

Roman Women's Rights in Divorce and Custody

Ancient History Master Thesis

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Introduction

The Roman upper classes did not approach marriage and divorce quite the same way our western civilisation does today. *'The Romans were monogamous, but successively.'*¹ This of course meant that the Romans, both men and women, could marry more than once. This also means that divorce could be a frequent practice.

Marriage itself took a different shape than what is considered normal in our society, which will be shown in this paper itself. Whereas nowadays it is a decision made at one point by two people, in Roman times from the Republic onwards, it was more a question of consent from the couple and the fathers that could quite easily be withdrawn, resulting in the end of the marriage.²

Then, as now, there is sometimes the problem of what will become of the children that came from the now dissolved marriage. Nowadays most children will stay with their mother instead of their father in such a case, but that was all rather different in the time of the Romans. So the question that can be asked is as follows: How did the rights of Roman women regarding divorce and custody of their children evolve over time?

Quite a lot of work has already been done on the topics of marriage and divorce in Roman times. Susan Treggiari³ has written a very comprehensive book on every aspect of Roman marriage and the works of Corbett⁴ and Gardner⁵ deserve a mention as well; both have created comprehensive overviews on Roman marriage too. They have all covered the topic of divorce as well within their works, as have some other authors. This topic is well covered already. The same is true for the divorce issue, where Judith Evans-Grubbs⁶ among others has done a lot of work on.

On the other hand, surprisingly little has been done on the issue of custody and how that was given shape. The bigger works do often mention it, but only very briefly in a few lines, which makes the topic itself rather overlooked. There is one article that covers the topic in more depth⁷ but this only looks at the one period of time and does not offer a comprehensive overview of the issue or a chronological progression. That is where this paper comes in to try and fill a little of the gap that exists.

The primary sources that will be used in this investigation are law texts that deal with the topics of marriage, divorce and child custody. The laws will be used to get a closer look at the legal framework surrounding these cases of divorce and custody. They will give a closer

¹ Corbier, M. 'Constructing kinship in Rome : marriage and divorce, filiation and adoption' in: D. I. Kertzer and R. P. Saller ed. *The family in Italy from antiquity to the present* (London, 1991) 127-144, page 128

² Cantarella, E., 'Roman Marriage: Social, Economic and Legal Aspects,' in: *Hoping for continuity : childhood, education and death in Antiquity and the Middle Ages* (2005) 25-32, page 29-30

³ Treggiari, S., *Roman Marriage: Iusti Coniuges from the Time of Cicero to the Time of Ulpian* (Oxford, 1991)

⁴ Corbett, P. E., *The Roman Law of Marriage* (Oxford, 1930)

⁵ Gardner, J. F., *Women in Roman Law & Society* (London and Sydney, 1986)

⁶ Evans-Grubbs, J., *Law and Family in Late Antiquity: The Emperor Constantine's Marriage Legislation* (Oxford, 1995)

⁷ Evans-Grubbs, J., 'Children and divorce in Roman law,' in: *Hoping for continuity: childhood, education and death in Antiquity and the Middle Ages* (Rome, 2005) 33-47

insight in what legal rights women had regarding their children and how these laws evolved over time.

The problem with such texts is that they always originate from high up in the hierarchy. The laws apply mostly to the upper classes of Roman society, which is what this paper by necessity will mostly look at. Then there is the problem with laws in that is not always clear how much they are adhered to. Suzanne Dixon rightly points out that the Romans did not easily discard old and redundant laws. They were held in such reverence that they did not like to meddle too much in them.⁸ Nevertheless, those laws are what remains and as such they are the focus of this paper.

This thesis will be split up into three chapters. The first chapter must by necessity be a short introduction into what a Roman marriage was. It is almost impossible to understand what divorce and custody meant without a clear understanding of what went before the divorce. Roman marriage was distinctly different from the way marriages are arranged in the modern western societies and must therefore be explained. This will be done by examining the customs and the laws surrounding Roman marriages, laying the groundwork for the next segment of this thesis.

It is important to note that not every single aspect of Roman marriage can be covered in such a chapter. This paper does not strive to do so. As stated before, much work has already been done on Roman marriages and nothing that can be done in the span of this paper can come even close to achieving to half of what already has been done. It is however necessary to include some aspects of Roman marriage in order to create a clear picture.

The next part will look at women's rights regarding divorce in general. It is important to build up the legal framework concerning women's rights in both marriage and divorce and how these laws developed over time. Again, this is still part of laying the necessary groundwork to understanding what rights women had in the custody of their children. That means that this chapter, like the first, will not cover every single aspect of divorces, although it will certainly contain all the necessary elements.

Following on from this is the third part, which will examine women's rights regarding custody of their children more closely. This is of course the heart of the matter and it might seem that two chapters are a long lead-in to the main chapter, but both these earlier chapters are very necessary to fully understand the context of the custody laws. It is impossible to understand the final and main issue of this paper without possessing a clear understanding of the other two, because they are all very closely connected.

Within these chapters the setup will be in chronological order. So while the chapters themselves will be thematically ordered, the structure inside the chapters themselves will be chronological, which seems to make the most sense in this case. It will certainly offer the clearest view and by doing this consistently, it will avoid confusion.

Because laws change over time, especially over such a long time span as this thesis will cover, the period that will be examined in this thesis is the time of the Republic to Late Antiquity. The reason for this is that there is evidence of older forms of marriage⁹ than the one this thesis will begin with, but the sources for those forms of marriages are not very

⁸ Dixon, S., *The Roman Mother* (London and Sydney, 1988) page 42

⁹ Corbett, P. E., *The Roman Law of Marriage*, page 68-69

comprehensive and the same is true for divorces, so those will be left out of this text. From that point onward the developments in laws and customs will be followed to Late Antiquity, where it ends, because Antiquity ended.

For all the primary sources in this thesis the focus will be more on quality than on quantity. This doesn't mean that there will be too few sources. This paper makes use of quite a number of sources. But in this case it is more important to really see what these sources say than to compare them with a great many others. The in depth analysis is of greater value than a great many sources that cannot be studied as comprehensively.

Most of the sources that have been used for this paper I have read originally in Dutch. Since that however would never serve for a paper written in English, the English translations that have been used in this text come from two excellent sourcebooks: Judith Evans-Grubbs's *Women and the Law in the Roman Empire*¹⁰ and *A Casebook of Roman Family Law* by Bruce W. Frier and Thomas A. J. McGinn.¹¹

As for concepts, there will be several. Class is an important one, because both the laws and the more informal writings are dealing with the upper class, for whom the laws were in place. There is simply far less information to be found on the lower classes, which means that they are excluded from this investigation. The reader should bear in mind that the contents of this thesis therefore do not apply to the entire population of Rome, but merely the upper layer of it.

Within that class the focus will be mainly on the women and their children, so gender plays a central role. This thesis focuses specifically on the rights and perspectives of women, even though the laws and texts that detailed those rights were written by men. This shouldn't be too much of an obstacle, because the intention of this text is to determine what the rights of women were and that much can become clear from the texts even if the women didn't write those themselves.

¹⁰ Evans-Grubbs, J., *Women and the law in the Roman Empire: a sourcebook on marriage, divorce and widowhood* (London, 2002)

¹¹ Frier, B. W. and McGinn, T. A. J., *A casebook on Roman family law* (Oxford and New York, 2004)

Chapter 1

Roman Marriage

This chapter seeks to establish what marriage looked like for the Romans, from approximately the second century BC forwards, and how it developed over time. It then looks at the rights of women concerning marriage in particular. It is therefore important to first define what marriage meant and how a marriage was made. Only after that is it possible to truly understand the concept of divorce in the next chapter. And only when that has been made clear, can one look at the rights of women in marriage and divorce. This lays the groundwork for the matter of custody that comes after that.

The oldest forms of marriage

The phases of the Roman Marriage can be divided into three. The first period of which will be discussed in this paragraph. These early forms of Roman marriage were fundamentally different than the forms of marriage that became common in later times, therefore it is important to discuss them separately from the kind of marriages that were common during the period known as the classical period of Roman marriages.

In this early period of Roman marriage there were three distinct forms, all of which will be discussed below. All three of these types of marriages involved *manus*, where the woman was transferred from her own family into the family of her husband¹² and she came under his authority, which was not quite the same as being under the *patria potestas*, under her father's power. She had the right to call herself *mater familias* if she was in a *manus* marriage. Wives who were not in *manus* had no such right.¹³

Manus was not as one-sided as *potestas* and the woman was entitled to certain rights and protections, because the husband was not allowed to sell his wife and he was not allowed to kill her immediately either, not even if she had seriously misbehaved herself, not without consulting a council of relatives first.¹⁴ She also could inherit from her husband and her children because she was from the moment of her marriage onwards officially related to his family. It went so far that if a husband had made a will prior to his marriage that it became invalid after it, because his wife was entitled to inherit from him as well.¹⁵

But the woman's position in law was rather weak, because for most intents and purposes she acquired the same status as the man's daughter. Everything she had owned before she married became the property of her husband and neither could she incur debts on his behalf.¹⁶ In fact, a woman in a *manus* marriage had no property of her own at all. Everything she did possess before her marriage became her husband's, but anything that she acquired during the

¹² Treggiari, S., *Roman Marriage*, page 28-29

¹³ Treggiari, S., *Roman Marriage*, page 28

¹⁴ Frier, B. W. and McGinn, T. A. J., *A casebook on Roman family law* (Oxford and New York, 2004) , page 89-90

¹⁵ Treggiari S, *Roman Marriage*, page 29

¹⁶ Treggiari, S., *Roman Marriage*, page 29-30

marriage also belonged to her husband, or his father if he was still alive. This also applied for items and property that were left to her in someone's will.¹⁷

The three ways through which a *manus* marriage could be done are as follows:

1) Confarreatio

Confarreatio was the oldest form of Roman marriage and in this case the woman came under *manus* through a nuptial ceremony.¹⁸ This ceremony involved the use of a sacramental loaf made of far (spelt).¹⁹ It also involved a sacrifice to Jupiter.²⁰ Confarreatio was a form of marriage that was mainly reserved for the patrician classes, because it involved the Pontifex Maximus, the Flamen Dialis (the priest of Jupiter) and an additional ten witnesses.²¹

This is one of the two of the forms of marriage that required the ceremony in itself to make it legal, which is a good thing to bear in mind.

2) Coemptio

The second form of marriage is called coemptio, a form of marriage where the husband "bought" the wife in a formal transaction.²² What he bought was of course not so much the woman herself – because she was not a slave – as the right of *manus* over her. This transaction transferred the woman in question from her own family to the family over her husband. It removed the *patria potestas* of her own father over her, because she was no longer a part of his family, and gave her husband, or her husband's father if he was still alive, *manus* over her.²³ As mentioned before, *manus* was not the same as *patria potestas*, but there were some definite similarities.

The ceremony itself, because coemptio did require a ceremony, involved the *pater familias* handing over the woman to her bridegroom and for this there were witnesses required.²⁴ The ceremony also involved some words that needed to be spoken, but they are unknown to us today.²⁵

Although coemptio was a form of selling and buying, that did not mean that there was actually money involved in the process. Often there was a dowry, but this was paid by the bride's family to the groom's²⁶, so the bride's family did not benefit financially from this "sale."

3) Usus

The last way to make a marriage was through a practice called usus, which was the least formal of the three forms of marriage. It did not require any kind of ceremony to be observed. In the

¹⁷ Frier, B. W. and McGinn, T. A. J., *A casebook on Roman family law*, page 93

¹⁸ Cantarella, E., 'Roman Marriage: Social, Economic and Legal Aspects,' in: *Hoping for continuity : childhood, education and death in Antiquity and the Middle Ages* (Rome, 2005) 25-32, page 26

¹⁹ Treggiari S, *Roman Marriage*, page 21-22

²⁰ Corbett, P. E., *The Roman Law of Marriage* (Oxford, 1930), page 72

²¹ Cantarella, E., 'Roman Marriage: Social, Economic and Legal Aspects' page 26

²² Treggiari S, *Roman Marriage*, page 28

²³ Treggiari, S., *Roman Marriage*, page 21-22

²⁴ Frier, B. W. and McGinn, T. A. J., *A casebook on Roman family law*, page 55

²⁵ Treggiari S, *Roman Marriage*, page 26-27

²⁶ Frier, B. W. and McGinn, T. A. J., *A casebook on Roman family law*, page 55

case of *usus* all that was needed to make it a valid marriage was that a woman lived as a man's wife in his house for the duration of one year. When that period ended, she became a part of her husband's family without any further need for formalities.²⁷

Usus is the least formal way to acquire *manus* over a woman, but it was also complicated. Before the *manus* over a woman was acquired, she had already lived as a wife for an entire year. It seems fair to say that during that time both man and woman considered themselves to be married, even though no wedding ceremony had been celebrated. Could it then be called a marriage? It is somewhat unclear if during that one year of cohabitation, the two parties were also married and if that was then a marriage without *manus*.²⁸ *Manus* over the woman was only acquired after a year after all.

