1978

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THE ROMAN LAW OF GUARDIANSHIP IN ENGLAND, 1300-1600

R.H. HELMHOLZ*

I. INTRODUCTION

The place of Roman law in the history of English law has long been a subject of interest and debate. At least since the seventeenth century, when James I's abortive union of Scots and English law sparked interest in the subject,¹ scholars have scrutinized the pages of Glanvill and Bracton, the procedures of Chancery, and the acts of Parliament to detect possible civilian influence.² The results have not been conclusive. Some writers have minimized the role of Roman law in English history.³ Others have exaggerated its claims.⁴ In the end, the question remains open:

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³ E.g., Plucknett, supra note 2, at 48.

⁴ E.g., Sherman, The Romanization of English Law, 23 Yale L.J. 318 (1914).
What influence, if any, has Roman law had on the course of English legal development?

This article makes a small contribution to the subject by examining the use made of Roman law in the courts of the English Church. Focusing specifically on the law of guardianship of minor children, it explores a part of the history of that law that previously has been either ignored or unknown. Based upon an examination of the surviving court records, the article attempts to show that the Church courts exercised a significant guardianship jurisdiction in England through application of Roman law. It then assesses the implications of the evidence for the history of the development of both canon and common law.

A. The Common Law

The English common law of guardianship provides a necessary background for examination of Church court practice. Its outlines, of course, are well known. "[N]o part of our old law," wrote Maitland, "was more disjointed and incomplete than that which deals with the guardianship of infants." It was disjointed because by 1600 English law recognized at least ten separate kinds of guardians. It was incomplete because it provided permanent guardians for only a special class of fatherless children—heirs to real property that had been held by freehold tenure. Under the regime of primogeniture, when a father died leaving minor children the common law supplied a guardian for his eldest son alone; the younger children had no guardian. Even this very limited protection failed if the father held no freehold land. In that situation, the common law made no provision for the wardship of any of his children. Most infants, Maitland therefore concluded, were left "to shift for themselves and to get guardians as best they might from time to time for the purpose of litigation."
A special deficiency of the common law existed where an heir held land by military tenure. In such cases the common law treated guardianship as a lucrative right rather than as a trust for the child’s benefit. The guardian could take the profits of the heir’s lands, subject to a reasonable allowance for maintenance and education. He also could sell both the wardship and the marriage of the ward, tempting the purchaser to recoup the price from the heir’s revenues. Only where the heir held land by socage tenure was the guardian obliged to exercise his office for the benefit of the child.

Legal historians have commonly concluded, therefore, that guardianship in England was both deficient in coverage and open to abuse in application. This conclusion, however, is not entirely sound, since the royal courts did not have exclusive jurisdiction in guardianship matters. Professor Carlton has recently shown that the borough courts supplied some protection for orphans. This article will show that some of the gaps in the common law were also filled by the courts of the Church through application of principles of Roman law.

B. The Canon Law

The foundations for the Church’s jurisdiction in guardianship matters were threefold. First, the Church claimed the right to exercise a general jurisdiction in favor of miserabiles personae, those who by reason of weakness or incapacity could not adequately protect their own rights. Clearly, this jurisdictional claim could embrace fatherless children. Under canon law,
Church courts shared this duty with the courts of the king, particularly when secular justice was inadequate.13 Second, probate jurisdiction in England was lodged in the Church courts.14 Medieval wills often contained legacies to minor children, who had a right, in some places at least, to a filial portion or *legitime*. In the absence of a valid will, they also had claims to an intestate share. It fell to the ecclesiastical courts to secure administration and distribution of these legacies and portions during the infancy of the child. Appointment of a guardian was a way to carry out that responsibility. Third, the Church exercised jurisdiction over many aspects of family law. Cases involving annulment of marriage or disputed paternity brought the Church courts into frequent contact with minor children.15 Infants came naturally


15. It was usual, for example, in the diocese of Canterbury for a man convicted of fathering a child to be compelled to provide a fund for the child’s necessities and to endow the child’s mother. See, e.g., *Canterbury Act Book* Y.4.1, f. 40v (1540): “quod exhibeat alimenta puero et dotaret mulieri x s. citra proximo et qualibet septimana puero per annum” (“that he endow the woman with ten shillings and provide sustenance for the child before the next session and every week during the next year”).

Citations to manuscript Church court records are given hereinafter by diocese, rather than by present archive. The diocesan court records used, with corresponding archives, are listed as follows:

- **Canterbury**
  - Library of the Dean and Chapter, Canterbury.
- **Chichester**
  - West Sussex Record Office, Chichester.
- **Durham**
  - Library of the Department of Palaeography and Diplomatic, University of Durham.
- **Ely**
  - Cambridge University Library.
- **Hereford**
  - Hereford County Record Office, Hereford.
- **Lichfield**
  - Joint Record Office, Lichfield.
- **London**
- **Norwich**
  - Norfolk Record Office, Norwich.
- **Rochester**
  - Kent County Record Office, Maidstone.
under the jurisdiction of the courts that administered the law of domestic relations. Canon law therefore gave theoretical justification to, and English practice provided actual opportunity for, the ecclesiastical courts to appoint guardians as protectors of the interests of infants.

The law regularly applied in the ecclesiastical courts was, of course, the canon law of the Western Church. But the rules at the disposal of the English Church courts in exercising guardianship jurisdiction were drawn principally from the Roman law of cura and tutela, because the canon law contained no express law on the subject. Gratian's Decretum (c. 1140) and the Decretales of Pope Gregory IX (1234) provided the bulk of formal canon law. Neither included a section defining or regulating guardianship of infants. Where guardianship was mentioned, it was only with reference to an existing civil law institution. The canonical texts accepted the civil law and tacitly approved it. When medieval canonists treated the subject of guardianship, they almost always referred to appropriate sections of the Roman law Code and Digest for authority, not to canon law texts. This is as true of the Provinciale of the English canonist William Lyndwood as it is of the more numerous commentaries written on the Continent. Guardianship is thus an excellent example of the widely accepted

<table>
<thead>
<tr>
<th>St. Albans (archdeaconry)</th>
<th>Hertfordshire County Record Office, Hertford.</th>
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<tr>
<td>York</td>
<td>Borthwick Institute of Historical Research, York [Cause papers and A B Act books] and York Minster Library [M 2(1) Act books].</td>
</tr>
</tbody>
</table>

16. See, e.g., D.87 c.5; C.20 q.2 c.2; X 1.19.1; X 3.26.16. On the subject of the status of children in medieval canon law, see Metz, L'enfant dans le droit canonique médiéval; orientations de recherche, 36 Recueils de la société Jean Bodin 9 (1976)[hereinafter cited as Metz].

17. The two laws did occasionally diverge. For example, canon law held that a monk could serve as a tutor; Roman law, that he could not. But minor details apart, the canon law received the Roman law of cura and tutela. Compare D.86 c.26 with Nov. 123.5.

18. For example, to show that the judge could properly approve the appointment of a tutor testamentarius, but not a tutor dativus, without an inquisition into suitability and without satisdatio, the great canonist Hostiensis (d.1271) cited only Roman law texts: Institutes 1.13.5; Code 5.29.2; Code 1.4.27; and Institutes 1.24.pr. Henricus de Segusia, Lectura in Libros Decretalium ad X 2.28.67 [Ex parte M.], no. 9 (1581) (n.p.) [hereinafter cited by its usual medieval title, Hostiensis, Lectura, with reference to the text subject to the author's commentary]. This method of citation is followed throughout for medieval treatises on the civil and canon law.

19. Provinciale (Seu Constitutiones Angliae) 176 s.v. prius (1679) [hereinafter cited as Lyndwood, Provinciale].
proposition that the canon law owed much of its procedure and some of its substance to the civil law.\textsuperscript{20}

In this context, of course, civil law does not mean classical Roman law. It means the civil law found in the Emperor Justinian's \textit{Corpus Juris Civilis} and interpreted by the medieval glossators and commentators. Many of the internal changes in the Roman law from the primitive to the postclassical periods were unknown or irrelevant to the commentators, who fixed their attention on the Justinianic texts. This article adopts the same view. In dealing with the impact of Roman law on the Church courts, this is the proper method. What must be meant by the reception of Roman law in medieval Europe is the reception of the only Roman law medieval men knew.

It does not necessarily follow, however, that the English Church courts actually made use of the civil law. Many parts of the canon law were not applied in practice. Local custom, pressure from the royal courts, and the urgent need to reach settlement of disputes, as Professor Donahue has recently demonstrated, meant that the courts could not invariably apply the formal law of the Western Church.\textsuperscript{21} The important question must be: To what extent and in what manner was the Roman law of guardianship actually applied? To answer this question, we must look to the surviving court records.

C. The Church Court Records

Unfortunately, real difficulties confront the historian who undertakes research in these records, difficulties which affect the scope, or at least the certainty, of any conclusions drawn. The records have survived in very limited quantities and now lie scattered among various archives, almost entirely unprinted. Most importantly, Act books, that is, the day-to-day records of the procedural steps taken in litigation before the Church courts,

\textsuperscript{20} Gl. ord. ad X 5.32.1 s.v. adiuvantur: "Dicas quod legibus utendum est in ecclesiasticis causis nisi canonibus contradicant." ("You may say that [Roman] laws are to be used in ecclesiastical causes unless they contradict the canons.") See Kuttner, \textit{Some Considerations on the Role of Secular Law and Institutions in the History of Canon Law}, in 2 Scritti di sociologia e politica in onore di Luigi Sturzo 349 (1953) [hereinafter cited as Kuttner]; Merzbacher, \textit{Die Paròmie: Legista sine canonibus parum valet, canonista sine legibus nihil}, 13 Studia Gratiana 275 (1967); Naz, \textit{Droit romain}, 4 dictionnaire de droit canonique 1502 (1949).

constitute the principal available source. They normally set forth only rudimentary procedural information: the name and subject of each cause, the appearance by parties to it, the procedure taken on a particular day, and the term set for the next hearing. Except for chance survivals, mainly from York and Canterbury, we have lost the medieval Cause Papers that contained the substance of the law suits: the pleadings, the depositions, and the sentences. We therefore see inside the Church courts through a flawed medium, a record normally confined to the procedural steps taken.

