intestacy. . . (Scaevola, *D.* 31.88.17)

The jurist does not trouble to say what was wrong with the will. But the testator's plea *ad misericordiam* was evidently rejected; the will was void and therefore intestacy supervened. Given the number of pitfalls, it may be that legal help in making a will was usual.

Content of wills

Wills had to appoint an heir or heirs. The heir was responsible for continuing the deceased's family *sacra* or religious observances. The heir also succeeded not only to all the deceased's assets and rights but also to his or her obligations (so far as they were capable of surviving his or her death). This applied in particular to debts. The position of heir was therefore not merely a responsible but might also be an unprofitable one, since the debts of the inheritance might well exceed its assets and the heir would none the less remain liable to pay them in full. There is good evidence that, to spare their children these responsibilities and burdens, some testators preferred to disinherit them, and appoint someone else as heir charged with the duty of transferring property to the children, usually by way of *fideicommissum* (see below; Ulpian, *D.* 28.2.18 and *D.* 38.2.12.2). By this means the children could be spared the burdens which heirship imposed. Various technical devices were in due course devised to attempt to improve the position of the heir (Buckland 1963: 304–6, 316–19).

Apart from the appointment of an heir, the contents of a will were optional. Typically, a paterfamilias might appoint tutors for his children in minority; free some well-deserving slaves; and make legacies.

Legacies are of particular interest, because all the evidence is to the effect that these were so far from being few and modest tokens of esteem that they had actually to be curtailed by statute (Duncan-Jones 1982: 21). Much property was dispersed among many recipients; in part these, it seems, were payment for what during the testator's lifetime had been obtained through friendship and patronage. There was a series of statutes restricting the testator's power to dissipate his estate by means of legacies. Here it is enough to note the last of those statutes, the *lex Falcidia* of 40 BC, which provided that after paying legacies the heir (or heirs) must be left with a quarter of the net estate; if the total legacies exceeded that quarter, the legacies were abated in order to preserve it. This rule provided the jurists with a number of thorny technical problems, and the remnants of their discussions can be read in *D.* 35.2. What is most striking is that anybody should think of leaving more than three-quarters of his or her estate to persons other than the heirs appointed under the will.

Legacies

Several books of the Digest are entirely made up of discussion about types of legacies. They provide an invaluable picture of the sorts of property a Roman testator might have and might wish to single out and leave in a bequest. All that is possible here is to note some of the categories of legacy to which the jurists devoted particular attention: dowry; wine, corn or oil; farm equipment; *peculium*; food (*penus*); furniture; jewellery; freedom. The detailed discussions of the jurists can be found in books 33 and 34 of the Digest.

It is worth commenting in slightly more detail on four types of legacy.

(1) Usufruct is discussed in more detail in the next chapter, as an institution of the law of property. For the purposes of this chapter, what is important is that this enabled a testator to leave the ownership of his estate to one person but a legacy of the usufruct in it to another: the legatee was entitled to use the property and take its income or fruits, either for a fixed term or for life. By far the commonest arrangement was that a paterfamilias left a usufruct in his estate to his widow for her lifetime and ownership of the property to the children (*D.* 33.2).

(2) Legacies of annuities. A title of the Digest is devoted to legacies of annuities, that is payment of annual sums for the remainder of the lifetime of the payee (*D.* 33.1). The jurists construed these as a series of annual payments, of which the first was unconditional and the remainder were subject to the condition that the legatee was alive at the time

due for payment (Paul, *D.* 33.1.4). There are examples of annuities in favour of wives, children, and freedmen. It might be necessary to value the annuity in order to ensure that the *lex Falcidia* was complied with. An intriguing text of Aemilius Macer sets out how this was to be done, by making assumptions about the legatee's life expectancy at a given age: the range is from five years for those of age sixty or more to thirty years for those between birth and age twenty (*D.* 35.2.68 pr.). These assumptions, although not generous, appear not to be too unrealistic (Frier 1982; Duncan-Jones 1990: 93–104).

(3) A similar sort of arrangement was the legacy of an allowance for food or clothing (*alimenta*). The Digest suggests that this would most commonly be left to freedmen and might be for payment in monthly or annual instalments for a fixed period of years, or until the age of majority, or for life (*D.* 34.1).

(4) Legacies for purposes. Philanthropists seem to have favoured what the jurists called legacies *sub modo*, legacies for purposes to be carried out. Inscriptions as well as texts in the Digest attest a large number of these, for such things as providing games, heating public baths, paving roads, and constructing buildings, or for the commemoration of the deceased. Here is one example: 'Lucius Titius left a legacy in his will of 100 to his hometown, Sebaste, so that from the interest on it games should be celebrated in his name every other year . . .' (Scaevola, *D.* 33.1.21.3). In order to ensure the durability of such arrangements, the legatee chosen would have to be a non-natural person, such as a municipality: the legatee was then liable, so long as it existed, to perform the purpose for which the legacy had been left. In classical law, however, such arrangements suffered from the weakness that the *modus*, the purpose, could not be enforced as such: the legatee could only be forced to pay damages. (This was a general rule of the classical procedural system: see chapter 6.) There was no guarantee therefore that arrangements of this sort would be observed. In later classical law, however, it looks as if the purpose might have been enforced as such if there was a public interest.