This is where *usus* becomes complicated, because there was a very simple way for a woman, or her father who during that year still had *patria potestas* over her, to avoid that the husband's family gained *manus* over her. There was a rule that stated that if during this one year the wife left her husband's house for three days and stayed elsewhere, the terms for acquiring *manus* had not been met. From that point the period of a year started again and if during that time the woman left the house again for three days, the same applied.²⁹

All things considered, *usus* is of these three the most loose arrangement and the easiest to wriggle out of. This then sets the tone for the classical era of marriages, which will be discussed below. What can be concluded for this early era of Roman marriages was that they were reasonably formal, with the possible exception of *usus*, but that in the *usus* form there are signs of what came later.

Roman Marriage Classical Period

The three forms of marriage that have been discussed above fell into disuse fairly soon and were replaced with an altogether different form of marriage that no longer involved *manus*. By the time that Cicero was alive it had become unusual for women to be in marriages that involved *manus* at all.³⁰ Free marriages, marriages without *manus*, took their place and were already common in the third and second century BC.³¹

Marriages were of course still made, but the practicalities looked rather different. There were however still conditions that must be met for marriages to be made. Both the man and the woman needed to have *conubium*, the right to marry. This was in fact rather simple, because both parties needed to be free and they needed to be Roman citizens.³² Beyond that there were several other factors that could make a marriage impossible, such as being too closely related.³³ A loss of freedom, because of being taken captive by an enemy for instance, also affected his right to have *conubium*.³⁴ A slave could not have *conubium* because slaves were not free and foreigners could not have *conubium* either on account of not being Roman citizens.³⁵

²⁷ Cantarella, E., 'Roman Marriage: Social, Economic and Legal Aspects' page 26-27

²⁸ Corbett, P. E., *The Roman Law of Marriage*, page 68

²⁹ Cantarella, E., 'Roman Marriage: Social, Economic and Legal Aspects' page 27-28

³⁰ Treggiari S, *Roman Marriage*, page 21-22

³¹ Corbett, P. E., *The Roman Law of Marriage*, page 90-91

³² Gardner, J. F., *Women in Roman Law & Society*, page 31

³³ Corbett, P. E., *The Roman Law of Marriage*, page 24

³⁴ Treggiari S, *Roman Marriage*, page 44

³⁵ Gardner, J. F., *Women in Roman Law & Society*, page 31-32

It is however not all as clear-cut as it seems, because foreigners could obtain a permit that allowed them to marry a Roman citizen anyway.³⁶ The Latin cities already had the right during the time of the Republic, but if the father was Latin and the mother Roman, this did mean that the children resulting from that marriage would be Latin, because children took their status from their father and not their mother.³⁷ Following from this meant that if a Roman woman had a child with someone who did not have *conubium*, this made the child illegitimate.³⁸ Most of the foreign groups living in the Roman empire obtained citizenship as time went on until Emperor Caracalla gave the Roman citizenship to every person, provided they were free and not a slave, in 212 AD.³⁹

The reason that the status of the husband and wife mattered so much, was because of the children that were born to them.⁴⁰ The primary purpose of a Roman marriage was to produce children.⁴¹ This was a definition of a legally binding marriage in Rome. It was considered important to have legitimate children, heirs, to pass the inheritance to when the parents died.⁴² Only children who had been born in a legal marriage fell under their father's *potestas*.⁴³ This means that an illegitimate child, such as one born from a Roman woman but a father was not Roman did not fall under the father's *potestas*.

Several factors played a role in making a marriage, most of which are not of any particular interest for now, but it is interesting to take note of the fact that love did not necessarily play much of a role, if at all. As mentioned before, marriage was primarily for the sake of having children to carry on the family and to leave the possessions to when the parents died. It was even frowned upon among the upper classes to make a marriage based purely on attraction and love.⁴⁴

What was necessary for a Roman marriage was to have *conubium* and to be old enough. For boys this was usually at around the age of fourteen and for girls at the age of twelve.⁴⁵ The other thing that was an absolute requirement for marriage was consent. Marriage in Rome was something that was heavily based on consent, as mentioned in the Digests. '*Sleeping together does not make a marriage, but consent does.*'⁴⁶ It should be clearly understood that consent did not only mean that the man and the woman entering into the marriage should give their consent for the match. The fathers retained their power, *potestas*, to either withhold consent at first or withdraw it later on. Needless to say that the later withdrawal of consent meant the end of the marriage and therefore divorce.⁴⁷ This will of course be discussed in more depth in chapter 2.

The fathers' consent for a marriage were the most important conditions for a marriage, provided that they of course were still alive at the time. If the fathers had died, their children

³⁶ Gardner, J. F., *Women in Roman Law & Society*, page 32

³⁷ Treggiari S, *Roman Marriage*, page 44-45

³⁸ Treggiari S, *Roman Marriage*, 45-46

³⁹ Frier, B. W. and McGinn, T. A. J., *A casebook on Roman family law*, page 31-32

⁴⁰ Gardner, J. F., *Women in Roman Law & Society*, page 32

⁴¹ Evans-Grubbs, J., *Women and the law in the Roman Empire: a sourcebook on marriage, divorce and widowhood* (London, 2002), page 81

⁴² Corbier, M. 'Constructing kinship in Rome' 127-144, page 133

⁴³ Gardner, J. F., *Women in Roman Law & Society*, page 32

⁴⁴ Bradley, K. R., *Discovering the Roman Family: Studies in Roman Social History* (New York and Oxford, 1991), page 127

⁴⁵ Gardner, J. F., *Women in Roman Law & Society*, page 38

⁴⁶ D. 50. 17. 30. Translation used: Evans-Grubbs, J., *Women and the law in the Roman Empire*, page 82

⁴⁷ Cantarella, E., 'Roman Marriage: Social, Economic and Legal Aspects,' page 29

were free to make marriages as they saw fit.⁴⁸ But so long as the father was alive, his consent was needed for a match. And, should the grandfather still be alive at the time that the marriage was made, then both his consent and that of the father himself were required for making the marriage valid.⁴⁹

This however is also not as simple as it sounds, because while a father could withhold his consent for a match, he could not make his son marry his choice for a wife. If the son put his foot down and refused to make that marriage, there was nothing the father could legally do about that.⁵⁰ This gave the son a little leeway to make his own choices or at the very least block a marriage that he did not want without the need for giving any reasons for doing so.

It was different for a daughter whose father was still alive. She did have the option to refuse the choice of husband that her father had chosen for her, but only when his choice was morally objectionable. Otherwise, when she did not explicitly speak out about it, it was understood that her consent was given and that she agreed with the match:⁵¹ *'But she who does not fight against her father's will is understood to consent. Moreover, the liberty to dissent from her father is only allowed to the daughter if her father chooses for her a shameful fiancé or one of unworthy habits.'*⁵² The only way a daughter could marry without her father's consent while he was still alive was if he was considered mad, because someone like that could not give his consent to anything.⁵³ All things considered, this did not leave a woman much in the way of being able to object.

Marriages made without the father's consent were simply not considered valid and the children who were born from such a marriage were not considered legitimate. If the marriage was made without the knowledge of the father however, for instance if he had been away for a long period of time, and he had not objected to the marriage, that did count as giving consent, which made the marriage legal.⁵⁴ This meant that sons and daughters could take a rather active role in the making of their own marriages, so long as their fathers did not actively object. Consent can therefore be understood as the act of really agreeing or simply not be seen to object at all.⁵⁵

Consent was important, as shown above, and so was intent. The bride and groom had to intend to live as husband and wife and then view each other as the spouse to which they were married, a concept referred to as *affectio maritalis*.⁵⁶ This state of mind served to set marriage apart from concubinage.⁵⁷ The couple remained married so long as they behaved as though they were married to one another, even if they had for some time lived apart.⁵⁸

⁴⁸ Frier, B. W. and McGinn, T. A. J., *A casebook on Roman family law*, page 216

⁴⁹ Corbett, P. E., *The Roman Law of Marriage*, page 57

⁵⁰ Evans-Grubbs, J., 'Parent-child conflict in the Roman family: the evidence of the code of Justinian' in: George, M., *The Roman family in the empire: Rome, Italy, and beyond* (Oxford, 2005) 93-128, page 100-101

⁵¹ Evans-Grubbs, J., 'Parent-child conflict in the Roman family: the evidence of the code of Justinian', page 101

⁵² D. 23.1.12, translation used: Evans-Grubbs, J., *Women and the law in the Roman Empire* page 89

⁵³ Corbett, P. E., *The Roman Law of Marriage*, page 58-59

⁵⁴ Frier, B. W. and McGinn, T. A. J., *A casebook on Roman family law*, page 216

⁵⁵ Frier, B. W. and McGinn, T. A. J., *A casebook on Roman family law*, 41

⁵⁶ Treggiari S, *Roman Marriage*, page 44-45

⁵⁷ Gardner, J. F., *Women in Roman Law & Society*, page 47

⁵⁸ Frier, B. W. and McGinn, T. A. J., *A casebook on Roman family law*, page 49

For the woman it was also important to live in the house of her husband. It was an integral part of marriage, though in itself it did not in fact mean that she was indeed married. Cohabitation alone was not enough.⁵⁹

This makes the basis of a marriage very loose. Roman marriage did not in fact depend on written documents of the fact, such as is the case today, nor did they require a ceremony to make it legal. This lack of official documentation to be lodged with the relevant authorities naturally makes it far easier for couples to divorce. Because there were no legal documents to untangle in case a marriage ended, the marriage itself remained a private affair.⁶⁰

Such a loose structure made it also somewhat difficult to prove that a marriage existed or had existed. It was usual to draw up some document that recorded the marriage, for example to record the details concerning the dowry, which could then serve as proof that the marriage had both existed and was valid.⁶¹ Documents recording the existence of a child who was marked as legitimate could also serve as proof for a marriage, because without a legitimate marriage there could simply be no legitimate child.⁶²

In the absence of such documents proving a marriage was difficult, but not impossible. If there happened to be some dispute over the marriage, the next step was to consult the neighbours. If the neighbours and friends of the couple had observed that the couple had lived and behaved as a married couple, their observance carried some weight in establishing whether there had been a legitimate marriage or not.⁶³

Establishing the fact that there was a legitimate marriage became more important with the introduction of legislation by the Emperor Augustus, because he penalised those who did not marry and have children. There was no direct fine to pay for not being married and for not remarrying within a certain period of time, but the laws did restrict unmarried persons' abilities to inherit. On the other hand it meant privileges for those men and women who did marry; certain offices became more easily available for men and a woman could, if she had three children be allowed to handle her own affairs without any need for a guardian.⁶⁴ It also served as a clear incentive to get married and procreate.

The letter of the law did not leave much room for not getting married, at least for someone who did not wish to suffer the penalties for such a thing. The law applied to all men between the ages of twenty-five and sixty. Women were supposed to be married between the ages of twenty and fifty. Those who had been widowed or divorced had to remarry within a period of two years.⁶⁵

All things considered, a Roman marriage didn't need any ceremony or celebration to make it valid so long as all the other conditions were met. That did not mean that there was no such thing as a wedding, or at least celebrations and customs to mark the beginning of a marriage, because those did exist. It was not a simple matter of a man and a woman living under the same roof with the consent of their fathers or relevant guardians. According to the laws in place, that was all that was needed for a marriage to be considered valid, as demonstrated above.

⁵⁹ Gardner, J. F., *Women in Roman Law & Society*, page 47

⁶⁰ Corbier, M. 'Constructing kinship in Rome' page 133

⁶¹ Evans-Grubbs, J., *Law and Family in Late Antiquity: The Emperor Constantine's Marriage Legislation* (Oxford, 1995), page 142-143

⁶² Frier, B. W. and McGinn, T. A. J., *A casebook on Roman family law*, page 47

⁶³ Frier, B. W. and McGinn, T. A. J., *A casebook on Roman family law*, page 47

⁶⁴ Evans-Grubbs, J., *Law and Family in Late Antiquity*, page 103-104

⁶⁵ Evans-Grubbs, J., *Women and the law in the Roman Empire* page 84

Certain rituals were observed, which involved sacrifices to the gods and a feast at the bride's house,⁶⁶ so celebrations definitely did take place. But again, celebrations were optional. There was nothing in the law that ordered that such customs should be observed to make a marriage valid.