This necessarily limits what can be known about the practice of guardianship jurisdiction. It means that the process of actual administration of the minor's property by guardians is largely hidden. The records do not reveal much about subjects such as how consciously the judges applied the formal law or how conscientiously guardians performed their offices. About these and other important questions the records provide only hints. They do show, on the other hand, a good deal about the appointment of guardians, the kinds of litigation in which they represented infants, and the use of formal checks on the qualifications and integrity of guardians. They reveal enough, in other words, to yield some reasonably reliable conclusions about the nature of the law of guardianship enforced by the ecclesiastical courts.

II. Classification and Appointment of Guardians

A. Distinction Between Cura and Tutela

The Roman law of guardianship was neither simple nor free from internal ambiguity, but as understood by medieval jurists, it provided two basic sorts of guardian: The tutor and the curator. The former was given to a child in pupillari aetate, i.e., one who had not yet reached puberty. The curator, whose selection rested with the minor, represented the child till the age of twenty-five. Of the two, the tutor was the more important. His duties em-

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22. Puberty was normally set at age 14 for boys and 12 for girls. Institutes 1.22. See also id. 1.13.3. On the subject of tutela in Roman law, see W. Buckland, A Text-book of Roman Law from Augustus to Justinian 142-73 (3d ed. 1963) [hereinafter cited as Buckland]; 1 P. Bonfante, Corso di diritto romano Diritto di famiglia 551-692 (1963) [hereinafter cited as Bonfante]; Solazzi, Tutele et Curatele, 53 Revista italiana per le scienze giuridiche 263 (1913); 54 id. at 17 (1914).

23. Institutes 1.23; Hostiensis, Lectura ad X 1.19.1, no. 4: "Nam tutor datur pupillo, curator adulto, et non pupillo." ("For a tutor is given to a child below puberty; a curator to an adult and not to a child below puberty.") Problems of interpretation in classical and postclassical Roman law are treated in S. Solazzi, La minore eta nel diritto romano (1912).
braced protection of both the child’s person and property. The duties of the curator extended only to matters of property and litigation.

English practice reflected the difference between cura and tutela. For example, in a testamentary cause heard at London and appealed to Canterbury in the early 1290’s, one question raised on appeal was whether a second guardian could properly be appointed for a child who already had a tutor. The man who sought appointment as a second guardian did not state in his petition whether he was asking to be named a tutor or a curator. An exception was taken on the ground that “between a tutor and a curator wide difference and distinct effects exist, as appears evidently in many treatises of the law.” The petitioner’s answer, that a curator could in some situations be appointed in addition to a tutor, and that the tutor already appointed should be removed for cause, was supported by citation from the Digest. This case was clearly argued according to the Roman law of guardianship.

Unfortunately, this Canterbury case is one of the rare instances in which the remaining record indicates what legal arguments

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24. Institutes 1.14.4; Azo, Summa Codicis V, tit. de tut. test. (n.d.): “[S]ed persone datur eius universo patrimonio administrando.” (“But he is given to the person for administering his entire patrimony.”)

25. Canterbury Ecclesiastical Suit Roll, no. 135. This case is to appear in a forthcoming volume of the Selden Society, edited by Professor Norma Adams with Professor Charles Donahue, Jr. Most medieval commentators held that in this situation a curator could be appointed if necessary for protection of the child’s interests. E.g., Baldus, Commentaria ad Digest 26.1.3.2 [si pupillus] (n.d.): “Et ideo potest dici quod propter necessitatem sit adiungendus tutori curator, seu coadiutor generalis, per quem tutor poterit convenire et agere tutioria.” (“And therefore it can be said because of necessity there may be joined to the tutor a curator or general coadjutor through whom he can act and sue as a tutor.”); Azo, Summa Codicis V, tit. in quibus causis tut. habenti (n.d.): “[U]bicumque autem dixi dari tutorem habenti tutorem ut ibidem iudex posset dare curatorem si viderit esse faciendum.” (“Wherever I have said that a tutor is given to one having a tutor as in that instance, however, a judge can give a curator if he shall deem [it] proper.”) Placentinus (d. 1192) earlier took the view, however, that such a guardian could not properly be called either tutor or curator, suggesting the terms auctor or administrator instead. Placentinus, Summa Codicis V, tit. in quibus causis tut. habenti (1536) (repr. 1962).

26. “[I]nter tutoren et curatorem longa sit differencia et effectus diversus sicut in multis iuris tractatibus evidenter apparat.” This plea seems to have failed, however, and in Ecclesiastical Suit Roll, no. 148, also relating to the same suit, Roger of Arderne is referred to as tutor seu curator.

27. Ecclesiastical Suit Roll, no. 135: “Item suspectus est et inutilis in cuius loco alius datur quia debet alere pupillum ff. de susp. tu. 1. iii c. tutor et § si tutor (Digest 26.10.3.12).” (“Item, he is suspect and useless, in whose place another is given because he must nourish the child.”)
GUARDIANSHIP

were used. Most surviving cases merely show enough use of civilian terminology to raise an inference that the Roman law distinction between *cura* and *tutela* was followed. For example, at Rochester in 1437 a small child named Thomas Chawnig was referred to correctly in the Act book as being *sub tutela.* In a case heard at St. Albans in 1529, a girl of seven, Margaret Dyar, was rightly assigned a *tutor.* And in a fourteenth century York case, a *curator* rather than a *tutor* served as representative of William, son of Galfred Smyth, described as *in minori etate,* the phrase used for a child who had passed puberty but not yet reached full majority. At Canterbury in 1572, a girl of twenty-one or twenty-two was required correctly by the court to choose a *curator* in order to sue for a legacy allegedly left to her.

These examples show knowledge and application of the Roman law distinction between *cura* and *tutela.* Other cases, however, point in the opposite direction. They suggest a looseness in terminology and a blurring of the distinction between *tutor* and *curator.* The same person was named to serve in both offices simultaneously. In the York court records, for example, the guardian appointed was often called *tutor sive curator.* At Ely

29. St. Albans Act book ASA 7/2, f. 29r: "Comparuit personaliter in iudicio Margareta filia ut asseruit Willelmi Dyar defuncti dum visiit parochie sancti Stephani etatis vii annorum vel circiter cui quidem Margarete propter ipsius minorem etatem dominus officialis assignavit Thomam Bamford parochie sancti Andree in tutorem." ("Margaret Dyar, daughter as she says of William Dyar, deceased, during his lifetime of the parish of St. Stephen, appeared personally in court, and being seven years old or thereabouts the lord official assigned Thomas Bamford of the parish of St. Andrew as her tutor because of her minority.")
31. Canterbury Act book Y.2.29 s.d. 26 March 1572: "Et deinde dictus Soppyn allegavit Margaretam Swetnam alias Swetman partem actricem presentem esse minorem xxvi vel saltum xxxv annis et eo nomine non habere legitimam personam standi in iudicio. Unde facta fide petit eadem Margaretam cogendam fore ad petendum sibi curatorem ad litem cui legata debita solvi possunt ex decreto." ("And finally the said Soppyn alleged that Margaret Swetnam, alias Swetman, the present plaintiff, is less than twenty-one or at least twenty-five years and for that reason has no legitimate standing in court. Therefore, faith having been pledged, she asks that Margaret be compelled to seek a *curator* for herself to whom the legacies due can be disbursed by decree.")
32. It is possible, of course, that the Roman law term was used without carrying with it any of the substance. See R. Genestal, *Etudes de droit privé normand I,* La tutelle 58 (1930). The English evidence, given below, suggests by its contrast to feudal guardianship that at least some of the substance of the civil law was implied.
33. See, e.g., CP.G.203b (1519); CP.G.421 (1550); Act book Cons. A B 6, f. 79v
in 1377, John Curteys was assigned as both tutor and curator for William, son of John Fulbourn. In a 1533 case from the archdeaconry of St. Albans, the judge assigned two men without distinction as tutores et curatores for the children of William Heydon. Thus, in practice the two offices were consolidated. Where a distinction was drawn, it was usually between care of the person of the child and administration of his goods: a tutor was placed in charge of the child’s person, whereas a curator was placed in charge of the child’s property. Thus, in a guardianship hearing at York in 1372, the judge set a term to appoint both tutores personarum and curatores bonorum for the children of Roger of Honingham.

Such a distinction had, of course, a certain congruence with the formal law. A curator was appointed solely to protect the minor’s property or to assist him in litigation. A tutor, at least as understood in the Middle Ages, was appointed in part to care for the child’s person. But neither classical Roman law nor medieval civilian jurisprudence limited a tutor to rights over the person, as the York case suggests. He had administratio of the child’s goods. The duty of curator and tutor was substantially identical

(1510). The phrase tutor vel curator, or a variant thereof, was found in the civilian texts. See, e.g., Code 2.27.2; Digest 27.9.1; Nov. 72.2. It was used, however, because the same principle of law was applicable to both offices, not because there was no distinction between them, as happened in English practice.

34. Ely Act book EDR D/2/1, f. 67r. The joint use of the terms was made at Ely in the sixteenth century. See Act book EDR D/2/12, f. 70v (1580), in which Robert Edward, son of Thomas Edward, asked that William Edward, “patruum suum tunc et ibidem presentem sibi et omnibus et singulis bonis iuribus creditis et catallis suis atque in omnibus et singulis negotiis suis constitutum atque curatorem donec ad legitimam etatem pervenerit” (“his uncle then and there present, be constituted tutor and curator for him and for all his goods, rights, dues, and chattels until he comes of legitimate age”). A similar instance from the Canterbury records is found in Act book Y.3.21, f. 144r (1585).

35. St. Albans Act book ASA 7/2, f. 79v (n.d.). This is an interesting case, brought into court by William Heydon and Thomas Heydon, alleging that John Ewer, executor of a testator also named William Heydon, was withholding legacies left to their sons. The court required them to find a curator et tutor to represent their own sons’ interests. The record reads: “Et dominus assignavit eisdem Willeimo et Thome ac eorum utique ad comparendum cum pueris sui et uno viro honesto in curatorem et tutorem dictorum puerorum ordinando et deputando.” (“And the lord [official] assigned William and Thomas jointly and severally to appear with their children and one reliable man to be deputed and appointed tutor and curator to the said children.”) In the same Act book, at f. 80r, Robert Long and John Heydon were duly appointed during a subsequent hearing, at which the children were also present.