2. Fideicommissa *or trusts*

The most versatile institution of the law of succession was the *fideicommissum* or 'trust'. This was a device which – like a legacy or succession under a will – operated only on the death of the person establishing it. But whereas appointment as heir was made directly by the testator, and a legacy was paid directly by the heir to the legatee, the trust

worked indirectly, through an intermediary. The person making the *fideicommissum* would entrust (*committere*) property to the faith (*fides*) of an intermediary, for it to be conveyed ultimately to the beneficiary. The intermediary was usually, but did not have to be, the testator's heir.

Initially trusts were not recognized by the law, and the only entitlement the beneficiary had was a moral one which was not enforceable in the courts. That changed when the emperor Augustus introduced a jurisdiction charged with the enforcement of such trusts; at first the consuls were responsible for this jurisdiction. Later on, a special praetor performed the same role. An institution which had depended purely on faith and friendship now came to depend on legal obligation.

The trust was very versatile, but we can review at least its principal uses.

(1) It was used to transfer property to beneficiaries who as a matter of *ius civile* were unable to receive legacies or inheritances: for example, foreigners, proscribed criminals, those debarred under statutes such as the *lex Voconia* or the Augustan marriage legislation. There is good evidence of this in the works of Cicero (*fin.* 2.55). Although it is hard to believe that this freedom remained wholly untrammelled once trusts were actionable, there is none the less evidence of their being used for avoidance of civil-law restrictions; and a series of measures through the first and second centuries AD closing loopholes confirms the – albeit diminishing – utility of the trust for getting round inconvenient rules of civil law. There are strong parallels here not just with the development of trusts in the common law but also that of equivalent fiduciary devices such as *Treuhand* on the continent: they too were initially associated with circumvention of the strict rules of law.

(2) Under civil law the appointment of an heir was permanent. The trust, however, allowed appointment of an heir to be followed by a transfer of the whole or part of the inheritance to someone else. Gaius deals with this case 'When we have written "Let Lucius Titius be heir", we can add "I ask and request of you, Lucius Titius, that as soon as you are able to accept the inheritance you make it over to Gaius Seius." ' (*Inst.* 2.250). In this case the heir was obliged to transfer the inheritance immediately. But often the heir was asked only to transfer it after an interval; a common case was for the transfer to be made on the trustee's death (Papinian, *D.* 35.1.102; *D.* 36.1.56 and 60.8). Here the trust provided an alternative to usufruct for granting someone a life interest in property (the difference was that, whereas under usufruct the person enjoying the life interest did not own the property, under a trust he or she did, but with

the obligation to transfer it to the beneficiary of the trust). This method too seems to have been used to benefit the testator's widow during her lifetime, the property being directed ultimately to the children. There is some reason to think that this device may occasionally have been used to protect the interests of children of first marriages as against their stepmother (Humbert 1972: 207–40; but see Treggiari 1991: 392).

(3) Trusts could be imposed not only on the heir but on any person who acquired a benefit from the deceased, even if the benefit was very modest and essentially transitory, most of it being passed on to the ultimate beneficiary. That included heirs who succeeded on intestacy. The reasoning behind this was quite simple: 'Trusts can be charged on heirs on intestacy, since the paterfamilias is regarded as intentionally leaving them his estate on intestacy' (Paul, *D.* 29.7.8.1). Here the trust opened up a novel path: it was possible to die without making a will, yet still direct where some or all of the estate was to go.

(4) Because a trust could be charged on a person other than the heir it was able to serve purposes going beyond the generation of the deceased's immediate successors. For example, the testator might appoint someone who received land under his will as trustee under a trust in favour of a further beneficiary, whether that was a named individual or simply a member of the family. Here is one example, provided by Scaevola: 'A father prohibited his son and heir from alienating or mortgaging lands and entrusted to him that they would be preserved for his legitimate children and other relatives' (*D.* 32.38 pr.). Although in this case the son became the owner of the land, it was not his to dispose of; and its fate was already regulated by his father's will. This arrangement could extend over several generations, although classical law appears to have insisted that it was valid only so far as the beneficiaries were identifiable: the most remote beneficiaries who were still regarded as identifiable were the immediate issue of those living at the date of the settlor's death (Modestinus, *D.* 31.32.6). Those who have read a lot of English eighteenth- and nineteenth-century fiction are inclined to imagine that, as with the English entail, much of the land of Roman nobles would be tied up by this sort of device. But in fact there is little reason to believe that this was so.

3. Challenges to wills

So far the discussion has been concerned mainly with the content of wills, but the formal requirements for their validity have also been

mentioned. From the late republic, however, there was also a substantive ground on which a will might fail: it might be challenged by the so-called 'complaint against an undutiful will' (*querela inofficiosi testamenti*). This was an action which could be brought by a descendant or ascendant of the testator if he or she had been left less than a quarter of what would have been his or her share, had the testator died intestate. For example, if the testator had three children, each had a prospective share of one third of the estate, and each could bring the *querela* if left less than one twelfth of it. The result of a successful claim was that the estate fell into intestacy, so the claimant received his or her full intestate share. (There might be additional complications if the claimant chose to challenge only some of the appointed heirs; in that case, the will need not be set aside in its entirety, and bequests made in the will might stand, although scaled down proportionately.)