What can be concluded from this period is that marriages had changed rather drastically from the earlier forms, in which there was no more need for either ceremony or documentation, which of course made it rather difficult to prove the existence of a marriage.

Later Roman Marriage

Roman marriages did not change much in shape in the later Roman Empire, but there was a definite shift in attitudes towards marriage. In 320 AD Emperor Constantine lifted the Augustan law on celibacy,⁶⁷ which made sure that the choice to marry and to have children became much more of a personal choice instead of the civic duty that it had been under the laws of Augustus.⁶⁸

The law stated: *'Those who were considered celibate under the ancient law are to be freed from the threatening terrors of the laws and are to live in such a way as though they were among the number of married (and) were supported by the bond of matrimony, and all are to have an equal condition of taking whatever each one deserves. Moreover, no one is to be considered childless: the penalties proposed for this name shall not harm him. We determine this matter also in regard to women and we release from everyone indiscriminately the commands of the law which were placed on their necks like yokes.'*⁶⁹ It can be said that in some ways this was a return to the state before aforementioned laws came into existence. Even so, there is some debate on whether the Augustan marriage laws were very effective in the first place.⁷⁰

Whatever the case may be with the Augustan legislation, it was apparently considered important enough for Constantine to feel the need to officially revoke it. It seems unlikely that he would have made a law to counter it if it was already quietly ignored and conveniently sliding into oblivion. The fact that he did officially dismiss it more than suggests that it did still operate to some extent at least.

As mentioned above, the Roman citizenship had been extended by Caracalla to almost every free person in the Roman Empire, which should have made the choice of partner easier in terms of the number of people a person had to choose from. But new rules were imposed that limited marriages between people whose social classes were too far apart or prevented men from making marriages with a woman who was for example a prostitute or an actress. Cohabitations between such people was not recognised as a legitimate marriage and children from such unions were likewise deemed to be illegitimate.⁷¹

Consent remained an important factor in making the marriage and continued much as it had been in the previous period.⁷² A contract could be signed and read out to make sure that it

⁶⁶ Cantarella, E., 'Roman Marriage: Social, Economic and Legal Aspects' page 28-29

⁶⁷ Evans-Grubbs, J., *Law and Family in Late Antiquity*, page 119

⁶⁸ Kuefler, M., 'The Marriage Revolution in Late Antiquity: The Theodosian Code and Later Roman Law' *Journal of Family History* 32 (2007) 343-370, page 345

⁶⁹ Cod. Theod. 8.16.1, translation used: Evans-Grubbs, J., *Women and the law in the Roman Empire* page 103

⁷⁰ Evans-Grubbs, J., *Law and Family in Late Antiquity*, page 104-105

⁷¹ Kuefler, M., 'The Marriage Revolution in Late Antiquity', page 349-350

⁷² Kuefler, M., 'The Marriage Revolution in Late Antiquity', page 351

was known that the man and woman were married – the knowledge of the neighbours still served as evidence of the existence of the marriage – and celebrations might mark the occasion, but there was still no ceremony to make the marriage legally binding.⁷³

The father's part in the proceedings remained important and a woman could do very little on her own in regards to her marriage without her father's consent. In some ways it can even be said to be a little harsher than the situation in the classical law. Under those laws a woman could, if she had been emancipated, make her own choice regarding marriage. This later changed to the situation where an emancipated daughter still needed the consent from her father if she was still under the age of twenty-five.⁷⁴ That had become the age of majority during that time for both men and women.⁷⁵

The woman had some leeway, but not very much: *'Widows less than twenty-five years old, even if they enjoy the freedom of emancipation, are not to enter upon a second marriage without their father's agreement or in opposition to him. Therefore the go-betweens and marriage-brokers shall cease, the secret messengers and corrupt reporters of information! No one is to purchase noble marriages, no one is to cause a disturbance, but a marriage alliance is to be considered publicly, and a multitude of suitors is to be summoned. But if in the choice of alliance, the woman's will opposes the opinion of her close relatives, it is certainly pleasing, as has been ordained in the marriage arrangements of women minors whose fathers are dead, that in weighing the issue the authority also of a judicial hearing be added, so that if suitors are equal in birth and morals, he shall be judged preferable whom the woman, deliberating with herself, shall have approved.'*⁷⁶ The woman in question could apparently have her way if the choice was between two suitors of equal standing, but if they were not equal and she preferred the one who was below the man preferred by her family, she would have to marry the one she did not want.

This is rather different from the earlier situation, where a daughter did not have to marry the man her father chose for her if she made a point of speaking up about it. It was true that her consent was assumed if she was not seen to object, but once she did, she had a fairly good chance of being heard. This law seems to rather restrict a woman's right in choosing to marry someone, especially if her wishes clashed with those of her family.

Once a woman was over the age of twenty-five and she was once again free to marry, she did usually have more rights to have a say in her next marriage, especially if her father had died.⁷⁷ If her father had died and she was still under the age of twenty-five, she still needed to reach an agreement with her family before she could make a new marriage.⁷⁸

Having said that, there was a definite shift in attitude, where the consent of the fathers of the bride and groom was still significant, but the consent of the couple in question gained importance as well. *Affectio maritalis* became a more emotional than mental interpretation.⁷⁹

⁷³ Clark, G., *Women in Late Antiquity: Pagan and Christian Life-styles* (Oxford, 1993) page 14

⁷⁴ Evans-Grubbs, J., *Women and the law in the Roman Empire* page 105-106

⁷⁵ Evans-Grubbs, J., *Law and Family in Late Antiquity*, page 140

⁷⁶ Cod Theod. 3.7.1, translation used: Evans-Grubbs, J., *Women and the law in the Roman Empire* page 106-107

⁷⁷ Evans-Grubbs, J., *Law and Family in Late Antiquity*, page 142

⁷⁸ Clark, G., *Women in Late Antiquity*, page 15

⁷⁹ Kuefler, M., 'The Marriage Revolution in Late Antiquity' page 349

Conclusion

The marriage itself changed quite a lot over time. One of the most prominent changes is that the wife was no longer transferred to the family of her husband and that she remained a part of her father's family even when she married. The development towards a more consensual marriage then remained largely unaltered, although rules and laws concerning divorce did alter much in this period, but that will be more closely examined in the next chapter.

As for the rights of women in particular, there seems to be little evidence that they had a say in their own marriages in the earliest phase. This appears to have changed in the classical period, when consent became more important and if a woman truly made the effort to make her voice known, she could object to a husband that her father had chosen for her. This did not give the woman very many rights, but at the very least it can be said that she had some room for some negotiation and a little leeway. The freedoms that a woman had under the classical law were then further restricted in the later Roman law. She had less freedom, especially under the age of twenty-five. So it does seem that conditions were most favourable for women under the classical law and less so under the later Roman law.

Chapter 2

Women's Rights in Divorce

This chapter will examine the rights of women in divorce in Rome and how these rights changed over time. It is important to establish this first before examining the subject of custody more closely in the next chapter; it would be hard to understand without a foundation to build on. In the previous chapter I have already shown that women did not have a great many rights concerning their marriages, so in this chapter divorce must be looked at more closely to see if the same is true here.

Divorce in the oldest forms of marriage

Unlike in the later Roman marriages, one of the oldest three forms of marriage was indissoluble. *Confarreatio* could not be dissolved under any circumstance, not until the time of Domitian at least, and even then it was only permitted after a special request had been made.⁸⁰ The same was not true for *coemptio* and *usus*. Those two could be dissolved, though not very easily and not just for any reason.

The woman could not initiate the divorce. That privilege belonged to the husbands, who could only divorce their wives for a few specific reasons: adultery, poisoning the children and substituting keys. And if she was divorced for such misbehaviours, she also lost her dowry.⁸¹ There was some logic to this inequality, because a woman who married became a part of the family of her husband. The *manus* marriages forged ties of kinship that could not be severed easily. Her husband's family however could push her out of that family.⁸²

The jurist Gaius described the way to accomplish a divorce this way quite well: '*Women cease being in manus in the same ways as daughters-in-power are freed from a father's potestas. Just as daughters-in-power depart from a father's potestas through one mancipation, so through one mancipation women in manus cease being in manus, and if they are manumitted after this mancipation, they are made sui iuris.*'⁸³

This could potentially mean that a woman became legally independent (*sui iuris*) after a divorce, because she was no longer under her father's power – that had ceased to be the moment she had been transferred into her husband's family – and after a divorce she was no longer in the power of her husband or his father either. It could even be said that she stood to benefit from a divorce in some ways. Of course that meant at the same time that she no longer had her dowry, so she certainly did not benefit in that way, unless she was divorced for any reason other than the three named above.

The husband who divorced his wife for no good reason however did not stand to benefit from the divorce, at least not in any financial sense, because he would lose his property, half of which would go to the wife he had divorced and the other half to the goddess Ceres. From 230 BC onwards however the development began that a man could divorce a wife who had not

⁸⁰ Corbett, P. E., *The Roman Law of Marriage*, page 220

⁸¹ Treggiari S, *Roman Marriage*, page 441-442

⁸² Corbett, P. E., *The Roman Law of Marriage*, page 222

⁸³ Gaius, *Institutiones* 1.137, translation used: Frier, B. W. and McGinn, T. A. J., *A casebook on Roman family law*, page 94

committed any offences, but that meant that she gained the right to reclaim her dowry.⁸⁴ It appears that at least in the second century AD women who were in *manus* marriages had gained the right to initiate their own divorce. But by then this type of marriage was essentially a dying breed and it is somewhat uncertain how much it was used at that time.⁸⁵

Women did not on the whole have very many rights concerning their own divorces, but neither could they be easily divorced, especially if their behaviour was beyond reproach. There was a system in place that penalised a husband who divorced his wife, which is unlikely to have made it tempting to do so. The rights of men and women considering divorce in this period were by no means equal, but neither was it easy to divorce for either of the sexes.

Divorce in the classical period

As discussed in the first chapter, marriages changed from marriages with *manus* to marriages without *manus*, where the wife remained under her father's power until he died, even if she was married. This meant that the structure of marriage itself was changed and because of that, divorce was no longer the same either.

It was much easier to divorce to begin with. Because a woman remained under her father's power rather than being made a part of the family that she married into, she could leave that family very easily. Nevertheless, there were some traditions that accompanied divorce. The jurist Gaius names one: *'In repudiations, that is, in the renunciation (of marriage), these are the accepted words: "Have your own property." Likewise, "Take care of your own property." It makes no difference whether renunciation is made to the other party while he or she is present or while absent through a person who is in that party's power or in whose power he or she is.'*⁸⁶ It is however thought to be unlikely that the phrase, or indeed any specific words at all were in fact mandatory.⁸⁷

What can be learned from this source however is that both men and women could make the first step to divorce. That was something that women had not been able to do while *manus* marriages were still the prevailing form of marriage. Needless to say of course that if her father was still alive and she was still under his power that she could not do this without his agreement, but it's still a change from the old ways. That does not mean that very many women availed themselves of the opportunity in the late Republic already; there is little evidence for the women of that time making use of it, even though they had the right.⁸⁸

It seems a very informal way of handling divorce and as such did cause some troubles. Because the words were not mandatory, it meant that one of the spouses could be divorced without their knowledge. Cicero wrote about such an example: *'In the memory of our fathers it happened that a pater familias left a pregnant wife in the province of Spain and moved from there to Rome, where he married another woman without sending notice (of divorce) to his first wife. He died intestate, leaving a son born from each woman.'*⁸⁹ The question then became of

⁸⁴ Treggiari S, *Roman Marriage*, page 441

⁸⁵ Treggiari, S., 'Divorce Roman Style: How Easy and how Frequent was it?' in Rawson, B. ed: *Marriage, Divorce and Children in Ancient Rome* (Oxford, 1991) 31-46, page 37-38

⁸⁶ D. 24.2.2.1, 3, translation used: Frier, B. W. and McGinn, T. A. J., *A casebook on Roman family law*, page 164

⁸⁷ Gardner, J. F., *Women in Roman Law & Society*, page 84-85

⁸⁸ Treggiari S, *Roman Marriage*, page 444

⁸⁹ Cicero, *De Oratore* 1.183, translation used: Frier, B. W. and McGinn, T. A. J., *A casebook on Roman family law*, page 161

course if his second marriage was legal, since he apparently never formally divorced his first wife or if he had simply divorced his first wife through the act of marrying to his second wife. Cicero unfortunately did not mention how this particular case ended and which side won, but it appears as though the man under discussion apparently thought that he could safely do this. It might very well be possible that he was convinced that what he did was a perfectly legal way of divorcing his first wife.