36. Act book M 2(1)c, f. 7r.

37. See Institutes 1.14.4; Bartolus, Commentaria ad Digest 26.1.1, no. 5 (1580-1581).

38. See, e.g., Azo, Summa Codicis V, tit. de admin. tut. vel cur. § debet gerere (n.d.).

39. Buckland, supra note 22, at 152-59, 169-73. See also note 24 supra.
in this respect. The difference was that the curator acted for a child past puberty, and the tutor, for a child who had not yet reached that age. Although medieval civilians carefully maintained this distinction, practice sometimes employed a different one, depending on the function of the guardian rather than the age of the child.

In some recorded instances, court practice diverged even further from civilian usage, using terms quite foreign to Roman law. For example, at Rochester in 1439 the Act book styled a guardian acting for a child curator et gubernator. The representatives in one instance from 1578 were designated supervisores of the children. Sometimes no special description at all was given to the person acting for the child, as in a number of cases in which the Act book merely stated that the child's goods were to remain in custodia of a certain person. In a few cases, the court records used the terminology of English common law. In an entry from 1564 at Chichester, the official records styled the court-appointed

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40. See, e.g., Azo, Summa Codicis V, tit. qui dare tut. vel cur. § potes autem (n.d.): "Ergo post pubertatem sibi alium curatorem debeat petere adultus." ("Therefore, after puberty, the adult should ask for another curator for himself.")

41. Act book DRb Pa 1, ff. 105v, 108v. This was a case apparently brought to recover the person of the child. It was called in the Act book "causa subtractionis et alienacionis dicti pupilli contra formam decreti et commissionis officialis Roffensis."

There are numerous other examples of court practice diverging from civilian usage. In a case recorded in Durham Act book III/4 s.d. 23 June 1581, there is a reference to James Slaiter, "tutor, curator et gubernator Willemi Slaiter et Ricardi Slaiter." In another case, a suit was brought at Canterbury in 1418 (Act book Y.1.3, f. 49r) by Thomas Hather for a legacy allegedly owed to Alice, daughter of the testator, "cuius gubernacionem habet uxor partis actrix." The 16th century royal court records also contain a case brought by a guardian called tutor testamentarius et gubernator assignatus for the son and heir of John Sysours of London. Public Record Office, London, K. B. 27/1086 m. 73 (1533). The same terminology is used in a 1424 will found in 2 Register of Henry Chichele 277 (E. Jacob and H. Johnson ed. 1938).

42. Rochester Act book DRb Pa 12 s.d. 4 March 1578, f. 83v. This may be a reference to the supervisores who were often appointed in probate matters to supervise the execution of a will, and it is noteworthy that in some cases, executors or administrators were called upon to act as apparent guardians of the children without express designation as tutores in the Act books. See, e.g., York Act book M 2/(1)c, ff. 29v-30v (1375); London Act book MS. 9064/11, f. 126v (1513). Medieval wills also sometimes specifically designated executors as guardians. See, e.g., 5 Lincoln Record Society Publications, Lincoln Wills I, 1271-1525, at 22, 126 (C. Foster ed. 1914) [hereinafter cited as Lincoln].

43. See, e.g., Canterbury Act book Y.1.3, f. 67v (1418), in which John Frawnceys claimed to have been "deputatus custos dictarum pecuniarum quoque idem Johannes pervenerit ad legitimam etatem" ("deputed custodian of the said moneys until the same John shall reach legitimate age"). Other cases in which no formal designation was given in the record include Canterbury Act books X.1.1., f. 9v (1449); Chartae Antiquae A 36 I, f. 11r (1326); Chichester Act book Ep I/10/3, f. 35v (1524); Durham Act book III/1, f. 25v (1532); York CP.F. 259 (1479); and St. Albans Act book ASA 7/1, f. 46v (1527).
guardian as *custos*, and in a 1512 London case, a child was described as being *in warda et tutela* of the guardian. Occasionally the records produce an example of usage in direct conflict with the civil law rule, as in one York case from 1513 in which a boy of sixteen asked for both *tutor* and *curator*. Theoretically, only a *curator* could be appointed because the boy had passed puberty. Perhaps the combination of the two offices for children below puberty was so prevalent at York that it was carried over for one who had gone beyond the age of fourteen. It is difficult to be sure. In any case it is evident that, although the Roman law distinction between *cura* and *tutela* was known in England and sometimes invoked, more often than not the English Church courts used the terms without scrupulous concern for technical correctness.

**B. Tutores**

Roman law recognized three separate kinds of *tutela*: Testamentaria, legitima, and dativa. The first term designated the guardian named in the parent’s will; the second, the next of kin; and the third, the guardian appointed by the magistrate. Medi-

44. Cause Papers Ep I/15/1/118 s.d. 1564.
45. London Deposition book DL/C/207, ff. 98v-99r (1512). See also York CP.F.87 (1490): “habentis tutelam et custodiam supradicti Alexandri” (“having wardship and custody of the aforesaid Alexander”). In both of these cases, secular wardship seems to have been involved. In the first, in fact, the right had been purchased from the king. In a case recorded in Rochester Act book DRb Pa 2, f. 29v (1445), there is a reference to a five-year-old child being simply “in potestate” of the adult who received a legacy for the child. In Rochester Act book DRb Pa 3, f. 498r (1465), there is a reference to “quatuor orphanis sub tutela et in custodia dicti Willemi Bedill” (“four orphans under the guardianship and in custody of the said William Bedell”).

46. York Act book Cons. A B 7, f. 23r: “Ricardus Seriantson filius Henrici Seriantson de Cawod defuncti xui annorum etatis ut asservuit coram domino commissario personaliter comparuit et peciit Willemum Johnson de ciuitate Ebor’ sibi assignari in tutorem et curatorum persone sue et rerum ac bonorum suorum. Et dominus commissarius ad pecticionem dicti Ricardi decrevit ut peciti.” (“Richard Seriantson, son of Henry Seriantson of Cawood deceased, sixteen years of age as he asserts, appeared personally before the lord commissary and asked that William Johnson of the city of York be assigned to him as *tutor* and *curator* of his person and of his goods and possessions.”) An apparently similar instance from the Southern province is Lichfield Act book B/C/2/10 s.d. 29 January 1572.

47. Azo, Summa Codicis V, tit. qui dare tut. vel cur. § potest autem (n.d.): “Sed si detur tutor puberi ipso iure datio non tenet.” (“But if a *tutor* should be given to one past puberty, the appointment is invalid legally.”)

48. Id., tit. de tutela test.: “et quia tutella alia testamentaria, alia legitima, alia dativa” (“and because *tutela* is either testamentary, legitimate, or appointive”). But cf. G. Durantis, Speculum Judiciale I, tit. de tutore, § 4 (1574 repr. 1975) (adding fourth category, *tutela anomala*, to account for guardians that could not be fitted into other three categories).
eval jurists discussed all three as living institutions. The law decreed that each was entitled to appointment in descending order of preference. The tutor testamentarius, if suitable, excluded all other claimants. If he were disqualified or if no tutor testamentarius had been named, the tutor legitimus or next of kin served. Although classical Roman law limited this class of tutors to agnates (relations on the father's side), the Emperor Justinian extended the law to include cognates. It was in this form that the institution was inherited by the Middle Ages. Only in the absence of any suitable tutor legitimus would the magistrate appoint a tutor dativus.

Collections of medieval wills show that testamentary guardians were known in England. Parents sometimes named specific persons to care for their minor children and to take custody of the children's personal property. The wills do not always use the Roman law term tutor testamentarius in making this appointment. But the law required no special form to create such a tutor. And the functions normally mentioned in the wills were

49. The texts and commentators commonly mention a fourth type, tutela fiduciaria. See Institutes 1.19; Buckland, supra note 22, at 146-47. Medieval civilians debated the origins of the word fiduciaria and the possibility that tutela dativa had assimilated tutela fiduciaria. Cynus of Pistoia noted: "Solet tamen quaeri, utrum ille titulus de fiduciaria tutela sit hodie correctus per 1. 12 tab. val per constitutionem novam . . . . De hoc est controversia: sed haec prolixae disputationis causa evitandae omitto." ("It is usually asked whether this title of tutela fiduciaria is today corrected by the law of the Twelve Tables or new constitution . . . . There is controversy about this: but I omit it to avoid prolix disputation.") Commentaria in Codicem V., tit. de legitima tut., 1. frater, no. 7 (1578) (repr. 1964). See generally Villata di Renzo, La Tutela 44-46 (n.d.) (noting common opinion that the institution continued to exist). English records, however, have produced no mention of tutela fiduciaria.


51. Institutes 1.20.pr.; Cynus of Pistoia, Commentaria in Codicem V, tit. de test. tut., no. 2 (n.d.).

52. Nov. 118.5; Azo, Summa Codicis V, tit. de leg. tut. § itaque (n.d.).

53. See Lincoln, supra note 42, at 22; 16 Somerset Record Society, Somerset Medival Wills (1383-1500) 13 (F. Weaver ed. 1901); note 41, supra, at 109, 277. See also 10 Selden Society, Select Cases in Chancery, A.D. 1364 to 1471, at 100 (W. Baldon ed. 1896); 64 Surtees Society, Acts of Chapter of the Collegiate Church of St. Peter and Wilfrid, Ripon 85 (1875). In at least one case at York, the testament of the decedent was included in the file for the cause, doubtless for reference. CP.G.844 (1570).

54. Code 5.28.8; Swinburne on Wills, supra note 5, pt. 3, § 12, at 290: "It is not material by what words the tutor is appointed, so that the testator's meaning do appear; for they are nevertheless to be confirmed tutors." The rule in classical Roman law may have required formal words. Buckland, supra note 22, at 143-53. However, Gaius, upon whom Buckland appears to rely, seems to qualify this statement of formal requirement by the word rectissime. See 1 The Institutes of Gaius Bk. 1, § 149 (F. de Zulueta ed. 1946).
those of a tutor. It seems likely, therefore, that the testators had the civilian institution in mind.