Although it is not possible to follow through the logic of this argument (as Marcian explains in *D.* 5.2.2), the jurists appear to have taken over from rhetoric the notion that the invalidity of the will was in some sense founded on the testator's insanity at the time of making the offending dispositions. In any case, to succeed in this claim, the claimant not only had to be within the necessary degree of relationship to the testator but must also have been unduly passed over. There were perfectly good reasons for disinheriting relatives, but it is rather interesting that the jurists do not appear to discuss them. It may be that they took the high-minded view that this was a matter for the rhetoricians. Imperial constitutions, however, do go into this question: people validly excluded from benefiting include those leading immoral lives and gladiators (*C.* 3.28.19 (AD 293); *C.* 3.28.11 (AD 225)).

The *querela* is the one and only substantial restriction on freedom of testation in Roman law: a testator simply had to leave these individuals the requisite amount unless he or she had a solid reason for not doing so. But it is worth emphasizing that this tied the testator's hands only to the extent of one quarter of the estate. For the rest he or she was free. By the standards of some modern jurisdictions, the Roman regime was extremely liberal.

It is interesting that two restrictions on absolute freedom of testation – the *querela* and the *lex Falcidia* – emerged at much the same time, in the late republic. It is tempting to connect this with a breakdown of existing conventional *mores* amid the turmoil of the end of the republic. What could previously be taken for granted as social practice now had to be laid down as the law (Paulus 1994).

4. Intestate succession

Intestacy might come about either because no will was made or because the will was invalid. The second of these has already been mentioned: breach of formal requirements might render a will invalid; so might other contingencies, such as the birth of a legitimate child to the testator after the will was made.

It is a vexed question how common it was to make no will (Daube 1965 and 1969: 71–5; Crook 1973; Cherry 1996). Sir Henry Maine famously spoke of the Roman 'horror of intestacy'. There is anecdotal evidence which suggests that making a will was the norm: Cato is notoriously said to have regretted having lived a single day intestate (Plutarch, *Cato maior* 9.6). But in this respect as others he may not have been typical. Those who had nothing to leave are likely to have left no will. But the evidence seems to suggest that, motivated by horror or otherwise, the propertied classes at Rome typically did make wills. The material which survives suggests that men were significantly more likely to make wills than women (Champlin 1991: 46–9). Perhaps women were less prone to feeling horror.

It is of course a powerful incentive to make a will that, in its absence, one's property will be dispersed to people one would not wish to receive it. We must look therefore at the rules which applied for distribution of an estate on intestacy.

The rules were these. Children who became independent (that is, were released from paternal power) on the death of the deceased had the first claim to the estate, in equal shares. They were known as *sui heredes*. There might not be any (there never could be any, for example, if the deceased was a woman). In that event the next best claim was that of the nearest 'agnate' or agnates, if more than one were equally near. They were relatives who traced their relationship to the deceased through the male line only. There might also be no agnates: in the case of freedmen there never would be, and here the rule was that if the freedman left no children the patron succeeded to his estate. For ordinary free citizens, in remote pre-classical times, if there were no *sui heredes* or agnates, the property went to the *gens*. This term is sometimes translated as 'clan'. Perhaps 'extended family' is less redolent of the Scottish highlands. In the developed law the *gens* played no part, and the praetor introduced a more complicated hierarchy, in which children, including those who had been emancipated by the deceased and so were technically no longer within the family, came first; then came agnates; while

cognatic relations – that is, those whose relationship with the deceased was traced either through the female or the male line – were also given a claim according to their proximity to the deceased. The appalling details of how this question was determined are contained in a text of Paul (*D.* 38.10.10). Last of all came the claim of spouses, so preserving until the bitter end the separation of their property.

What is interesting about this division is the equal treatment given to the deceased's children: no preference is given to males over females, and none to the eldest male over younger children. This system of partible inheritance must have had a strong tendency to fragment the deceased's estate, and one that may seem the more surprising in a society where possession of a particular amount of property (mostly land) was what determined an individual's membership of a given class. Various factors may have mitigated the tendency to fragmentation: for instance, making a will in which preference was shown to one or more of the children; and the likelihood that only a small number of his children would survive the deceased.

What then would be the motive for making a will? A recent study of surviving Roman wills indicates that the Roman testator was most likely to appoint his children – and particularly his sons – as heirs under his will (Champlin 1991: 107–20). But it was precisely to the children, in equal shares, that the law of intestacy directed an estate. A strong reason pointing an individual towards making a will would therefore be the desire to treat the children unequally, whether or not for the purpose of preferring the sons, and whether or not with the intention of avoiding undue fragmentation of the estate. This of course would not be the only possible reason: others would be a sort of superstition (as Maine suggested) or the desire to free slaves or pay off social obligations by leaving legacies. There does not seem to be much merit in speculating about which, if any, of these reasons would have weighed with most Roman testators most of the time.