Examples like this could make divorce very complicated, so another law sought to prevent such situations: *'No divorce is confirmed unless seven adult Roman citizens have been summoned, as well as a freedman of the person who is going to divorce. By "freedman" we will understand also a person manumitted by his father, grandfather, great-grandfather, and other male descendants or ascendants.'*⁹⁰ There was a requirement of witnesses, which could of course prevent these types of situations, but still there is no mention made of any need for recording any of these proceedings for future reference. The divorce in this case remained very much a private affair.

It became more or less acceptable that it was still held to be a divorce if there was on one side the intention to divorce, which did not apparently mean that the partner who was being divorced should be entirely aware of this.⁹¹ This was still the case in the late third century AD, when Diocletian and Maximian confirmed this: *'Though a notice of divorce has not been handed over or made known to the husband, the marriage is dissolved.'*⁹² This could simply be because the initiating party had sent the notice, but it had not been received by the party who was being divorced or simply no notice had been sent. Either way, it clearly did not matter much in legal terms. A divorced spouse who was simply unaware of his or her own divorce was in this case compared to a mad person, someone who simply could not understand what was said to them.⁹³

To the Roman law divorces were indeed something private. *'Long-standing tradition holds that marriages are free. So it is settled that agreements preventing divorce are invalid, and stipulations imposing penalties on the party who divorced are not considered licit.'*⁹⁴ This was stated by the Emperor Alexander in 223 AD, but he spoke of a long-standing tradition, one that likely went back some centuries, as the evidence so far seems to support. The source clearly states that it was forbidden to make laws against divorce, which put divorce as a concept more or less beyond the scope of the law. Even the marriage legislation of Augustus did not try to seek to discourage divorce. It only very strongly encouraged single citizens to remarry if they were divorced and produce children from their marriages.⁹⁵

Although that was indeed the case, some laws were in place regarding divorce, to regulate and clarify what was and was not legal. *'Divorce does not take place unless it is genuine, made with the intent of establishing a permanent separation. So something that is either done or said in the heat of anger is not confirmed until, because of its persistence, it was clear that a mental judgement occurred. Therefore, if a wife sent a repudiation in anger but*

⁹⁰ D. 24.2.9, translation used: Frier, B. W. and McGinn, T. A. J., *A casebook on Roman family law*, page 164

⁹¹ Gardner, J. F., *Women in Roman Law & Society*, page 85

⁹² Cod. Just. 5.17.6, translation used: Evans-Grubbs, J., *Women and the law in the Roman Empire* page 190

⁹³ Treggiari, S., 'Divorce Roman Style' page 37

⁹⁴ Cod. Just. 8.38.2, translation used: Frier, B. W. and McGinn, T. A. J., *A casebook on Roman family law*, page 160

⁹⁵ Gardner, J. F., *Women in Roman Law & Society*, page 82-83

soon thereafter returned (to her husband), she is held not to have divorced.⁹⁶ It is clear from this that it is not in fact forbidden to divorce; this only clarifies under which circumstances a divorce could be said to be legal and final. It is also well worth noting that in this example the spouse who initiates the imaginary divorce is the woman. She is the one who sends a repudiation. It is not remarked upon as odd and improper, so it can be safely assumed that she was well within her rights to do so.

Divorce was restricted only in one area: a freedwoman who had married her former master. She could not divorce him without his direct consent. *'Since you have increased the rank of your freedwoman by marrying her, and therefore she should not be forced to offer services to you, since you can be content by the benefit of the law, because she cannot legally marry someone else if you are unwilling.'*⁹⁷ This was not to say that the marriage could not be dissolved, it just could not be dissolved on the freedwoman's say-so. Gardner does point out that marriage and divorce were based on consent, so that the law could not technically prevent the divorce or punish it, but it could prevent the woman from legally marrying so long as her husband persisted in not giving his consent to the divorce.⁹⁸

This was considered a respectable thing to do, for a man to free one of his slave women in order to marry her. That did not mean that her consent was not necessary; if she did not want to marry her patron, she could not be forced to. She just could not divorce him if she wanted to get out of the marriage.⁹⁹

This is backed up by Ulpian, who says the following: *'In regard to what the (Augustan) law says: "A freedwoman who has married her patron is not to have the power of effecting a divorce," this does not appear to have made the divorce invalid, because it is usual to dissolve marriage by civil law. Therefore we are not able to say that the marriage still exists, since there has been a separation. And so (the jurist) Julian writes that she does not have a legal action for return of dowry. Therefore quite rightly, as long as her patron wants her to be his wife, she does not have the right of marriage (conubium) with anyone else.'*¹⁰⁰ This was one union that could only be broken up by the husband.

There was of course always the possibility that a husband and wife agreed that they wanted to divorce. *'Gifts made "on account of divorce" have been allowed between husband and wife. For often it happens, that on account of priesthood or even sterility,¹⁰¹ or old age or ill health or military service, a marriage could not be conveniently maintained;¹⁰² and therefore the marriage is dissolved "with a good grace" (bona gratia).¹⁰³* Other than this source there is very little evidence in the law for this particular type of divorce, presumably because it was the one that required the least interference from it. It did not need witnesses or messages sent between the spouses, because they both agreed to end the marriage. Amicable divorce did not need the law to settle any disputes and divorce itself was free.¹⁰⁴

⁹⁶ D. 24.2.3, translation used: Frier, B. W. and McGinn, T. A. J., *A casebook on Roman family law*, page 163

⁹⁷ Cod. Just. 6.3.9, 20, translation used: Evans-Grubbs, J., *Women and the law in the Roman Empire* page 190

⁹⁸ Gardner, J. F., *Women in Roman Law & Society*, page 86

⁹⁹ Frier, B. W. and McGinn, T. A. J., *A casebook on Roman family law*, page 45

¹⁰⁰ D. 24.2.11, translation used: Evans-Grubbs, J., *Women and the law in the Roman Empire* page 193

¹⁰¹ D. 24.1.60.1, translation used: Evans-Grubbs, J., *Women and the law in the Roman Empire* page 188

¹⁰² D. 24.1.61, translation used: Evans-Grubbs, J., *Women and the law in the Roman Empire* page 188

¹⁰³ D. 24.1.62, translation used: Evans-Grubbs, J., *Women and the law in the Roman Empire* page 188

¹⁰⁴ Treggiari, S., 'Divorce Roman Style' page 37

So far it has been established that men and women could both initiate a divorce. There were no laws against it, because making laws against divorce was in itself against the law. Early on in these free marriages women might not have made much use of this, but it is clear that there was no legal impediment preventing her from making an end to the marriage that she was in.

A Father's Rights

It was however not all as straightforward as this, because both the husband and the wife were under their fathers' power so long as he lived and they had the final say in the marriage and the dissolution thereof. If the father's consent for a marriage ended, that would effectively break up the marriage.¹⁰⁵ In the previous chapter was established that a daughter's consent for a marriage was assumed unless she objected against it and in the same way her consent was assumed if her father decided to break up the marriage.¹⁰⁶

Divorce could be brought about by the father of the woman against her wishes; legally speaking he had that right¹⁰⁷, although it was very likely that doing so was not something that greatly benefitted his own reputation.¹⁰⁸

In the second century AD laws came into effect that severely limited the father's ability to break up the marriage of his daughter: *'The deified Emperor Pius prohibited a father from breaking up a happy marriage... unless perhaps question should arise as to where the person might with greater advantage reside.'*¹⁰⁹ So if the marriage was a good one and the daughter was happy in it, the father needed to have a very good reason to try and come between the spouses. Of course the terms of the source are somewhat vague, which meant that there was probably still some leeway for the father if he truly wanted to end his daughter's marriage.

There are several sources from that time and some time after that do in fact make mention of this particular issue. This is another: *'If a man's daughter is married to me, and he wishes to lead her away with him or should seek to have her procured for him, must an affirmative defense be raised against the interdict if, for instance, the father wishes to break up a happy marriage, perhaps even one enhanced by children? We follow the fixed principle that truly happy marriages are not to be disturbed by the exercise of a father's power. Nevertheless, this rule is to be carried out by persuading the father not to employ his patria potestas harshly.'*¹¹⁰ This text does make it clear that the principle of a father breaking up a marriage is frowned upon, but it is not expressly forbidden. The law does not state that the father cannot end the marriage, only that the general rule is that such a thing was frowned upon. It is said that the involved parties should instead try to reason with the father and plead with him not to exercise his power in a cruel way. It is never stated that he can be penalised for this.

This too is backed up by another source: *'The deified Marcus, our predecessor and a most scrupulous emperor, established that if a father initially granted consent to a marriage*

¹⁰⁵ Cantarella, E., 'Roman Marriage: Social, Economic and Legal Aspects' page 29

¹⁰⁶ Treggiari S, *Roman Marriage*, page 445

¹⁰⁷ Evans-Grubbs, J., 'Parent-child conflict in the Roman family' page 112-113

¹⁰⁸ Treggiari, S., 'Divorce Roman Style' page 34

¹⁰⁹ Paulus, *Sententiae* 5.6.15, translation used: Frier, B. W. and McGinn, T. A. J., *A casebook on Roman family law*, page 222

¹¹⁰ D. 43.30.1.5, translation used: Frier, B. W. and McGinn, T. A. J., *A casebook on Roman family law*, page 226

*and (then after the marriage) changed his mind, his will is deemed legally ineffective when his daughter-in-power is living in harmony with her husband. But (the outcome is) otherwise if the father acted on the basis of a great and just reason. Still, no provision of law requires that an unwilling woman return to her husband. He (the father), to be sure, does not have it within his discretion to bring about the divorce of a daughter who is freed from his power.*¹¹¹ So only if the daughter is no longer under his power could the breaking up of a marriage by a father be legally prevented.

Only one source makes mention of the possibility of punishing a daughter's father for such a course of action: *'Indeed, as to producing and leading away a wife, it is more proper that a father, even one who has a daughter in his power, be sued by her husband.'*¹¹² And even here it is clear that the husband will be the one who has to hold the father to account for his actions. The woman is apparently not allowed to do so herself.

It is also interesting to note that although a father could legally dissolve a marriage, he did not have the right to make his daughter come back with him. If she chose to remain with her husband in spite of her father's wishes, there was very little that he could do about it. Neither could he get his hands on the dowry so long as she did not agree to let him.¹¹³ So in the eyes of the law the marriage was no longer a legitimate one, from which followed that the children born to that couple were no longer legitimate either, but a father could not separate a couple who really wanted to stay together, which is a tiny loophole in the law that allowed a daughter to make the choice to stay with the man she had married, even though he was no longer her husband in the eyes of the law.

Only a father could break a marriage; that was his privilege and not that of the mother, who had no legal say in the ending of the marriage of her daughter. That wasn't to say that a mother had no voice in these matters¹¹⁴, but the ultimate decision rested with the father alone. It had never been a mother's right, though several of them tried and were told in no uncertain terms that they were not allowed to do so.¹¹⁵

It is safe to say that the father's rights to break up the marriage of a daughter who was happily married were strongly discouraged at the very least. It was not a morally acceptable thing for him to do if the daughter herself did not want him to do that. There is however very little evidence, as demonstrated above, that he was completely forbidden from pursuing such a course of action. If he could name a good reason why he did what he did, it seems unlikely that it was possible for the law to stop him from doing so, his own daughter included. But it also seems that if the daughter had truly made up her mind not to divorce, that he could not put an end to the cohabitation either.

¹¹¹ Cod. Just. 5.17.5, translation used: Frier, B. W. and McGinn, T. A. J., *A casebook on Roman family law*, page 223

¹¹² D. 43.30.2, translation used: Frier, B. W. and McGinn, T. A. J., *A casebook on Roman family law*, page 226

¹¹³ Evans-Grubbs, J., 'Parent-child conflict in the Roman family' page 114-115

¹¹⁴ Dixon, S., *The Roman Mother*, page 63

¹¹⁵ Dixon, S., *The Roman Mother*, page 118-119

Dowry

If a marriage broke up, the wife did have the right to the return of her dowry. *'After a divorce, a wife herself, if she is sui iuris, has the action on a wife's property (actio rei uxoriae), that is, a claim for return of the dowry. But if she is in a father's power, the father, accompanied by the daughter, has the action on a wife's property; it does not matter whether the dowry is adventitious or profectitious. If the wife dies after the divorce, her heir is given the action only if her husband has delayed in returning the dowry to the wife.'*¹¹⁶ As before, so long as the father is still alive, the daughter herself could do little in these matters. The interesting part in this source is that if the woman had become legally independent, if her father had died, that meant that there were options for her to reclaim her own dowry. And reclaiming the dowry was an important thing for her to do, because it allowed her to remarry, which was the accepted form of behaviour.¹¹⁷

Ulpian states something along the same lines in another source: *'When the marriage has been dissolved, the dowry is paid to the woman... This (is the case) if the woman is legally independent. 1: But if she is under paternal power and the dowry came from him, the dowry is his and his daughter's; and then the father is not able to get back the dowry, either through himself or through a legal agent, except at his daughter's wish... 2: But when the father brings an action concerning the dowry, do we accept "his daughter's wish" (to mean) that she consents or, on the other hand, that she does not object? And there is a rescript from the emperor Antoninus (Caracalla) that a daughter appears to give her consent to her father, unless she clearly objects.'*¹¹⁸ At first sight it seems that this is exactly the same as the source that was previously examined. If the woman was legally independent, she was well within her rights to make a claim on her own dowry, but if her father was still alive, the right to take action remained with him and he was assumed to have his daughter's consent in the matter. But it seems here that if she truly did not want him to do this, she could object. It does not say in this source that she should give a good solid reason to object, only that she can and it is implied that if she does, her father had no legal right to act.