The ecclesiastical court records confirm English familiarity with tutela testamentaria because the term tutor testamentarius was sometimes explicitly used. In addition, it appears substantively in cases where the judge enforced the wishes of the testator in appointing guardians for a testator’s children. In a case heard at Canterbury in 1452, for example, the judge put the specific question to witnesses: “Did the said Moses [the testator] order and specify in his last will that his children should be governed and supported by the feoffees of the said Moses?” In a case three years earlier, the executors of William Colyn were cited ex officio by the diocesan court. The charge stated that they had “refused to permit John the son of William to be in the custody of John Trisham,” who allegedly had been appointed in the father’s testament to take charge of the child. The result of an affirmative finding in both cases would be to uphold the appointment of a tutor appointed by testament.

Different in substance, but also indicative of a readiness to follow the directions of the testator, is a case heard at York in 1372. The widow of Nicholas Strensale had been named tutrix testamentaria in her husband’s will on condition that she not remarry. She did remarry and consequently was removed from her office by the York court in favor of the man specified in the will as tutor in case of the widow’s disqualification. A more

55. See, e.g., York Cons. A B 6, f. 49v, where a reference is made to Agnes While, “tutrix testamentaria Roberti While filii naturalis et legitimi dicti Willelmi [While]” (“testamentary tutrix of Robert While, the natural and legitimate son of the said William [While]”). She was also serving as executrix.

56. Act book X.1.1, f. 63r: “Interrogatus an dictus Moises ordinavit et fecit in sua ultima voluntate quod filii eius essent gubernati et exhibiti per feoffatos dicti Moisi, dicit quod sic.” (“Asked whether the said Moses in his last will ordained and directed that his sons should be governed and cared for by the feoffees of the said Moses, he says that he did.”)

57. Act book X.1.1, f. 9v. The entry did not specifically call John Trisham a tutor testamentarius, but the Act book recorded that the allegedly offending executors were initially assigned a term “ad exhibendum testamentum et ultimam voluntatem dicti defuncti” (“to show the testament and last will of the said deceased”). This suggests that the will would determine the outcome of the dispute over custody. Other custody cases include Rochester DRb Pa 1, f. 105v. (1439), and Canterbury Chartae Antiquae A 36 I, f. 11r (1326), where, however, it was the widow of the father who asserted the right as curator “recipere dictum puernum et alere eundem pro lucro de dicti pecunia proveniente usque ad legitiam etatem eiusdem” (“to receive the said child and to nourish him through the profit of the said money until his legitimate age”).

58. Act book M 2(1)c, f. 8v. The disqualification was specified in the will, but it was
difficult case arose fifty years later at York. The question raised in litigation was whether a *tutor testamentarius* named in a father's will for the elder child had, by virtue of the appointment, the right to act as *tutor* for the child's younger brother if the elder child died. No result survives, however, and the Roman law on the question is open to argument. Both of these York cases do indicate, however, that the courts looked to the will of the parent in determining guardianship questions, as Roman law specified.

Second in the line of preference of appointment under Roman law was the *tutor legitimus*, the next of kin. The English court records do not provide conclusive evidence of compliance with this civilian rule. Only one possible reference to a *tutor legitimus* specifically so called has been found. In a case from 1509 at York, Roger Busshol was approved as *tutor et curator legitimus* to the children of William Godehap after he had proved that he was their uncle. It appears that in practice, the *tutor dativus*, the guardian appointed by the magistrate, was normally used in default of a testamentary guardian. Judges appointed a guardian themselves if no *tutor testamentarius* had been named, despite the Roman law rule that a *tutor dativus* was to be appointed only if there were no qualified *tutor legitimus*. Indicative of this approach are cases in which the ecclesiastical courts appointed someone to enforce a child's rights to a legacy.

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Also in accord with the formal Roman law, which disqualified the widowed *tutrix* if she remarried, Code 5.35.2.

59. See Act book Cons. A B 6, ff. 49v, 50r, 58r, in which the judge "decrevit fore deliberandum super ista peticione" ("decreed that there should be deliberation on this petition").

60. The medieval commentators discussed only the question of how large an interpretation can be put on designations by class. See, e.g., Bartolus, Commentaria ad Digest 28.2.6 [Si quis filiabus] (n.d.).

61. Act book Cons. A B 6, f.14v: "[F]acta fide quod dictus Rogerus Busshol est avunculus eorumdem liberorum, . . ., dictus vicarius generalis assignavit prefatum Rogerum in tutorem et curatorem legitimum dictorum liberorum Willelmni Godeknap." ("[F]aith having been pledged that the said Roger Busshol was the uncle of the same children, . . ., the said vicar general assigned the aforesaid Roger as *tutor* and *curator legitimus* of the said children of William Godeknap.") In an earlier York cause, the representative of the children apparently claimed his office "ut proximus agnatus liberorum" ("as the nearest agnate of the children"), so that although no specific use of the term *tutor legitimus* was found in the record, the substance of the civil law seems to have been respected. York CP.F.128 (1420-1421).

62. There is a suggestion of this by at least one 13th century author. See Martinus de Fano, Formularium, c. 179, in 1:7 Quellen zur Geschichte des Romisch-Kanonischen Processes im Mittelalter 77 (L. Wahrmdn ed. 1917)[hereinafter cited as Wahrmdn]. For a later example, see 1 H. Grotius, The Jurisprudence of Holland 35 (R. Lee trans. 1926)[hereinafter cited as Grotius].

63. See, e.g., Canterbury Ecclesiastical Suit, no. 315 (1291-1293), wherein a witness
Equally so are cases in which one of the lawyers attached to the court acted for the child. In none of these cases does the record state that no tutor legitimus was available. The courts appointed tutores dativi instead of automatically allowing the next of kin to serve.

On the other hand, the English courts often considered the wishes of the family in appointing a tutor dativus. For example, at York in 1371 when naming a guardian of the children of Roger Honyingham, the judge first ordered the relatives of the children to be summoned in case they wished to participate in the appointment. When several appeared, the judge chose two of them to serve as guardians. In a second case the appointment was made "by the common and express consent of all and singular cognates and agnates of the children," and in a third, the judge revoked his appointment of a guardian earlier thought to be related to the child after discovering that no kinship existed.

Investigation of contemporary French court records has disclosed that some courts in France also convoked the kin of the child to participate in the designation of a tutor. Indeed, the practice was so prevalent that commentators have been able to speak of it as a conseil de famille. They have cited it as evidence when asked "si dictus Rogerus sit tutor vel curator et si testamentarius vel dativus?" ("if the said Roger is a tutor or curator and whether testamentary or appointive?"). He replied, "quod curator est et dativus et per eundem magistrum Osbertum ut dicit" ("that he is a curator and appointed by the same Master Osbert as he says"). In a case recorded in York Act book M 2(1)c, f. 26v (1375), there is citation of William Grynder, tutor et curator of the daughter of Philip Gourdemaker, "auctoritate curie predicte legitime deputatus" ("legitimately deputed by the authority of the aforesaid court").

Cases in which the Act book records that the guardian chosen was related to the child are found in Chichester Act book Ep 1/10/19, f. 91v (1593); Ely Act book EDR D/2/12, f. 70v (1580); Lichfield Act book B/C/2/26 s.d. 16 June 1590; Rochester Act book DRb Pa 1, f. 31v (1437); York Cons. AB 6, f. 14v (1509); Act book M 2(1)c, f. 19v (1374), CP.F.128 (1420-21), Exch. AB 5, f. 33r (1591); and St. Albans Act book ASA 7/2, f. 80r (1533).

There was, however, an appeal.

See P. Timbal, Droit romain et ancien droit français: regi mens matrimoniaux, successions liberalités 110 (24 ed. 1975); M. Ville, Le droit romain 69 (1946); Levy, L'Officialité de Paris et les questions familiales à la fin du XIVe siècle, in 2 Études
of the way in which customary law influenced and changed the received Roman law in court practice. English evidence on the subject is less complete than the French, and it is impossible to speak about the practice as a fixed institution. But the similarity to French practice, even extending to the language used by the records,⁶⁹ may well be an indication of the same sort of adaptation of Roman law in light of customary usage. In any event, it seems certain that the courts did not observe strictly the Roman law preference for the tutor legitimus.

It does seem fair to point out, however, as the French commentators have not always done, that the use of a council of the family was not contrary to the underlying civilian principle, i.e., representation and protection from the kinship group. Roman law preferred the family member, the tutor legitimus, to the tutor dativus for that reason. If English and French practice used the tutor dativus where the formal law would have used the tutor legitimus, that practice at least respected the principle of kinship selection behind the civil law preference.

In all, the evidence of the manner in which the ecclesiastical courts chose the tutor is insufficient to conclude certainly how far practice diverged from civilian rules. What evidence there is suggests an observance of the Roman law preference for the testamentary guardian, as well as a consolidation in practice of the tutor legitimus and the tutor dativus. The courts made the appointment themselves where no guardian was appointed by will. But the evidence, incomplete as it is, suggests that they did so with an eye to the wishes of the family.

C. Curatores

The second kind of guardian in Roman law was the curator, normally appointed for minors between puberty and the age of twenty-five. As a distinct office, cura played a smaller role in English practice than it had in Roman usage. As previously
noted, the English courts frequently consolidated the office of curator with that of the tutor. Medieval canon law further diminished the role of the curator by allowing minors past puberty to represent themselves in litigation involving "spiritual" causes such as marriage, tithes, and Church office. In some matters, appointment of a curator was an option, not a necessity.

On the other hand, canon law and English practice did find a place for the curator. Occasionally, they even consciously distinguished between curatores ad litem (or ad lites, as the records more commonly state) and curatores with a continuing responsibility for administration of a minor's property. This is clearest in litigation in which the judge appointed one of the lawyers attached to the court as curator ad lites. It is difficult to believe that continuing administration was envisioned for the lawyer, who surely must have been meant to act only for purposes of litigation. On the other hand, when the qualification ad lites was not added, when the curator was related by blood to the minor, and when he expressly swore to keep and preserve the child's property, a curator with the full duties of his civilian counterpart must have been meant. The judge must have appointed a real guardian to protect the minor's property during the period of need.

Roman law had fewer formal rules about appointment of curatores than it did for tutores. No curator at all had to be appointed to protect the child's property rights unless the minor requested one or a person entering into a contract with him demanded that one be appointed as protection against a later claim.

70. See notes 32-40 supra and accompanying text.
71. Sext. 2.1.3; Metz, supra note 16, at 81.
72. The origins of the distinction seem to rest in the rule that a particular curator could not be assigned to an unwilling minor, except ad litem. Also, a curator, unlike a tutor, could be assigned for a limited purpose. See, e.g., Institutes 1.23.2; Digest 28.1.4 (both recognizing distinction).
73. E.g., Canterbury Act book Y.2.29 October 1572; Chichester Act book Ep 1/10/19, f. 81r (1593); Durham Act book III/4 s.d. 9 June 1581; Lichfield Act book B/C/2/26 s.d. 12 May 1590; York CP.E.241r (1358), Act book M 2(1)c, f. 23v (1358).
74. See, e.g., Canterbury Act book Chartae Antiquae A 36 I, f. 11r (1326); York Act book Cons. A B, f. 14v (1509). Even in this area, the courts did not maintain the separation in every instance. In a Chichester case recorded in Act book Ep 1/10/19 s.d. 22 December 1593, a curator ad lites was appointed to preserve property of two minor children until they reached their majority: "[A]ctui subscripsit neconon dimitis et scriptum suum obligatorium penes registrar de resolvendo et satisfaciendo dicte Avitie predictam summam xxx s. cum eadem Avitia ad suam legitimam etatem pervenerit." ("The curator subscribed to the record and left his written bond with the registrar to repay and to satisfy with the said sum of thirty shillings the said Avitia when she shall reach legitimate age.")
that the transaction was invalid because the minor was not of age. All curatores were dativi, i.e., formally appointed by the magistrate. Where a curator had been named in a parent’s will, however, the magistrate routinely approved the nomination. Roman law also envisioned that the minor himself would suggest the curator to be appointed, and this is the method usually specified in the Act books.

It is, in fact, impossible to read the records of appointment of curatores without seeing a real informality in the court proceedings. In a typical case, a child appeared in court to demand a legacy he believed was due him. Since he could not act in court without a guardian, he brought along someone willing to act for him. Seeing nothing wrong with the suggested appointment, the judge decreed as the minor requested. The suit then went forward. It was a simple, practical procedure. The ecclesiastical courts of Canterbury, York, Durham, Ely, and Lichfield all contain records that suggest such informality. As with the consent of the family in cases of tutorum dativi, social reality breaks through the formal record. The desires of the parties determined usage in the courts. Again the practice was in line with Roman law principles. And where the child was old enough to make a reasonable choice, as are most children between fourteen and twenty-five, no other practice made more sense. Only when the minor had no nominee of his own did the court itself find and appoint a curator.

In sum, English practice relating to the appointment of guardians followed a limited version of the Roman law categories. The consistency with which the courts of the northern province of York used civilian terminology was slightly greater than that of the courts of the southern province of Canterbury. Henry Swinburne, the York canon lawyer who wrote circa 1600, may

75. The minor could not be forced to accept any particular curator, but could be compelled to name someone of his own choice. Digest 26.1.3.2; Azo, Summa Codicis V, tit. de tut. test. (n.d.).
76. Institutes 1.23.1; Hostiensis, Lectura ad X 2.28.67 [Ex parte M.], no. 8; Bartolius, Commentaria ad Digest 26.5. rubr.
77. Code 5.31.6. See generally F. Schulz, Classical Roman Law 193 (1951) [hereinafter cited as Schulz].
78. Act book Y.3.1, f. 68v (1575) (children aged 17, 15, and 11). This case, like the others following, was brought to recover a legacy.
81. Act book EDR D/2/12, f. 70v (1580) (child described simply as pubes).
82. Act book B/C/2/26 s.d. 12 May 1590 (no age given).
have meant to suggest this difference by purposely refraining from discussing more than guardianship in the courts at York.\footnote{But further, the customs of this realm are so divers and contrary one to another, which do concern this matter, that I might easily fall into divers errors.} But the evidence of differences between the north and the south is not absolutely conclusive, and even among individual jurists and commentators on Roman law there was uncertainty about which kind of \textit{tutela} to use in describing a particular guardian.\footnote{One question frequently debated by commentators, for example, was whether a guardian invalidly appointed by will, but nevertheless confirmed by the court, should be called \textit{tutor testamentarius} or \textit{tutor dativus}. See, \textit{e.g.}, Azo, Summa Codicis V, tit. \textit{de confirm. tut. vel cur} (n.d.).} If substance is taken as the test, it is clear that guardians were appointed in the south as well as in the north of England, and that they were sometimes more than guardians \textit{ad litem}. Still, the English courts did not observe every distinction in terminology of the civil law; they did not follow every Roman law rule about the appointment of either \textit{curatores} or \textit{tutores}. But they did not ignore the law’s substance.

\section{DUTIES OF GUARDIANS}

The classification and appointment of guardians show clearly the extent of English compliance with civilian categories. The question of how rigorously the Church courts enforced the duties of the Roman law \textit{tutor} and \textit{curator}, though a more complex subject legally, yields a conclusion roughly analogous to that relating to appointment, \textit{i.e.}, use of Roman law without observance of all its features.

\subsection{Preliminary Steps}

The requirement of \textit{satisdatio} provides a good example of this conclusion. Roman law required that the guardian produce surety of his faithful performance (\textit{satisdatio} or \textit{cautio}) in the form of a deposit of money or the production of personal guarantors before exercising his office.\footnote{ Institutes 1.24; Digest 46.6.4; Code 5.42.3. For a comprehensive discussion of the institution, see A. Guzman, Cauchein tutelar en Derecho romano (1974).} The purpose of this requirement was protection against loss of the infant’s property. English court records contain instances in which the courts adhered to this rule.
In a testamentary cause heard in 1418 at Canterbury, for instance, the guardian suing to recover a legacy allegedly due to the child was first obliged "to produce sureties to safeguard the goods of the infant." The terminology follows that of the civil law exactly. In numerous other cases the Act book specifically records a cautio's or satisdatio's being given.

On the other hand, there are also cases in which no satisdatio was mentioned. The formal law itself can explain some of these. It excused tutores testamentarii from this requirement on the ground that the testator's trust in their integrity provided a sufficient safeguard. Although this sometimes may have accounted for omission of the satisdatio, neither this exemption nor that available where a tutor legitimus was found to be "an honest person, particularly if the child's fortune [was] of moderate size," will explain all the English cases in which no satisdatio was noted. Too many of them involved tutores dativi, for whom...
no exemption was available. The preliminary provision of sureties was therefore used, but was not required in every instance.

One possible explanation for omission of the *satisdatio* may be the use in court practice of a formal oath taken by guardians to carry out their duties in the interests of the infant. Apparently added to the classical law by the Emperor Justinian, this requirement no doubt reflects the great importance to the oath in the centuries after the establishment of Christianity. It is the best documented of the preliminary steps in the surviving English court records, which give more detail about its content than they do about the *satisdatio*. In one appointment at York, for example, the new guardians swore "corporally touching the Holy Gospels that they would in good faith keep and preserve the goods and persons of the said children during the time of their administration to the use and profit of the children and [that they] would do whatever was beneficial for the said children and would avoid what was harmful." The "use" mentioned here was normal. The guardian typically swore to hold and administer the goods *ad usum filiorum* or *ad usum orphanorum*, one of the several

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91. That a demand by the opposing party may have played a part in the decision is suggested by one case, in which the record mentions production of the cautio only after a demand. Canterbury Act book Y.3.1, f. 77r (1575): "Tunc Patrickus Smyth unus executorum peciit quatenus dictus Smyth [the curator] . . . ad prestandam sufficientem caucionem tam pro solucione dicte summe quibusdam Johanni Smyth, Agneti Smyth, et Agneti Smyth . . . ." ("Then Patrick Smyth, one of the aforesaid executors, asked that the said Smyth provide sufficient surety for the payment of the said sum to John Smyth, Agnes Smyth, and Agnes Smyth . . . .")

92. Much the same can be said of the requirement that the guardian make an inventory of the infant's property. Code 5.37.24; Cynus of Pistoia, Commentaria ad Code 5.37.28.4, no. 1 (n.d.); Lyndwood, Provinciale 176 s.v. prius (1679). Sometimes the Church court records mention it; sometimes they do not. A later parallel from court practice in Holland can be found in Grotius, supra note 62, at 43.

93. Nov. 72.8; Cynus of Pistoia, Commentaria ad Code 5.37.28.4 (n.d.): "Quarto debet iurare utilia facere et inutilia praetermittere." ("Fourth, he must swear to do what is beneficial and avoid what is harmful.") Cynus cited only the Novels as authority, and no reference to the oath has been found in the Codex or Digest. Nor do most modern writers on Roman law mention it. A fuller form of the oath, similar to the one found in the English records may be found in gl. ord. ad Clem. 3.11.2 s.v. tutorum et curatorum.

94. Act book M 2(1)c, f. 7r (1372): "Iuramentis ad sancta dei evangelia corporaliter prestatis quod personas et res dictorum impuberum bona fide custodient et salvabunt durante tempore administrationis sue ad utilitatem et comodum impuberum eorum, quaecumque dictis impuberibus utilia facient et inutilia praetermittent."  

95. Chichester Act book Ep 1/10/3, f. 35v (1524). The Church court records consistently use the term *ad usum* rather than *ad opus*. They fully support Maitland's findings of the interchangeability of the two terms and of the dominance of the former in the ecclesiastical setting. See J. Bean, The Decline of English Feudalism, 1215-1540, at 105-19 (1968); 2 Pollock & Maitland, supra note 6, at 233-39.

96. London Act book MS. 9064/11, f. 126v. (1513). See also Chichester Act book Ep I/10/19, f. 123r (1593); Durham Act book III/4 s.d. 3 June 1581; Canterbury Act books Y.1.2, f. 97v (1389); Y.2.10, f. 145r (1523); Lichfield Act book B/C/2/26 s.d. 22 September.
ways in which the ecclesiastical courts employed the "use" normally associated with English land law.

One should not quickly discount the importance of this oath. It had both a moral and a legal force. The former was intangible, but not unreal. Medieval men accorded the oath a high place; witness the fact that it was the only preliminary step expanded beyond the Roman law texts. Its strictly legal force found expression in a legal remedy available for breach of the oath to protect the child's property. The guardian's oath was, therefore, in no sense an empty gesture. It occasionally may have satisfied judges that no *satisdatio* had to be produced.