A later law makes that clearer still: *'You are not at all prevented from taking away the money of a daughter who is under your power. But if you gave (the money) as dowry on her behalf, you are not able to get it back during the marriage even if she agrees. Moreover, if the marriage has been dissolved, you are not able to get (the dowry) back if she is unwilling.'*¹¹⁹ It does not say here that the daughter needs to firmly object, though it is no great leap to assume that she would have had to in order to demonstrate her unwillingness. But here, as in the previous source, it says nothing about her needing to state a good reason for objecting.

It goes to show that a woman did have some agency, limited though it was, in the matter of the recovery of the dowry if her father was still alive. If however she was legally independent it seems as though she could act in the same way that her father did, which gave her a deal of freedom to act in this matter.

¹¹⁶ Tituli ex Corpore Ulpiani 6.6-7, translation used: Frier, B. W. and McGinn, T. A. J., *A casebook on Roman family law*, page 173

¹¹⁷ Gardner, J. F., *Women in Roman Law & Society*, page 112

¹¹⁸ D. 24.3.2, translation used: Evans-Grubbs, J., *Women and the law in the Roman Empire* page 191

¹¹⁹ Cod. Just. 5.18.7, 9, translation used: Evans-Grubbs, J., *Women and the law in the Roman Empire* page 192

There were however instances in which the dowry could be held back by the husband: *'Retentions from a dowry occur (for five reasons:) either because of children, because of morality, because of expenses, because of gifts, or because of removal of property. Retention occurs because of children if the divorce came about through the wife's fault (culpa) or that of the father in whose power she was; for then a sixth is retained from the dowry for each child up to a maximum of three. On the basis of serious immorality a sixth is retained, but an eighth for less serious instances. Only adultery counts as serious immorality; all the rest is less serious. The husband's immorality is punished in the case of a dowry that must be returned from a (given) day, as follows: for serious immorality he returns the dowry at once; for less serious, in six months' time. In the case of a dowry that should be returned at once, he is ordered to return from the fruits as much as the payment made for a dowry returned over three years.'*¹²⁰

Here it seemed that the woman was slightly worse off than the man. Whereas he for immorality was not seriously penalised – all he had to do was to give the dowry back sooner rather than later in case he had committed some serious offences, the woman stood to lose financially, and if there were multiple children born from the marriage, that could be quite a substantial part of her dowry.

All things considered it can certainly be said that a woman had more rights than she had in the previous period. She had more rights in initiating a divorce, that she did not previously have and could act more independently, especially if her father had died.

Divorce in Late Roman Marriages

As shown in the previous section of this chapter, divorce was relatively free and could be initiated by both men and women. Laws were in place to prevent that laws were made to limit divorce or prevent it altogether. Yet it turned out that from the reign of Emperor Constantine on that is exactly what happened.

In the year 331 AD he issued a law that runs as follows: *'It is pleasing that a woman not be permitted to send a notice of divorce to her husband because of her own depraved desires, for some carefully contrived cause, such as his being a drunkard or gambler or womanizer. However, neither should husbands be permitted to divorce their own wives for just any reason whatsoever. But in the sending of a notice of divorce by a woman only these crimes are to be looked into: if she has proven that her husband is a murderer or a preparer of poisons or a disturber of tombs, so that only then, after being praised, she shall receive back her entire dowry. For if she has sent a notice of divorce to her husband for any reason other than these three crimes, she should leave it (the dowry), down to a hairpin, in her husband's home, and in return for such great confidence in herself, should be deported to an island. Also in the case of men, if they send a notice of divorce, it is fitting that these three crimes be inquired into: if they want to repudiate an adulteress or a preparer of poisons or a go-between. For if he has ejected a woman who is free of these crimes, he ought to restore the entire dowry and not marry another woman. But if he does, the former wife will be given the opportunity to invade his home and*

¹²⁰ Tituli ex Corpore Ulpiani 6.9-10, 12-13, translation used: Frier, B. W. and McGinn, T. A. J., *A casebook on Roman family law*, page 174

*transfer to herself all the dowry of the second wife, in return for the injury brought against her.*¹²¹

It is important to take note of a few things in this source. The first of these is that this text is directed against unilateral divorce, where one party was trying to divorce the other against their will. There is nothing in there that forbids spouses from separating amicably. If both husband and wife could agree that their marriage had reached its end, they could divorce without any interference from the law whatsoever and they remained able to do so until 542, when Justinian banned that.¹²²

The second point of interest is that this law does not in fact forbid divorce, it only heavily penalised it unless it was for a few mentioned serious offences. It flies in the face of the law that was discussed in the previous section, that divorces were meant to be free and that no penalties were to be put on the one who initiated the divorce, which means that this law was a rather sharp break with the past.

It was also rather a set-back for women, who had until then gained some more legal rights. She could initiate her own divorce to some extent, her father's influence in the breaking of her marriage had been restricted and she could act with some independence in the recovery of her own dowry after a divorce.

In this new law a woman had to make an accusation and needed to prove it before she could legally divorce her husband. All three offences that are mentioned in the law that serve as ground for her to divorce him are also criminal offences. Constantine made it so that the only reason a woman could legally divorce her husband was in the case he was a true criminal. The same was true for the husband, though the crimes he needed to prove in order to get his divorce were slightly different. All the same, nothing short of criminal activity could put an end to the marriage.

That needs a slight correction, though. Failing any of the crimes stated in the law, the marriage could still be ended. If an accusation had been made but had not been proven, the marriage was still at its end. If the man was the one who had made the accusation, he lost his wife's dowry and was not allowed to remarry. If he did, his former wife had a right to the dowry of his new wife, which cannot have made marrying such a man an attractive prospect. The woman on the other hand was punished in a manner that was definitely harsher: she lost her dowry and was deported to an island. This is a very large step back from the legal rights she had gained in the previous centuries.

This particular law was in place for all of three decades, when it was repealed by Julian.¹²³ It seems as though after this time, people reverted to the practices of divorce that they were used to from the days before Constantine's legislation was in effect.¹²⁴ There are some suggestions that mainly women took advantage of the opportunity to divorce their husbands

¹²¹ Cod. Theod. 1.16.1, 331, translation used: Evans-Grubbs, J., *Women and the law in the Roman Empire* page 203

¹²² Clark, G., *Women in Late Antiquity*, page 25

¹²³ Bagnall, R. S., 'Church, State and Divorce in Late Roman Egypt,' in Selig, K. and Somerville, R. ed: *Florilegium Columbianum: Essays in Honor of Paul Oskar Kristeller* (New York, 1987) 41-62, page 42-43

¹²⁴ Arjavi, A., 'Divorce in later Roman law' *Arctos: Acta Philologica Fennica* 22 (1988) 6-21, page 11-12

again when it became available.¹²⁵ Julian's interest appeared to have been more in the more financial aspects of divorce; he reverted to the classical law on recovery of dowry.¹²⁶

Only in the year 421 AD were new restrictions on divorce imposed: *'A woman who has separated (from her husband) by presenting a repudium given by her, if she has proved no causes for her own divorce, having lost the gifts which she had received as a fiancée, shall also be deprived of her dowry and given over to the penalty of deportation. We deny to her not only the bond of a second husband, but also the right to return from exile. But if a woman, struggling against marriage, has proved clearly vices and middling faults (on the part of her husband), she will lose her dowry and is to refund the (pre-nuptial) gift to her husband, certainly never to be joined in marriage with anyone again. And so that she not stain her widowhood with the shamelessness of illicit sex, we offer to the repudiated husband the right to accuse her by law. It remains that, if a woman who has left (her husband) has proven serious causes and knowledge implicated in great crimes (on her husband's part), she shall gain possession of her dowry and shall also obtain the betrothal gift, and she shall receive the power of remarrying five years from the day of divorce. For then she will appear to have done this from abomination of her husband rather than desire for another man.'*¹²⁷

This law bears some resemblance to the one put in place by Constantine, but is at least marginally less harsh. Like before, it still has the threat of deportation if a wife wanted to divorce her husband for no offence or if she could not prove the offence. It is milder only in the sense that if the woman could prove that her husband was not a criminal but he had a few serious character flaws, she could divorce him without being deported, as was the case in Constantine's legislation. On the other hand, if she could not prove anything, deportation was the end result. Only if her husband was indeed a criminal, then could she divorce without penalty and get her dowry back. Compared with the relative freedom that a woman might have had in the period between Constantine's legislation and this new law, it was once again very restrictive.

For the men other measures were put in place by the same law, which continues as follows: *'Certainly, if the husband has first brought about the divorce and has brought a serious criminal charge against the woman, he shall accuse her and pursue her by law and having obtained his vengeance he shall possess her dowry and shall receive back his generosity (i.e., the pre-nuptial gift) and shall obtain the free choice of marrying another woman soon. But if it is a fault of character, not of crimes, he shall receive back his gift, relinquish the dowry, and marry another wife after two years. But if he has preferred to split up the marriage solely because of disagreement and the repudiated woman is weighed down by no vices or sins, the husband shall lose both the prenuptial gift and the dowry, and in perpetual celibacy he shall endure the penalty for insolent divorce from grievous solitude, and to the woman the power of marriage has been conceded after the end of a year. However we order that the provisions of the ancient law concerning withholdings from the dowry on account of children be preserved.'*¹²⁸

¹²⁵ Evans-Grubbs, J., *Law and Family in Late Antiquity*, page 233

¹²⁶ Clark, G., *Women in Late Antiquity*, page 23

¹²⁷ Cod. Theod. 3.16.2, 10, translation used: Evans-Grubbs, J., *Women and the law in the Roman Empire* page 204

¹²⁸ Cod. Theod. 3.16.2, 10, translation used: Evans-Grubbs, J., *Women and the law in the Roman Empire* page 204-205

Once again, the men were decidedly better off. That did not mean that this law made it a very attractive prospect for them to end their marriage without a very good cause, but they did only face the possibility of no remarriage and the loss of a dowry. There is nothing in the text that suggests that a husband divorcing his wife for no good reason cannot be deported under any circumstances, just as it was with Constantine's law.

From reading those two pieces of legislation it is very clear that there was a definite shift in attitudes towards divorce and that it was not made an attractive possibility to either the husband or the wife, though it is also very plain to see that the divorcing wife comes off worst in both pieces of legislation. As Kuefler wrote, divorce was no longer a private right of Roman citizens, like it had been in the classical law. Instead the state had imposed penalties for the offence of breaking up a marriage¹²⁹, though it is interesting that the law did not make it impossible to divorce at all. In 421 AD it was still perfectly legal to divorce so long as it was something that was agreed to by both spouses and although bilateral divorce was penalised, it was still doable.

Theodosius II felt that this law was somewhat too harsh and backtracked with another law that was issued in 439 AD¹³⁰ that stated that a *repudium* would do to undo the marriage, but that it ought to be hard to dissolve a marriage for the sake of the children, something that will come up again in chapter 3 in more depth. He also stated the following: *'But in sending a repudium and inquiring into the fault for the divorce, it is harsh to go beyond the guidance of the ancient laws. Therefore, having repealed the constitutions which order that now the husband, now the woman be repressed by the most severe penalties after a marriage has been dissolved, by this constitution we propose to revoke the blame for a repudium and the punishments for faults (and to return) to the ancient laws and the responses of jurisprudents.'*¹³¹ In short, he proposed a return to the ways of the classical law, where blame did not play a role in divorces. This also put men and women on a more equal footing again, whereas the balance had been rather favouring men from the law of 421 AD onwards.

The divorce laws of the late Roman Empire bounce back and forth between sterner legislation and a return to the classical laws that did not usually interfere with divorce itself, only how it should be done. The classical laws had never tried to restrict divorce – save in the case of a freedwoman married to her patron – in the way the later Emperors tried to do.