B. Care of the Child's Person

Once formally qualified, the Roman law guardian had three principal duties: To provide for maintenance of the child,\(^97\) to represent the child in litigation,\(^98\) and to administer the child's property.\(^99\) The English records contain examples of *tutores* and *curatores* carrying out all three of these functions. The duty of maintenance was normally inapplicable to the *curator*, who represented children old enough to shift for themselves.\(^100\) It was, however, one of the primary duties of the *tutor*. And although of the three requirements, it has left the least evidence in the remaining Act books, clearly some medieval guardians undertook to care for the physical and educational needs of the infants committed to their charge. In a 1371 case from York, for example, the guardians chosen promised specifically "to provide for and educate [the children] until they reached puberty."\(^101\) Fifty years earlier at Canterbury, the court had conditioned transfer of a child's legacy to his guardian on the latter's promise "to maintain [the child] from the profit stemming from the said money until

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1590; York Act books M 2(1)b, f. 2r (1371); M 2(1)c, f. 28v (1375); Cons. A B 6, f. 79v (1510).
97. Digest 26.10.3.14, 27.2.3; Villata de Renzo, La Tutela 26 (n.d.).
99. Digest 26.7. See also Buckland, supra note 22, at 152-59. It is, of course, possible to divide the duties further. Azo separated them into eight categories, dividing the duty to care for the child's personal well-being, for example, into three distinct parts. See Azo, Summa Codicis V, tit. de admin. tut. vel cur. § debet gerere tutor (n.d.).
100. See notes 22 & 28 supra. See also Digest 17.2.3; Baldus, Commentaria ad id., no. 1 (n.d.).
101. York Act book M 2(1)b, f. 1v (1371): "[D]ecretum fuit per dictum dominum officialem quod predicte due libere sint in custodia prefati Thome qui, sumptibus ipsius Thome propriis, promisit dictas liberas durante earundem impubertate quousque puberes facte fuerint alimentare et educare."
[he reached] legitimate age.” At Lichfield in 1590, one Act book entry records that the judge committed to the guardian “the protection and education [of the child].” Not every entry of appointment of a tutor is so specific. Most reveal nothing at all about provision for care and maintenance. It is unclear whether the duty resting in the tutor was understood, or whether the care of the child’s physical needs was left to informal resolution.

A second area of uncertainty, both under the formal Roman law and in medieval practice, concerns the right to custody of the infant. Roman law scholars do not agree on whether the tutor had control of the child’s person in classical law. The answer apparently depends on whether the vis et potestas held by the Roman law tutor should be construed in a technical sense to include actual control. It also depends on whether the texts assigning the tutor “to the person” of the child also imply control. Professor Watson, for example, argues that the texts designating a tutor “to the person” of the child did not mean the tutor had any actual control over the child’s person, but rather were intended simply to differentiate tutores from curatores. The curator could be assigned for one duty or for one item of property, whereas the tutor had authority over all the child’s property. Therefore, a tutor was assigned generally “to the person,” but did not have custody. Other scholars have interpreted the evidence literally, concluding that the tutor did have a right to custody.

The English evidence on this point is conflicting. The disagreement apparently open under the civil law texts seems mirrored in English practice. There are cases in which, as part of his

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102. Act book Chartae Antiquae A 36 I, f. 11r (1326), in which the guardian swore “quod paratus fuit recipere dictum puerum et alere eundem pro luco de dicta pecunia proveniente usque ad legitimam etatem eiusdem.” In a case recorded in Chichester Act book Ep 1/10/2, f. 35v (1524), William Sanford received goods and 50s. owed to a child named Joan. At the same time, he “acceptit onus alendi filian ipsius Johanne predictan” (“accepted the burden of supporting the aforesaid daughter of the same Joan”). William, however, was given no official designation as tutor for the child in the record.

103. Act book B/C/2/26 s.d. 6 June 1590: the diocesan official “commisit educacionem et tuitionem cuiusdam Henrici Bradshawe filii naturalis Johannis Bradshawe.” In an earlier Durham case, brought by a child who had reached majority, to recover an intestate share of his father’s estate allegedly wasted by his guardian, the defendant guardian pleaded that whatever he had spent of the child’s property had been “for sustaining the plaintiff during his minority.” Act book III/1, f. 25v (1532). Unfortunately, no outcome of the case has been found.

104. See Digest 26.1.1; Institutes 1.13.2.


106. A. Watson, The Law of Persons in the Later Roman Republic 108 (1967). See Schultz, supra note 77, at 173 (tutor’s limited right over ward’s person includes power to determine residence, education, and maintenance, but not power to give ward in adoption).
appointment, the guardian swore an oath to take custody of the child,\textsuperscript{107} and there are other cases in which he did not.\textsuperscript{108} Similarly, some cases indicate that the child's person was subject to control by the tutor,\textsuperscript{109} while others show that the child was in the custody of someone else.\textsuperscript{110} No sure explanation for this seemingly contradictory evidence can be given. Perhaps we can logically assume from the nature of the underlying disputes that most questions about custody were settled by private agreement among the families involved, which in turn would have led to diversity in the way children were provided for.

Even when actually brought before a court, custody cases are among the most difficult to decide by fixed rule. No judge who values the well-being of a child will grant custody to someone who does not care for the child. The preference of the child, the character of the candidates, and the wishes of the family all dictate variety in the results.\textsuperscript{111} Perhaps this is why the Church court records do not furnish greater and clearer evidence about child custody. The judges normally did not give reasons for their decisions, and the Act books seldom hint at the human reality behind the procedure recorded. All one can say with assurance is that the records show the duty specified in Roman law to provide for the child being undertaken by some guardians. Occasionally, they also indicate that the child was in the guardian's custody.

C. Representation in Litigation

The evidence relating to the guardian's second duty, vindication of the child's legal rights, is less ambiguous. Guardians clearly undertook this obligation. Appointments of \textit{curatores ad litem}, whose function was to participate in a law suit on behalf of a minor, furnish one certain example.\textsuperscript{112} Litigated cases in

\textsuperscript{107} See note 94 supra and accompanying text.
\textsuperscript{108} York Act book M 2(1)c, ff. 14r-14v: "prestitoque iuramento per dictum dominum Johannem consueto de conservando res et bona, bona fide quousque dicta Johanna ad plenam pervenerit etatem" ("and the accustomed oath of preserving the goods and effects until the said Joan shall reach full age having been taken in good faith").
\textsuperscript{109} See Rochester Act book DRb Pa 1, ff. 105v, 108v, where a suit was brought to recover the person of the child and was styled a \textit{causa subtactionis et alienationis dicti pupilli}. See also York Act book M 2(1)b, f. 1v (1371).
\textsuperscript{110} St. Albans Act book ASA 7/2, ff. 75v, 80r (1533); Canterbury Act book Y.2.13, f. 221r (1536).
\textsuperscript{112} See, e.g., Canterbury Act book Y.2.29, s.d. 29 October 1562: "Quo die compariit Bendicta Browne et spontanea voluntate elegit magistrum Ricardum Wallis et Wille-
which the record specified that a tutor was acting for a child furnish another. Instances of both occur in sufficient number to raise an inference that this part of the Roman law was applied throughout England. However, the evidence also suggests that the only regular court appearances by guardians occurred in probate matters, since all but two of the instances found come from testamentary causes. Typically, a tutor or curator sued to enforce the child's right to a legacy, an intestate share, or the portion of his parent's estate that fell to him under English inheritance custom. Most of these suits were brought against executors or administrators who had been unwilling to acknowledge, or at least to satisfy, the rights of the child. The role undertaken by guardians in litigation was to secure and preserve the minor's testamentary rights to personal property.

Even in this testamentary litigation, however, the English courts did not invariably appoint a guardian to protect the infant's interests. Sometimes the executor or administrator performed informally whatever protective functions were in fact undertaken. The judge named no special guardian, and he fastened no extra designation of tutor or curator on one of the executors. The executor, of course, always had a general responsibility to supervise distribution of legacies, which may have included a responsibility for making sure that the child's rights were fully protected. However, the Act books do not specify this, and the

mum Faryle in curatores ad lites etc.” (“On which day Benedicta Browne appeared and of her free will chose Master Richard Wallis and William Farlye as curators ad litem.”)

In York Act book M 2(1)c, f. 23v (1374), John de Stanton was deputed curator ad litem to Thomas, son of William Wyte, at the same time that two other men were assigned as tutores et curatores for the child. Stanton was one of the regular staff of court proctors, doubtless the reason for the appointment.

113. See, e.g., Rochester Act book DRb Pa 1, f. 31v (1437): “Johannes Novyn citatus est super eo quod detinet bona legata Thome Chownyng filio defuncti dicti sub tutela Willilmi Gode cognati eiusdem existenti ad promocionem eiusdem Willelmi Gode responsur.” (“John Novyn is cited at the promotion of William Gode to answer for detaining the goods left to Thomas Chownyng, the son of the said decedent, who is under the guardianship of William Gode.”)

114. Ely Act book EDR D/2/1, f. 67r (1377); Canterbury Act books Chartae Antiquae A 36 I, f. 11r (1326); id. Y.1.3, f. 65v (1418); id. Y.2.29 s.d. 26 March 1527. Such a suit probably lay behind Tooker v. Loane, 80 Eng. Rep. 338 (K.B. 1617). Dr. Charles Gray was kind enough to call my attention to this case.

115. See, e.g., London Act book MS. 9064/11, f. 123v (1513); St. Albans Act book ASA 7/1, f. 45v (1526-1527). The designation of executors and administrators as guardians was sometimes also mentioned in medieval wills. See note 42 supra.

116. Thomas Ridley, the 16th century defender of the ecclesiastical courts against the Common Lawyers, noted that “Executors and Administrators do supply [the role of tutores] so far forth as they have the tuition and governance of minors during their underage.” T. Ridley, A View of the Civile and Ecclesiastical Law 219 (London 1607).
GUARDIANSHIP

interests of an executor and administrator were at times potentially antagonistic to those of the infant. Perhaps the English judges made ad hoc judgments to appoint tutores whenever conflicts of interest occurred. Certainly the records contain cases in which the Church court judges, acting on their own initiative, ordered someone to hold a legacy for the benefit of a child.117 Even assuming, however, that this may have been a source of protection, these instances only emphasize the lack of a guardian with full civil law powers and responsibilities. Moreover, not every child had a guardian: tutores and curatores appeared in many, but not all, testamentary causes involving children.

The absence of guardians from other litigation in the Church courts contrasts markedly with their more frequent presence in testamentary matters. Only two clear instances of representation in other areas have been found, one in a matrimonial118 and the other in a contract case.119 The English Church courts exercised significant jurisdiction in both areas. And especially as to a minor’s contracts, Roman law assigned a significant place to the tutor or curator.120 Why do almost no tutores and curatores appear in these areas? It is hard to be sure. The surviving records produce no definitive answer, although their incompleteness may explain much. But academic law does suggest a possible explanation for both these omissions. Under the canon law of marriage, a child had the right to renounce any marriage when he or she reached the age of puberty. A child below puberty, therefore, would rarely become involved in litigation. Little could be decided definitely before then.121 Nor did a child over the age of puberty need a guardian in marriage cases, since his curator had authority only over his property, and the child could therefore participate personally in marriage litigation. Significantly, the one marriage case in which the court appointed a guardian involved a dispute

117. The judges in the following cases, apparently acting sua sponte, ordered money to be held for the benefit of a child, no tutor or curator being named: Canterbury Deposition book X.10.1, ff. 106r-106v (1416); Act books Y.1.2, f. 97v (1398); id. Y.2.10, f. 145r (1523); id. Y.3.1, f. 12v (1574); Rochester Act book DRb Pa 3, f. 345v (1458); London Act book MS. 9064/2, f. 73v (1484); St. Albans Act book ASA 7/1, f. 19r (1518).

118. York CP.E.89 (1365). I am indebted to Professor Donahue for calling my attention to this case.

119. York Act book M 2(1)a, f. 5r (1315). With this absence of evidence, compare the situation in the Parlement of Paris noted in Martin, supra note 13, at 314.

120. See generally Buckland, supra note 22, at 157-59, 170-73. The Church courts in France appointed guardians for this purpose. Fournier, supra note 13, at 80-81.

over the age of one litigant.\textsuperscript{122} Where there was no dispute, guardians had no place.

As to contracts, litigation in the English Church courts involved obligations undertaken by means of an oath. “Breach of faith” was the rubric under which such cases were heard.\textsuperscript{123} Medieval civil law treated sworn contracts differently from unsworn contracts; it regarded the former as inviolate. Therefore, if the minor had made the agreement with an oath, the law deprived him of the special protections extended under Roman law.\textsuperscript{124} One of those protections was the need for a \textit{curator} to allow him to contract more freely than he could without one. Since very small children would rarely make contracts, and since other children below age twenty-five could contract as adults by using an oath, there was no need for guardians in the sort of contract litigation heard by the English Church courts.\textsuperscript{125} Thus, in the two areas of Church court jurisdiction where guardians might have served useful purposes, medieval law rendered their presence unnecessary.\textsuperscript{126} Their role in litigation was therefore normally limited to participation in testamentary causes.

\textsuperscript{122} York CP.E.89. Perhaps significantly, the definitive sentence in the opinion includes reference to a \textit{curator}; but the words have been crossed out. This may reflect the final decision of the court that the litigant was of age and needed no guardian \textit{ad litem}. That a minor could act without a guardian in a marriage case was specifically recognized in X2.13.14. In Canterbury Act book Y.1.4, f. 125v (1423), there is a clear statement showing that no \textit{curator} was present: “Alicia Philipp' de Herne etatis, ut dicit in ea parte interrogata, xvi annorum constituit M. Adam Body procuratorem suum in quadam causa matrimoniali.” (“Alice Philipp of Herne, sixteen years of age as she says, being interrogated in this matter, constituted Master Adam Body her proctor in a certain matrimonial cause.”)


\textsuperscript{124} The Constitution \textit{Sacramenta puberum} of Frederick I, laying down this rule for minors past puberty, was included in medieval copies of the \textit{Codex Justiniani}. Code 2.28.1. For representative comments by civilians and canonists approving the rule, see Cynus of Pistoia, \textit{Commentaria ad Code} 2.28.2, nos. 5, 10 (n.d.); Hostiensis, \textit{Lectura ad X} 2.24.28, nos. 4-5; T. Sanchez, De Sancto Matrimonii Sacramento, lib. 6, disp. 38, no. 13 (1737) (n.p.) [hereinafter cited as Sanchez].

\textsuperscript{125} The rule of \textit{Sacramenta puberum} was also extended to include children who were “nearly at the age of puberty.” Sanchez defined this age as ten and one-half for boys and nine and one-half for girls; this would have covered almost all children likely to make agreements. \textit{See} Sanchez, supra note 124, at lib. 6, disp. 38, no. 2; \textit{id.} lib. 1, disp. 51, no. 24.

\textsuperscript{126} Sir Thomas Smith may have suggested as much, writing that as soon as children reach puberty, they are of age, and “[i]hat which is theirs they may give or sell, and purchase to themselves either lands and other moveables.” T. Smith, \textit{De Republica Anglorum}, lib. 3, c. 7 (London 1583).
D. Administration and Accounting

Under Roman law, administration of the child's property was the most important and extensive function of the tutor. He was required to administer the assets for the exclusive benefit of the infant. Unlike the common law of feudal guardianship, Roman law made him a trustee. Civilians fashioned complicated rules regulating what acts the tutor or curator could perform in the interests of the child. They fastened liability for violation of these rules squarely on the guardian.¹²⁷

English Church court records contain clear references to administratio being undertaken by the guardians of infants.¹²⁸ The office carried with it the duties of a trustee (in theory at least), for the guardians assigned by the courts were always ordered to hold the property for the use of the child,¹²⁹ not for their own enrichment. In English practice, however, administratio must have been a much simpler task than that undertaken by the Roman law tutor. The medieval guardian had only a limited form of property to administer. The duties of the tutor were normally exercised in this area, as in litigation, only within the Church's probate jurisdiction. They were restricted, therefore, to chattel interests. More specifically, the court decrees transferring property to the tutor mention only simple pecuniary legacies. There may have been exceptions, such as cases involving leases, but the records examined produced no cases of assets requiring continued management, such as a business or even a herd of animals, falling into the hands of the tutor. In the one case where stock animals were part of a minor's intestate share, the animals were sold immediately to an agent of a neighboring abbey.¹³⁰ The guardian then held the money for the child. Bequests to children occasionally included valuable personal items, such as a silver bowl.¹³¹ But preservation of a bowl requires little management. In the normal situation the restricted nature of the property assigned to the care of the tutor simplified his task. He had only money to preserve.

¹²⁷ See Buckland, supra note 22, at 154-59.
¹²⁸ See, e.g., Chichester Act book Ep I/10/3, f. 35v (1524), where a reference is made to a sum of money that "dominus assignavit inter filios ut patet ex dorso inventarii, deinde commisit administracionem Thome Myles . . . ." ("the lord [official] assigned among the sons as appears on the back of the inventory, of which he committed the administration to Thomas Myles . . . .").
¹²⁹ See text accompanying notes 95 and 96 supra.
¹³⁰ York CP.F. 259 (1479).
¹³¹ Chichester Act book Ep I/10/3, f. 35v (1524); York Act book M 2(1)c, f. 17r (1374).
Administratio in England was further simplified because the medieval guardian was not required, like his Roman predecessor, to lend an infant's money at interest.\(^{132}\) No doubt he had to stand accountable for whatever profits were actually made, after deducting a legitimate amount expended for the child. But this was a different matter from requiring him to make usurious use of the fund.\(^{133}\) Although there were means of avoiding the Church's prohibitions against usury, the tutor was not obliged to embrace them. The English records use words like conservare,\(^{134}\) custodire,\(^{135}\) and redeliberare\(^{136}\) when defining the task of administration of the fund. If these words were used precisely, the guardian must have had to keep custody of the money and hand it over to the child when he came of age. More than that he need not have accomplished. As a result, English administratio was a much less involved task than that detailed in the civil law texts. Compared to the administratio undertaken by the Roman tutor, or by the guardian at common law, administration by the canonically appointed tutor was a slight burden.

The last act required of the tutor was to make an accounting of his administration.\(^{137}\) This ended the formal relationship. There are clear indications in the English records of observance of this final step, both in the initial oath taken by guardians to account and in actual court terms scheduled for the accounting.\(^{138}\) Thus, at Chichester in 1565, Roger Cutsolde was assigned a day in court "for rendering an account of the portion of the boy" whose property he had held.\(^{139}\) After the hearing, the guardians apparently turned the property over to the former ward and obtained a formal acquittance from the court.

Classical Roman law contained a number of remedies available where guardians had not carried out their duties properly.

\(^{132}\) See generally Villata di Renzo, La Tutela 259-70 (n.d.).
\(^{133}\) For a discussion of this point, see Cynus of Pistoia, Commentaria ad Code 5.37, c. novissime (n.d.).
\(^{134}\) York Act book M 2(1)c, f. 14r (1374).
\(^{135}\) Canterbury Act book Y.1.3, f. 67v (1418).
\(^{137}\) Digest 27.3.1.3; Baldus, Commentaria ad id. (n.d.).
\(^{138}\) See, e.g., York Act book M 2(1)c., f. 7r (1372), in which the tutores, as the final part of the oath, swore that "administracionis sue tempore finito ordinario qui protem pore fuerit racionem de eis reddent plenarie et fidelem" ("at the end of the period of their administration, they [would] render a full and faithful account to the ordinary of the place at that time").
\(^{139}\) Act book Ep. I/10/12, f. 37v: "ad reddendum compotum de porcione pueri."
Removal of a suspect tutor was the primary remedy during the period of guardianship.\textsuperscript{140} Liability in favor of the child could later be asserted under three or four different forms, depending on the nature of the offending act.\textsuperscript{141} English practice clearly knew the remedy of removal. Instances of it have survived.\textsuperscript{142} Cases were also brought against guardians for violation of their oath to administer faithfully.\textsuperscript{143} Presumably, restitution to the child followed successful prosecution of such a suit. But there is no surviving evidence to suggest any sophistication or differentiation in remedy against defaulting tutores. The English records show no sign of any of the four distinct ways in which a former ward could theoretically seek redress under the civil law. Of the \textit{actio rationibus distrahendis} or the \textit{actio tutelae utilis}, the English courts knew, or at least enforced, nothing.