Theodosius did change his mind some years after this law and did reintroduce grounds that made divorce legal, although it was still milder than the law of 421 AD had been.¹³² From that point onwards it seemed as though there was no return to the classical law, but that the men and women who divorced were treated in a slightly more equal fashion than they had been in the earlier and harsher legislation.¹³³

All this time consensual divorce had been allowed to be conducted as it had been, without any interference of the state, until Justinian issued a new law in 542, which banned that too: *'Regarding the bond of reverence for marriages themselves, however, so that (marriages)*

¹²⁹ Kuefler, M., 'The Marriage Revolution in Late Antiquity' page 355

¹³⁰ Evans-Grubbs, J., *Law and Family in Late Antiquity*, page 235

¹³¹ Novel 12 of Theodosius II, translation used: Evans-Grubbs, J., *Women and the law in the Roman Empire* page 205

¹³² Clark, G., *Women in Late Antiquity*, page 24

¹³³ Arjavi, A., 'Divorce in later Roman law' page 14

*not be abandoned rashly and indiscriminately, the new law, which had allowed marriages to be dissolved solely on the basis of an opposing desire, has been rejected.*¹³⁴ This law was rejected again in 566,¹³⁵ but the attempt had certainly been made.

All things considered women were worse off than men in the divorce legislation of the later Roman Empire. Their right to initiate divorce was strongly diminished, if not made entirely impossible. The same was true for the men; divorce was made harder to initiate for both men and women, although penalties for divorcing were decidedly harsher for wives than husbands. Later legislation did make the punishments for divorce more equal, but that did not take away that penalties remained in existence.

Conclusion

Divorcing was hard for a woman in the earliest phase of Roman marriages and became gradually easier in the centuries leading up to Constantine's legislation. Women could act with more independence than they had been able to do before that, both in their marriages and in the recovery of their dowries after marriage.

After that it became harder again until the situation was almost back to the point at which it started in terms of how difficult it was to obtain a divorce. It is not a straight line of progression and certainly from 331 AD it went from hard to easy and back again until it eventually stabilised at a situation where it was hard to divorce.

¹³⁴ Novel 35.11 of Valentinian III, translation used: Evans-Grubbs, J., *Women and the law in the Roman Empire* page 206

¹³⁵ Bagnall, R. S., 'Church, State and Divorce in Late Roman Egypt,' page 45

Chapter 3

Custody after Divorce

The way marriages in Rome were shaped and the legislation concerning divorce have a profound impact on the matter of custody, as shall be demonstrated in this chapter. The matter of what to be done with children from a marriage after it broke up is not overly represented in the source material, but there is certainly enough to be able to get an idea of what these matters might have looked like and how they developed over time.

Definition and custody in the earliest divorces

To begin with it is good to establish a point from which to go on and in this case it seems more than reasonable to begin with some laws that can be seen as ground rules for the topic under discussion.

*'Some Roman citizens are patres familiarum, others are sons-in-power; some women are matres familiarum, others are daughters-in-power. Patres familiarum are males who are of independent legal status (suae potestatis), whether they have reached the age of legal majority or not. The same holds for matres familiarum. Sons- and daughters-in-power are those (Roman citizens) in someone else's power. For a person born to myself and my wife is in my power. Likewise, a person born to my son and his wife, that is, my grandson and my granddaughter, is just as much in my power as are my great-grandson and great-granddaughter, and so on.'*¹³⁶

It is very clear from this that any child born in a legitimate marriage is under the power of its father. It was clearly understood in Roman law that the father of an illegitimate child was unknown in the eyes of the law, but *'it is a legitimate marriage that shows who the father is'*¹³⁷ and a legitimate child was under its father's power, because they belonged to his family group and not their mother's.¹³⁸

This power was the privilege of a father. Women did not have it: *'Women, to be sure, cannot adopt by any method, since they do not even have power over their natural (biological) offspring.'*¹³⁹ Women could not adopt and they had no power over their children under any circumstance.

It is a good thing to bear this in mind. Women could never obtain custody of their child in the modern sense of the word, because women could not have *potestas*,¹⁴⁰ but that did not mean that there was no possibility to raise their children under their roof under certain circumstances. That is the kind of custody that will be examined in this chapter: the kind where women could keep their children with them after a divorce.

¹³⁶ D. 1.6.4, translation used: Frier, B. W. and McGinn, T. A. J., *A casebook on Roman family law*, page 298

¹³⁷ D. 2.4.4.3, translation used: Frier, B. W. and McGinn, T. A. J., *A casebook on Roman family law*, page 299

¹³⁸ Treggiari S, *Roman Marriage*, page 467

¹³⁹ Gaius, *Institutiones* 1.104, translation used: Frier, B. W. and McGinn, T. A. J., *A casebook on Roman family law*, page 312

¹⁴⁰ Gardner, J. F., *Women in Roman Law & Society*, page 144

There is no evidence for the idea that women could keep their children with them after the divorce in any of the earliest forms of Roman marriage. It seems unlikely, considering the definitions given above, that it was possible for women to hold on to their children after their divorces.

As discussed in chapter 1, in the three early forms of marriage – *confarreatio*, *coemptio* and *usus* – a woman was transferred from her own family into the family of her husband, so that she became a part of his family in the eyes of the law. She assumed the position of a daughter of that family.¹⁴¹ In chapter 2 it was made clear that divorcing from such a marriage, which was difficult enough in and of itself, involved her being separated from that family group into which she had been transferred by her marriage.

Taking that into account, and also bearing in mind that any children born from the marriage before it was dissolved belonged to the family group to which the divorced woman no longer belonged, it seems highly unlikely that a mother was able to keep her children with her when she divorced. It is of course always a possibility that some arrangement could be made which allowed the mother to see her children, but there is no evidence of this in the legal sources, so that is pure speculation.

On balance, and considering that divorcing was not very easy and therefore unlikely to be a frequent occurrence in the first place, it appears as though there was no legal possibility for a mother to hold on to her children in the event of a divorce in any of those three forms that involved *manus*.

Custody after divorces under classical law

There is more evidence for custody after a divorce under the classical law than there was for the earlier period. Divorce had become much easier in the free marriages based on consent, but that had the downside of also making matters far more complicated. And although the law did not interfere in matters of divorce itself – that would itself have been against the law – it did sometimes have to step in and regulate the more complicated cases.

In this case the trouble could start as early as when a mother was still pregnant. There was no legal impediment to prevent a couple from divorcing while the woman was still pregnant or indeed so early in her pregnancy that she was not even aware herself that she was expecting. But there were laws in place dictating what to do in such a case: *'The wife needs to do no more than give notice (to her husband) that she is pregnant by him. So she does not give notice to her husband to send guards; for it is enough for the woman to make it known she is pregnant. The husband's role is then either to send guards or to give notice to her that she is not pregnant by him; but either the husband himself or someone acting in his name is allowed to do this. The penalty for the husband is this: unless he sends guards or replies giving her notice that she is not pregnant by him, the husband is compelled to acknowledge the offspring; if he does not acknowledge it, he is forced by extraordinary judicial measures. So he will have to answer that she is not pregnant by him, or response must be made in his name. If this is done, he will not otherwise have to acknowledge it unless it really is his son... Obviously, if the woman gives*

¹⁴¹ Treggiari S, *Roman Marriage*, page 29

*notice to him and he denies she is pregnant by him, then, even if he does not send guards, he will not avoid an inquiry as to whether the woman is pregnant by him.*¹⁴²

The point of this law seems to be to establish that the man who divorced his wife was indeed the father of the child his ex-wife was expecting and that she was unable to pass off a changeling child as the ex-husband's, hence the need for the guards.¹⁴³ This in itself has little to do with custody, but it does make clear that the father would have to acknowledge the child if it was his – if not, the burden of proof would be on him and not his ex-wife – and the child itself would be counted as legitimate offspring from the marriage, which placed the child under its father's power.

And a child under its father's power was his to take into his home: *'Clearly, after the child is born, the husband can rightfully claim the boy through an interdict, either that it be produced or he be allowed to take it away.'*¹⁴⁴ Evidently, it was the father's right to decide where the child was to reside, because any legitimate child belonged to the father, but, judging from this text, he could decide to leave the child with its mother. The law does not state that he must take the child into his own home, only that the decision whether to do so or not rests entirely with him. It did not give the mother the right to decide, but she could potentially benefit from it, especially if she happened to be on somewhat friendly terms with her ex-husband.

If that was the case, they could then come to some agreement between them as to what was to be done with the child.¹⁴⁵ Especially in their younger years it seems a likely scenario that children did spend considerable time with their mother.¹⁴⁶ Of course, if the father should happen to die, it was likely that the children then went to live with their mothers.¹⁴⁷ If the father was still alive and the children lived with him, the mother might not see them very often.¹⁴⁸

Divorcing while the woman was still pregnant was not at any rate one of the most uncomplicated issues. *'But if the husband voluntarily offers observers and she does not allow them, or if the woman has not made an announcement, or if she has in fact made an announcement, but has not allowed observers (chosen) by the decision of a judge, the husband or his parent is free not to recognize the offspring. If a woman has not announced that she is pregnant within the thirty-day period, if she afterwards announces it, she ought to be heard, after the case has been investigated. But indeed, even if she has omitted an announcement altogether, (the jurist) Julian says that this does not at all harm the offspring which is born.'*¹⁴⁹

This source goes some way in demonstrating that there were certainly possibilities for a child born after a divorce to still be recognised by its father as his legitimate offspring, but the divorce definitely complicated the issue and muddied the waters. As pointed out in the first section of this chapter, *'it is a legitimate marriage that shows who the father is'*¹⁵⁰ and since the marriage had been ended, but it was still close enough for the resulting child to have been

¹⁴² D. 25.3.1.3-4, 16, translation used: Frier, B. W. and McGinn, T. A. J., *A casebook on Roman family law*, page 105

¹⁴³ Frier, B. W. and McGinn, T. A. J., *A casebook on Roman family law*, page 105

¹⁴⁴ D. 25.4.1.1., translation used: Frier, B. W. and McGinn, T. A. J., *A casebook on Roman family law*, page 109

¹⁴⁵ Rawson, B., *Children and Childhood in Roman Italy* (Oxford, 2003) page 227

¹⁴⁶ Treggiari, S., 'Divorce Roman Style' page 39-40

¹⁴⁷ Bradley, K. R., *Discovering the Roman Family*, page 135

¹⁴⁸ Bradley, K. R., *Discovering the Roman Family*, page 140

¹⁴⁹ D. 25.3.1.6, translation used: Evans-Grubbs, J., *Women and the law in the Roman Empire* page 200

¹⁵⁰ D. 2.4.4.3, translation used: Frier, B. W. and McGinn, T. A. J., *A casebook on Roman family law*, page 299

conceived within the marriage, this must have made it harder, in a legal sense, to determine if the child really was the husband's.

As such, there were provisions within the law for the father to deny that the child was his, as written in the source. It does however seem that the law would much prefer it if the ex-husband did acknowledge the child. At the very least always it seems preferable that the option that the child was the husband's was always kept open.

Establishing whether a wife was pregnant and if the child she expected was the husband's was a matter of some importance to the law, but that did not mean that the woman in question was always a willing participant in these proceedings: *'During the reign of the deified brothers, it happened that a husband asserted his wife was pregnant, but she denied it. When consulted, they sent a rescript to Valerius Priscianus, the urban praetor, as follows: "Rutilius Severus patently seeks a novel remedy, that he (be permitted to) appoint a guard for his wife, who had divorced him and insists that she is not pregnant. Thus, no one will be surprised if we furnish a new plan and remedy. So if he persists in this demand, the easiest solution is to choose the home of a most respectable woman, into which Domitia may come and there be inspected by three midwives of proven skill and trustworthiness, to be chosen by you. If all or two of them report that she seems pregnant, then the woman must be persuaded to allow a guard just as if she had wanted this herself; but if she does not give birth, the husband should know that this involves ill will and his own reputation, since he cannot implausibly be held to have seized on this to cause some affront to his wife. But if all or most (of the midwives) report she is not pregnant, there will be no further need for guards."*'¹⁵¹

While establishing whether or not a woman was pregnant and if the child was her ex-husband's was important, it could also be that the husband was wrong in thinking that his former wife was pregnant when he divorced her. The law did give him some provisions to establish the truth of the matter, but also warned against misusing those provisions, because in case the husband was actually wrong about his suspicions and he acted purely out of spite for his ex-wife – which does not seem unlikely at all in the case of this divorce; he *did* drag the matter before the authorities – he had to think twice before committing to such an act.