IV. Conclusion

The examination of Church court records accomplishes basically three things. It demonstrates how Roman law principles were used in English practice. It shows something about the extent to which the Church courts supplied the need for guardians not met by secular courts. And it suggests a possible significance of ecclesiastical practice in tracing the development of the common law.

First, guardianship jurisdiction enforced by the English ecclesiastical courts was a limited form of that found in the \textit{Corpus Juris Civilis} and expounded by medieval civilians. The consolidation of the offices of tutor and curator, the preference for the \textit{tutor dativus} chosen with the advice of the family, the relatively simple

\textsuperscript{140} Institutes 1.26; Digest 26.10. The reasons for removal were broad. See, e.g., Azo, Summa Codicis V, tit. \textit{de suspectis tutoribus} no. 1 (n.d.).

\textsuperscript{141} Baldus, Commentaria ad Digest 27.3.1.21 [\textit{in tutela}]: "Et nota hic quod si tutor furatur pecuniam pupilli ex hoc facto resultant quatuor agendi formae." ("And note here that if the tutor steals the child's fund, from this deed four forms of action can result.") See generally Schulz, supra note 77, at 178; H. Weymuller, Contribution à l'histoire de l'actio tutelae (1901).

\textsuperscript{142} E.g., York CP.E.32 (1337). See also note 58 supra.

\textsuperscript{143} E.g., London Act book MS 906d/11, f. 114r (1513): an action brought against Elizabeth, widow of Thomas Kimberell "alias iurata de conficiendo et exhibendo verum inventarium . . . quod quidem inventarium alias per ipsam exhibitum est falsum . . . cuius pretextu reatum periiuii se incurrere cognovit" ("sworn at another time to make and exhibit a true inventory . . . which inventory exhibited by her is false . . . by reason of which she makes recognizance that she had incurred the fault of perjury"). And in York CP.E 32 (1337), the court specified that removal was warranted because of violation of the guardian's oath.
nature of administratio undertaken by English tutores, and the disregard of the four separate remedies against defaulting guardians all lead to the conclusion that there was selective enforcement of the Roman law categories, even in ways one would not expect from reading contemporary jurists. Practice moved further towards simplicity than Roman law and its medieval commentators provided.

Modern French writers, noting a similar phenomenon in the courts of their country, have suggested that this pervasive simplification represents a compromise with, or perhaps an enrichment by, customary practice.144 This is a plausible suggestion for England as well. There are cases, for example, in which the Church courts followed the secular law in setting the majority of a minor at the age of twenty-one rather than at twenty-five, as specified by Roman law.145 There is equivalent evidence of their use of a “family council” not found in Roman law.146 These examples suggest, and indeed compel, a conclusion that the canon law was not a closed system; it was open to outside influence.

The difficulty with this conclusion is that it is not possible to find a customary source for every ecclesiastical variation from the Roman law.147 A slightly different explanation may better fit the evidence. It is that the Church courts discarded those parts of Roman law that no longer made practical sense in light of the conditions of medieval and early modern society. Consolidation of the offices of tutor and curator is a good example of this process. Originally, tutela had been a right granted for the benefit of the tutor; cura had always been meant for the minor’s protection. But by the time of Justinian, the powers and duties of the two offices had become virtually indistinguishable.148 Imperial

144. See notes 68-69 supra and accompanying text.
145. E.g., Canterbury Act book Y.3.21, f. 134r (1585), in which the intestate shares were ordered distributed “filis dicti defuncti cum venerint ad seperales etates xxi annum et filiabus dicti defuncti cum venerint ad suas etates xvii annorum vel in dies maritagi” (“to the sons of the said decedent when they come severally to the age of twenty-one and to the daughters of the said decedent when they come severally to the age of seventeen or on the day of their marriage”). See also Canterbury Act books Y.3.1, ff. 132r-132v (1575); Y.2.29 s.d. 26 March 1572; York CP.G. 844 (1570).
146. See notes 65 & 67 supra.
147. Variation and simplification in the guarantees of faithful performance by the tutor actually required in court practice furnish a good example of this point. See text accompanying notes 85-92 and notes 140-43 supra.
148. There is a full discussion of the development of the powers and duties of the two offices in 2 B. Biondi, Il Diritto Romano Cristiano 229-40 (1952). See also 1 Bonfante, supra note 22, at 552-55; Buckland, supra note 22, at 172; Levy, Vulgarization of Roman Law in the Early Middle Ages, 1 Medievalia et Humanistica 14, 31-32 (1943).
legislation had fastened the same protective function on each. The one major difference lay in the age of the child protected, but that is a formal difference only. In practical terms, the distinction made no sense. Medieval commentators, who were tied to the texts, maintained it. But in contemporary legal practice it had long since ceased to have real significance. All guardianship was one. This fact may explain why the English Church courts so frequently disregarded the distinction between cura and tutela. More generally, it may also explain the other areas of selective enforcement of the civil law categories. The Act books make clear that the canon law courts used the Roman law of guardianship. They did so, however, with an eye to the habits and the needs of contemporary practice. They discarded purely formal, archaic elements of the Roman law of guardianship.

Second, the Church courts regularly provided guardians only for minors with rights, or at least potential rights, to part of a decedent's estate. A legacy, a filial portion, or an intestate share was a prerequisite for the appointment of a tutor or curator. The evidence supporting this conclusion largely depends on an argument from silence: the Act books contain so many instances of guardians acting in testamentary causes that their virtual absence from other areas makes this conclusion probable. But if true, the conclusion means that in England guardianship was normally exercised as part of the Church's probate jurisdiction, rather than as part of the canon law's wider responsibility for miserables personae. The Church courts, in other words, did not provide a guardian for all orphans. They filled some gaps in the English common law of guardianship, but not all. The Church, therefore, made no systematic effort to remedy the defects in the secular law.

This conclusion should come as no surprise. Social historians have taught us that the Middle Ages paid little heed to the special needs and status of children. It may even be true that in

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149. The distinction was apparently dropped in other parts of Europe and abandoned by the commentators in the 16th and 17th centuries. See H. Jolowicz, Roman Foundations of Modern Law 119-20 (1957).

150. This conclusion does not necessarily show that the Church did not provide some support for children in other ways, as, for example, poor relief. See the document recorded in J. Pound, Poverty and Vagrancy in Tudor England 110 (1971).

any age most orphans do not need guardians, except in special circumstances. Our own society, despite its greater solicitude for children, has not taken the step of requiring the appointment of a guardian in all cases. Medieval society left less place than does our own for intrusion into family affairs by public courts. More was left to private resolution. That the Church courts did not provide every orphan with a tutor or curator is therefore no cause for wonder.

Finally, the enforcement of Roman law principles of guardianship in the English Church courts raises the possibility of influence on the development of the common law. Three changes in the common law illustrate this point. First, whereas the early law allowed the guardian in socage to profit from his office at the expense of the ward, two thirteenth century statutes changed this policy by requiring an accounting at the end of the guardianship. What had been a profitable right to exploit became a trust. Second, during the fifteenth and sixteenth centuries, the Court of Chancery began to appoint guardians in order to protect the property of infants. The Chancellor’s jurisdiction, according to most commentators, was “very similar to that exercised over guardians by the Roman Praetor.” Third, a post-Restoration statute made it possible for a father to dispose of the custody and tuition of his children by will.

Guardianship of heirs in socage previously had passed automatically to the nearest relative who could not inherit from the child. After 1660, to the extent that informal practice had not anticipated statutory change, the father could exclude this relative by appointing a testamentary guardian.

152. The matter is not free of controversy. See, e.g., Bersoff, Representation for Children in Custody Decisions: All That Glitters Is Not Gault, 15 J. Fam. L. 27 (1976); Fratcher, Toward Uniform Guardianship Legislation, 64 Mich. L. Rev. 983 (1966); Hansen, Guardians ad Litem in Divorce and Custody Cases: Protection of the Child’s Interests, 4 J. Fam. L. 181 (1964). For English law, see the instructive opinion of Mr. Justice Bennett in In re D. (An Infant), [1943] 1 Ch. 305. He was puzzled by the “well-established practice of making a nominal settlement on an infant when it is desired to make that infant a ward of court.” Id. at 306. The practice may be a purely formal continuation of the medieval practice. See also James, The Legal Guardianship of Infants, 82 Law Q. Rev. 323 (1966).

153. See note 10 supra.

154. Scrutton, Roman Law Influence in Chancery, Church Courts, Admiralty, and Law Merchant, in 1 Select Essays in Anglo-American Legal History 208, 220 (1907). See also 1 G. Spence, The Equitable Jurisdiction of the Court of Chancery 608-14 (London 1846); Cogan, Juvenile Law, Before and After the Entrance of “Parens Patriae,” 22 S.C.L. Rev. 147 (1970); Kuttner, supra note 20, at 352.

155. 12 Car. II, c. 24, § 8 (n.d.).
That these three instances of change all approximated the Roman law rules of guardianship requires no demonstration. That these rules were applied in the ecclesiastical courts is equally sure. Can we make a connection between the two? Can we speak of a "legal transplant"? It is hard to be sure. There were differences between the Roman law and the practices adopted by English law. Also, Professor Plucknett was certainly correct to point out that any suggestion of influence must "rest on inference rather than strict proof." But the similarities are very striking. And not every inference is wrong. To exclude the possibility that the influence of Roman law principles came through the courts of the Church seems as incautious as to adopt the idea automatically once the similarities are noted.

This article began by asking how large a role Roman law has played in the history of English law. It has answered that question only in a limited area, but within that compass the place of Roman law has been substantial. Enforced in simplified form within the courts of the Church, civil law principles and practices not only supplied some of the deficiencies in the English common law of guardianship, they may also have shaped the course of development of the common law itself. Not least among the contributions of the Church courts to English legal development has been the introduction of Roman law principles. The Church's jurisdiction over guardianship illustrates this point with particular clarity.

156. See generally A. Watson, Legal Transplants (1974).
157. Plucknett, supra note 2, at 48.
158. For a recent review of the literature and perceptive comments on the question of Roman law influence on English law, see Donahue, supra note 2, at 174.