On the other hand it might equally be possible that the woman was in fact pregnant and had, for whatever reason, denied this. In that case the unborn child could well be his heir and he had a vested interest in making sure that he could claim the child as such.¹⁵² If he did not, then the child was illegitimate, which made it entirely the mother's responsibility.¹⁵³

It was also quite possible that in Roman times, as sometimes is the case in the present day divorces were not always neat and conducted in a rational manner. This particular example is a good case to prove that point: *'A man divorced a pregnant woman; she (then) gave birth to a son, whom she, in her ex-husband's absence, recorded as illegitimate in the public register. The question was raised as to whether he is in his father's power, and (as a result), should his mother die without a will, whether he can upon his father's order enter upon his inheritance, the record made by his mother while angry not being held against him. He (Scaevola) responded that there will still be room for the truth.'*¹⁵⁴

¹⁵¹ D. 25.4.1, translation used: Frier, B. W. and McGinn, T. A. J., *A casebook on Roman family law*, page 108

¹⁵² Evans-Grubbs, J., *Women and the law in the Roman Empire* page 201

¹⁵³ Treggiari S, *Roman Marriage*, page 467

¹⁵⁴ D. 22.3.29.1, translation used: Frier, B. W. and McGinn, T. A. J., *A casebook on Roman family law*, page 303

Of course the mother's motivation cannot be found out now, so it is impossible if she really did this act out of spite for her husband or if she wanted to keep the child for herself. Illegitimate children did not belong to their father's family, but their mother's. She might not have *potestas* over them – women never could have that – but since in the eyes of the law the father of an illegitimate child was unknown, she could keep the child with her.¹⁵⁵ The source dictates that the truth of the matter could still be established, which meant that the son in question could still come under his father's power, but it is not at all unthinkable that the mother might have tried to use this strategy as a way to hold on to her child.

Judging by the following law it seems that it is not impossible to assume that some mothers might even be tempted to take matters a little bit further: *'What is more, sometimes there can even be theft of free persons, for example, if one of our children who is in our power is stolen, or also a wife in our manus or also my judgment-debtor or sworn gladiator.'*¹⁵⁶ The text does not name the mother as the one who could potentially steal a child-in-power of course, but in the light of this investigation it is also not a giant leap to think that a woman who stood to lose her child because of a divorce thought it necessary to take some extreme measures to assure that did not happen.

Needless to say, the two examples of these two sources were not in any way considered legal or recommendable. The law did not condone it. The first source makes it very clear that the mother who recorded her legitimate child as illegitimate was in the wrong, because she acted out of anger. It was possible to correct that error in favour of the child and the father. The second source labels taking away a child-in-power as theft, which of course is not considered legal either. It might at times however have seemed like the only option available to a woman who wanted to keep her child when the law had made no other provision for her to keep her children with her after a divorce.

Change in law

This changed from halfway through the second century AD: *'Even if a father fully proves that a son is in his power, still, after an inquiry, the mother will (at times) prevail in keeping him, as is held by some judicial decisions of the deified Emperor Antoninus Pius. For because of the father's depravity the mother obtained custody of the son in her home, (though) without decrease in patria potestas.'*¹⁵⁷

This is the first time that there was a legal way for the mother to keep her child. It was not a possibility under very many circumstances, in this case only when the father was clearly of such a bad character that it was deemed unacceptable for any child to live under his roof. From the text itself it is unclear why this ruling was made, but perhaps it was because the son did not have a good example to emulate. Whatever the cause, the mother was allowed to keep the child with her, though the father retained his paternal power. In the Roman society of that time, that was probably the best that the mother could hope for.

Another source backs this up: *'If indeed it is the mother who retains custody – for the deified Pius has decided in a court case, and (the Emperors) Marcus and Severus have determined in*

¹⁵⁵ Rawson B., 'Adult-Child Relationships in Roman Society' in: Rawson, B., ed: *Marriage, divorce, and children in ancient Rome* (Oxford, 1991) 7-30, page 26-27

¹⁵⁶ Gaius, *Institutiones* 3.199, translation used: Frier, B. W. and McGinn, T. A. J., *A casebook on Roman family law*, page 229

¹⁵⁷ D. 43.30.3.5, translation used: Frier, B. W. and McGinn, T. A. J., *A casebook on Roman family law*, page 109

*rescripts, that sometimes a child should better remain with her than with the father, provided there is a very convincing reason – (then) it is fair that she be assisted by (being given) an affirmative defense (against her husband’s claim of custody).*¹⁵⁸ The same is the case here: that if the mother could give a good enough reason for wanting to keep her child, there were possibilities for her to do so. Based on the previous source, the father’s bad character – and what exactly that entails is unfortunately not defined in that text – was one of the deciding criteria.

This source, unlike the other, has a small shift in focus. The first focuses more on the mother, the second one more on the needs of the child. The first speaks more of the mother’s rights, the second more of that of the child, who presumably needed a good household to grow up in that the father in some cases could simply not provide. It is not necessarily the mother’s rights that are put first in this source, although it is certain that she too benefitted from such an arrangement.

The sources about custody remain somewhat thin on the ground, but there were some others that make it clear that from this time onwards the matter of custody was not always as clear-cut as it had been in the days before Antoninus Pius made legal changes to the existing system: *‘Emperors Marcus Aurelius and Lucius Verus to Tatiana: If you have proven to the appropriate judge that the child whom you say you bore to Claudius is his son, he will order him (Claudius) to provide support to him (the child) according to his means. The same man will decide whether (the child) ought to be brought up in his (Claudius’) household.*¹⁵⁹

Clearly this case involved a mother who had some dispute with her ex-husband over the paternity over a child that had been born after the divorce. If the son had been born during the marriage there would not be separate households and the paternity was unlikely to be called into question, because any child born within a legitimate marriage was automatically assumed to be the husband’s child.

The interesting point in this source is that if the paternity of the child in question was proven, that it was then up to the judge to determine where the child was to live. The Emperors made it clear that Claudius would at least be expected to financially support the boy if he was indeed his, because that was considered to be the responsibility of any father,¹⁶⁰ but the living situation was left in the hands of the judge who was presumably more familiar with the case and the people involved in it. The matter of where the child would live was evidently not automatically decided by placing it with the father.

Another example is this source: *‘Emperors Diocletian and Maximian and the Caesars to Caelestina: There is no legal provision, in any constitution of ours or of our divine parents, that a division of children be made between the parents on the basis of sex. However, the appropriate judge will decide whether the children ought to stay and be cared for at their father’s home or at the mother’s after a marriage has been broken up.*¹⁶¹ Again the living situation of the children from a marriage that had broken up was left in the hands of a judge. If the system of placing children automatically with their fathers was still in place then it seems

¹⁵⁸ D. 43.30.1.3, translation used: Frier, B. W. and McGinn, T. A. J., *A casebook on Roman family law*, page 230

¹⁵⁹ Cod Just. 5.25.3, translation used: Evans-Grubbs, J., *Women and the law in the Roman Empire* page 199-200

¹⁶⁰ Evans-Grubbs, J., ‘Children and divorce in Roman law,’ in: *Hoping for continuity: childhood, education and death in Antiquity and the Middle Ages* (Rome, 2005) 33-47, page 35

¹⁶¹ Cod Just. 5.24.1, translation used: Evans-Grubbs, J., *Women and the law in the Roman Empire* page 199

unlikely that this text would have existed. Evidently, some thought was given to the matter before a decision was made and in this case it was very well possible that the children might end up living with their mother.

There were possibilities for mothers to go before a judge and demand that they be allowed to see their children, which seems to have been granted,¹⁶² but I would argue that this is not necessarily a custody issue, which is what is under examination in this chapter. It does serve as proof that mothers were getting more rights concerning their children, but seeing a child is not the same thing as having that child living in the same house, which is why I do not intend to give this much attention.

It is unclear how many children did live with their mother. If there was an amicable divorce, the couple would likely settle these matters between them without court interference. Given that in such cases the relationship was not as soured as it was in several of the sources examined in this section, they might have come to some arrangement where both parents could see the children. They might even have split them up in the manner suggested by Caelestina, by sex, or they might have arranged to have the children for different parts of the year, each in turn.¹⁶³ Instances where the divorced couple could settle their own affairs did not have to come before a court.

On the whole there was in this period a shift from a system where children from a marriage that had broken up always lived with their fathers to a system where mothers at least had the opportunity to gain the right to have their children live with them. There is nothing to suggest that the default state was not still where the children lived with their father. If they were born from a legitimate marriage, they were always under their father's power. Even if they continued to live with their mother, the father's *potestas* was not diminished. But Roman society did recognise that mothers had a moral right where it concerned their offspring,¹⁶⁴ which translated more and more into legal rights as well. So there was a definite progression in the rights of mothers concerning their children.

Adoption Option

There was one other way in which a mother could keep her child with her after a divorce: if she remarried and her new husband adopted the children she had from her previous marriage as his own.¹⁶⁵ It is not the first thing to think of when it comes to custody, but since this is definitely a way in which mothers could succeed in keeping their children with them after a divorce, I would argue that it is at the very least worth a mention.

The relevant parties had to jump through some hoops in order to achieve the intended result: *'Further, parents no longer have in their power those children whom they have given in adoption to others. In the case of a son given in adoption, three mancipations and two intervening manumissions are made, just as occurs when his pater releases him from power in order to make him sui iuris. Then he is remancipated to his father, from whom the adopting person claims him (the son) as his own before the praetor; and when he (the father) does not*

¹⁶² Evans-Grubbs, J., 'Children and divorce in Roman law,' page 38-39

¹⁶³ Evans-Grubbs, J., 'Children and divorce in Roman law,' page 37

¹⁶⁴ Evans-Grubbs, J., 'Children and divorce in Roman law,' page 39

¹⁶⁵ Corbier, M. 'Constructing kinship in Rome,' page 142

*counterclaim, the praetor awards the son to the claimant.*¹⁶⁶ Adoption was a lengthy process and did require the permission from the biological father, so if it had been the kind of divorce that had gone very wrong, it seems unlikely that he would agree to let his child be adopted by someone else. The father could benefit from it if the person who adopted his son was of a higher standing and could give the son an easier way to a public career,¹⁶⁷ so if he agreed it was probably more for the benefits than because of his ex-wife's wishes.

It does not seem very likely that a healthy young couple who had children of their own would go to this much trouble. Equally it seems likely that a father who would agree to let his children be adopted by the new husband of his ex-wife would begrudge her the right to have contact with them in the first place. It is therefore unlikely that this was a very frequent practice.

It could be an outcome in case the couple had no children of their own or they had only daughters. Without a son the family line might end, so adoption was an option to be explored in such a case.¹⁶⁸ Emperor Augustus did so, for example: he adopted his wife's sons, because he himself only had a daughter and he and his wife Livia had no children of their own.¹⁶⁹

On the whole it does not seem likely that adoption was used as a strategy by divorced women who wanted to have their children with them. It is a very complicated way that can only be done when the ex-husband agreed at any rate and it does seem that there were easier ways in which mothers could have their children.

In this period there was definite improvement in the law where mothers were concerned. While the default state was still that a father had the children in his house after a divorce and that his *patria potestas* remained unchanged even if his children did not live under his roof, there were changes in the law that allowed mothers an opportunity to have their children live with them, which is a change from the previous period.

Custody after Divorce in the Later Roman Empire

The law on divorce that Constantine introduced said nothing whatsoever about what should be done with the children that had come from a marriage that had split up¹⁷⁰ and there are no sources that deal with this problem either, but that does not mean that nothing sensible can be said about it, because I would argue that there is in fact quite a bit that can be learned from looking at the sources that deal with regulating divorces.

In Constantine's law nothing short of a criminal offence on the part of one partner could get the other party out of the marriage without penalties. If any of those offences could be proven, it seems not unlikely that the "innocent" partner took the children, since the guilty partner by that point was probably convicted of the crimes he or she had committed and was in no position to raise them and see to their welfare.

¹⁶⁶ Gaius, *Institutiones*, 1.134, translation used: Frier, B. W. and McGinn, T. A. J., *A casebook on Roman family law*, page 306

¹⁶⁷ Rawson, B., *Children and Childhood in Roman Italy*, page 233

¹⁶⁸ Corbier, M., 'Divorce and Adoption as Familial Strategies' in: Rawson, B., ed: *Marriage, divorce, and children in ancient Rome* (Oxford, 1991) 47-78, page 66-67

¹⁶⁹ Corbier, M. 'Constructing kinship in Rome,' page 143

¹⁷⁰ Evans-Grubbs, J., *Law and Family in Late Antiquity*, page 231-232

In the case where the woman had tried to divorce her husband without any of the relevant crimes being committed on his part, she would be in no position to look after children at all: *'For if she has sent a notice of divorce to her husband for any reason other than these three crimes, she should leave it (the dowry), down to a hairpin, in her husband's home, and in return for such great confidence in herself, should be deported to an island.'*¹⁷¹ Someone who was convicted could not raise children, so a woman who had attempted to divorce her husband in that way could not raise her own children.

The matters become somewhat more complicated with the man who had tried to divorce his wife without due cause. Men were not penalised as harshly as women for the same thing in this case: *'Also in the case of men, if they send a notice of divorce, it is fitting that these three crimes be inquired into: if they want to repudiate an adulteress or a preparer of poisons or a go-between. For if he has ejected a woman who is free of these crimes, he ought to restore the entire dowry and not marry another woman. But if he does, the former wife will be given the opportunity to invade his home and transfer to herself all the dowry of the second wife, in return for the injury brought against her.'*¹⁷²

Such a man was not supposed to remarry and he lost his wife's dowry, which must have made paying for his children's expenses somewhat more difficult. And since he was the one at fault for breaking up the marriage, I would argue that his ex-wife could make a good case for gaining the chance to have any children that were born from the marriage. There is nothing to suggest that the law that stated that a mother could have her children in her house with her because of the father's bad character was no longer effective. The change in law had been made concerning divorces, not custody of the children and there is no evidence that this particular law had ever been overturned.

Either way, Constantine's legislation was in place for only thirty years, after which a return to the classical law followed in the matters of divorce. It stands to reason that from that time until the time a new law introduced restrictions on divorce the rules and regulations concerning custody of children were in place again. Once again, there was no new law made about the custody of children, so the older laws that had been made by earlier emperors have to be assumed.

The law of 421 AD introduced measures to regulate divorce, but that once again penalised those men and women who attempted to divorce for causes that were not deemed acceptable by the law. For a woman there seem to be very few options in which she could hope to get custody of her children: *'A woman who has separated (from her husband) by presenting a repudium given by her, if she has proved no causes for her own divorce, having lost the gifts which she had received as a fiancée, shall also be deprived of her dowry and given over to the penalty of deportation. We deny to her not only the bond of a second husband, but also the right to return from exile. But if a woman, struggling against marriage, has proved clearly vices and middling faults (on the part of her husband), she will lose her dowry and is to refund the (pre-nuptial) gift to her husband, certainly never to be joined in marriage with anyone again. And so that she not stain her widowhood with the shamelessness of illicit sex, we offer to the*

¹⁷¹ Cod. Theod. 1.16.1, 331, translation used: Evans-Grubbs, J., *Women and the law in the Roman Empire* page 203

¹⁷² Cod. Theod. 1.16.1, 331, translation used: Evans-Grubbs, J., *Women and the law in the Roman Empire* page 203

*repudiated husband the right to accuse her by law. It remains that, if a woman who has left (her husband) has proven serious causes and knowledge implicated in great crimes (on her husband's part), she shall gain possession of her dowry and shall also obtain the betrothal gift, and she shall receive the power of remarrying five years from the day of divorce. For then she will appear to have done this from abomination of her husband rather than desire for another man.*¹⁷³

In most of the cases mentioned in this law, the woman is penalised for divorce. If she was punished, she would probably not get her children, because the divorce was her fault and she tried to divorce for dubious reasons. Only in the case of criminal activity on the husband's part would there be a possibility for her to be allowed to raise the children under her own roof.

Once again, the situation is slightly different for the men: *'Certainly, if the husband has first brought about the divorce and has brought a serious criminal charge against the woman, he shall accuse her and pursue her by law and having obtained his vengeance he shall possess her dowry and shall receive back his generosity (i.e., the pre-nuptial gift) and shall obtain the free choice of marrying another woman soon. But if it is a fault of character, not of crimes, he shall receive back his gift, relinquish the dowry, and marry another wife after two years. But if he has preferred to split up the marriage solely because of disagreement and the repudiated woman is weighed down by no vices or sins, the husband shall lose both the prenuptial gift and the dowry, and in perpetual celibacy he shall endure the penalty for insolent divorce from grievous solitude, and to the woman the power of marriage has been conceded after the end of a year. However we order that the provisions of the ancient law concerning withholdings from the dowry on account of children be preserved.*¹⁷⁴

If the woman should be guilty of criminal offences, the man would of course keep any children from the marriage with him, that much goes without saying. If he had divorced her for no good reason, it is certainly possible that the children, because of his bad character should go to the mother if she was inclined to take the matter before a judge. The law frowned on a man who divorced for such a reason, which more than implies that it is a stain on his good name to go ahead and attempt it.

It is the second reason for divorcing – because of character flaws and not because of any crimes – that might have been the most difficult cases to decide. But in most cases the general rule that might have been applied, was this: if a father could lose his children because of his bad character, the same was true for the mother of the children. Divorcing because of character flaws was not illegal, even though it was penalised, and a mother who had such flaws would have stood little chance of gaining the right to keep her children.

The welfare of the children was of more importance in this time than it had been before. The classical law had placed greater importance on the child's financial stability than on the emotional state.¹⁷⁵ There was however a shift in attitude shown in the law issued by Theodosius II in 439 AD: *'We order that legal marriages are able to be contracted by consent, (but) once contracted are not able to be dissolved except if a repudium has been sent. For indeed the*

¹⁷³ Cod. Theod. 3.16.2, 10, translation used: Evans-Grubbs, J., *Women and the law in the Roman Empire* page 204

¹⁷⁴ Cod. Theod. 3.16.2, 10, translation used: Evans-Grubbs, J., *Women and the law in the Roman Empire* page 204-205

¹⁷⁵ Clark, G., *Women in Late Antiquity*, page 18

*favour that should be shown to children (favor liberorum) demands that the dissolution of marriage ought to be rather difficult.*¹⁷⁶ This heavily implies that it was thought to be better for the children – whether financially or emotionally is not known – if the parents stayed together. Divorce was not something to be encouraged.

Justinian ruled in 542 AD that the child should reside with the parent who had not initiated the divorce,¹⁷⁷ which seems in line with the point that has already been made above, that the guilty party in the divorce was not thought to be of sufficient good character to have the responsibility for the upbringing of the children. So provided that the mother was not the one who divorced her husband, there was a very good chance that she was awarded the right to raise her own children even after a divorce.

Conclusion

The evidence for the custody of children is few and far in between, but it is definitely possible to gain some insights in the practices of the time with what is available. From that available evidence it is hard to say whether women could gain the right to raise their children after a divorce during the first phase of Roman marriages, but it seems highly unlikely. The right to decide where a child lived was the father's.

The period of the classical law did see some changes, when women gained the right to raise their children if the father was of sufficiently bad character that he could not be trusted to bring them up well. Even if such was the case, the father did not lose his *patria potestas*. But on the whole women did get more opportunities to keep their children after a divorce. This did not necessarily change when the divorce laws changed. Provided that the mother was the innocent party in the breaking of the marriage there was every chance that she could legally raise her children under her own roof.

¹⁷⁶ Novel 12 of Theodosius II, translation used: Evans-Grubbs, J., *Women and the law in the Roman Empire* page 205

¹⁷⁷ Clark, G., *Women in Late Antiquity*, page 19

Conclusion

The Roman laws regarding marriage, divorce and custody of children evolved much over time, but they can be roughly separated into three phases: the early one, the period covered under classical law and the later phase that in this paper started with the changing legislation regarding divorce under Emperor Constantine. Most of the different developments in regards to marriage, divorce and custody are closely tied together.

Regarding the earliest phase, women had few rights in the early period of marriage and consequently the same was true about divorce and the custody of children. Divorcing was a somewhat complicated process and happened altogether rather less than it happened later in Roman history. When a woman married, she became a part of the family that she married into. Undoing this process was a little difficult. A woman could not initiate it on her own and a man faced penalties if he did it for unjustified reasons, which must have meant that divorce happened only occasionally.

This meant that the question of custody must have come up only very rarely. Children remained with their father, because that was stated in the law. Children born from a legitimate marriage automatically belonged to their father. This is the default state for the custody issue. No mention was made in these texts about exceptions. If couples came to private understandings, which could be possible, then this is not reflected in the law. Purely from a legal perspective, it does not seem that there was a way for a woman of that time to be able to raise her children under her roof after a divorce.

Women had more opportunities in the following period, when marriage changed rather drastically to a system where she remained under her father's power instead of being transferred into her husband's family group. Marriage also became based on consent – the couple's and their fathers' – and a system developed where the end of the consent of any of the parties involved, could bring about the end of the marriage, which made divorce much easier than it had previously been. Women too could initiate the separation, though she needed the permission of her father to do so, should he still be alive. If the father had died on the other hand and the woman in question had become legally independent, she could make her own decisions regarding the state of her marriage.

Women gained more rights regarding their marriages and divorces in this period from the second century BC onwards. The father's ability to meddle in his daughter's marriage was limited from the mid-second century AD on and even if he did cause her divorce, he could not force her to leave her husband or make her get her dowry back if she did not want to do so. The father was not limited to such an extent that he could not break up a daughter's marriage anymore, but it was made perfectly clear in the law that to do so was frowned upon and was not encouraged.

These changes happened simultaneously with a woman's increased rights in obtaining custody of her children. Of course, as explained in chapter 3, she could never have *patria potestas* over them, but from the mid-second century AD the law did recognise that there were situations in which it was better and more responsible to place the child with its mother after a divorce if the father had a bad character. There are also several examples where the question of where the children were going to live was left up to a judge to decide, which means that the

mother might have stood a chance to gain the right to raise them in her house. As shown, a woman's rights regarding divorce and custody saw improvement at roughly the same time. They did not rise to such an extent of freedom as is usual in the present day, but in the context of Roman law a woman had definitely more rights and freedoms than she had previously enjoyed.

Divorce was made harder again after Constantine's legislation which sought to make divorce rather more difficult than it had been in the previous period. He also penalised those who attempted to divorce for reasons other than those outlined in the law. The punishments for doing so were harder on the women than on the men. The divorce laws bounced back and forth for some time before they eventually more or less settled on a situation where divorce was not encouraged and was penalised if attempted for the wrong reasons, although the punishments for men and women did become more equal. On the whole a woman's rights regarding divorce took a drastic decline in this period.

The same is not necessarily true for the issue of custody. Provided that the woman was not at fault for the divorce, she must have stood a chance of keeping her children in her home with her. Especially if the reason she had proven that her husband was guilty of a serious criminal offence, she must have been able to do so. If she had however attempted to divorce her husband for forbidden reasons, it seems unlikely that she could have obtained custody, but in the event of the husband's fault, the possibility must have existed. This was eventually confirmed in Justinian's law that the children were to live with the parent who was not at fault for the divorce.

For as far as can be ascertained it appears that women's rights regarding custody did not necessarily change when her rights concerning divorce did. The matter of custody would have come up less because divorce became rarer as a result of the legislation, but in the cases of divorce where the woman was not the one reckoned to be at fault, she might have stood a decent chance of being allowed to raise her children.

On the whole, a woman's rights concerning divorce and custody remained closely linked in the earliest two periods under discussion, both of which steadily improved especially from the mid-second century AD onwards, from the time when Emperor Antoninus Pius made changes in the existing legislation which gave women more rights than they had enjoyed up to that point. Later emperors confirmed the laws that he had issued and gave women the same rights as he had done.

There is no evidence that the laws regarding custody changed when the laws about divorce did and this is the point where the two, which had been almost intertwined before, diverge. From a legal perspective the rights of a woman to divorce went from almost non-existent to a fairly free system. From there they were then heavily curtailed again until it had almost returned to the situation as it was at the beginning of Roman marriages.

The custody followed a slightly different path. The early developments were similar, but the woman's rights concerning custody and the chances of obtaining it were neither diminished nor improved when her rights to divorce were restricted. So while the two matters remain closely connected, it does not follow that they must always follow the same path. In the later Roman Empire it is clear that they did not. The woman's rights in custody remained more or less unchanged since the period that the classical law was in place.

As pointed out in the introduction, the subject of custody of children and who had a right to raise them, has not been researched much, especially not when compared to the vast amount of work that has already been done on Roman marriages and divorces. In the work that has been done the first two periods are often discussed in the same book or article, while the later developments get attention in books and articles that do not often refer to the earlier periods in greater depth.

The same is true for the matter of custody. It seems that there is no work that examines this particular issue over the entire course of Roman history, which made this paper necessary. There has in general not been much study done about this subject, which means that there is much more room for work to be done on this. It would seem that the custody issue in later Roman times needs to be examined a bit further than has possible within the scope of this paper.

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