Less Favored – More Favored? Women's Approaches to Property After Re-marriage During the Second Half of the 18th Century

by

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Due to the greater interest in the relationship between gender and history, as it has been emphasized after the "cultural turn" of the 1990s, questions concerning women's roles in early modern legal practice became an important focus of research, too. First of all, criminal laws came into view: Questions were raised, why women were being hunted as witches, and whether they should be regarded as victims of the legal system. Furthermore, studies asked, how gender was constructed, when, for instance, fornication was being tried at court.[1]

Despite these efforts, research did not focus on civil legal practice with the same intensity. It appeared, that corresponding cases were regarded as less spectacular than issues of criminal law. Moreover, the existence of several judicial instruments like the guardianship seemed to have suggested that women could not be regarded as independently acting subjects of law. Instead, they were expelled from early modern legal culture.[2] Nevertheless, it has to be argued, that such an impression is not sufficient enough to understand the relationship between gender and law in the early modern society. In fact, it appears that women were not excluded from civil legal practice at all. Studies on marriage, marriage contracts and inheritance of women suggest a different picture.[3]

It is remarkable, that these new studies and approaches heavily rely on women's rights to and transfer of property. In fact, property seems to become one of the main topics, enabling us to throw a new light upon the women's status within the legal culture.[4] Women did, appar-

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[1] See Ulrike Gleixner, *Der Mensch und der Kerl: Die Konstruktion von Geschlecht in Unzuchtsverfahren der Frühen Neuzeit (1700-1760)*, Campus, Frankfurt a. M., New York, 1994. For further topics see Ute Gerhard, (ed.), *Frauen in der Geschichte des Recht: Von der Frühen Neuzeit bis zur Gegenwart*, Beck, München, 1997.

[2] For insights into the guardianship see Ernst Holthöfer, 'Die Geschlechtsvormundschaft. Ein Überblick von der Antike bis ins 19. Jahrhundert', in: Gerhard, *Frauen in der Geschichte des Rechts* (note 1) 390-452. For critics and further insights into the legal discourse see Susanne Jenisch, '„Die berüchtigte Materie von der weiblichen Geschlechts-Curatel". Die Abschaffung der Geschlechtsvormundschaft in der aufklärerischen Diskussion', in: Olivia Hochstrasser, Claudia Opitz, Brigitte Tolkemitt, (eds.), *Ordnung, Politik und Geselligkeit der Geschlechter im 18. Jahrhundert*, Wallstein, Göttingen, 1998, 285-301.

[3] See Karin Gottschalk, *Eigentum, Geschlecht, Gerechtigkeit: Haushalten und Erben im frühneuzeitlichen Leipzig*, Frankfurt, Campus, 2002; Patricia Crawford, 'Women and Property: Women as Property', *Parergon*, 19, 2002, 151-172.

[4] Recently, Hannes Siegrist and David Sugarman reflected on the immense meaning of property to constitute society and to shape social order. See Hannes Siegrist, David Sugarman, 'Geschichte als historisch-vergleichende Eigentumswissenschaft. Rechts-, kultur- und gesellschaftliche Perspektiven', in *Eigentum im internationalen Vergleich (18.-20. Jahrhundert)*, eds. Hannes Siegrist, David Sugarman, Göttingen, Vandenhoeck & Ruprecht, 1999, 9-33. For considerations introducing the term „legal culture" into German research see Harriet Rudolph,

ently, have the right to freely dispose of property; they were suing for their property, intending to defend it in court and transferring it within their families. Certain property was reserved for their use only, and contracts, wills and gifts offered the opportunity to overrule intestate succession.[5]

Therefore, if the question of less or more favored women in European legal history is being raised, one cannot ignore the strong link between discussions about the women's right to dispose freely of property and their legal status. This means that in conflicts about property not only property was being negotiated and evaluated. Norms, discourses and social practice joined together in shaping women's legal status, and, as a consequence, gender hierarchy, too. Moreover, research on conflicts illustrates the attitudes of contemporaries towards women and their legal status, since the suing parties introduced these assumptions to the jurists in court. But, as it will be argued in the following, despite the gender hierarchy, which had been established by laws, discourses and its application to the conflicts, legal practice at the end of the 18th century remained almost free from arguments based on attitudes towards gender or emotions. Rather, it relied on legal instruments like contracts, wills or local statutes. Accordingly, it is almost impossible to speak of an either more or less favored status of the women. On the one hand, it was not the aim of legal practice to overrule contemporary attitudes towards women possessing property, which suggests that women did have a less favored status. On the other hand, their property might be secured, if they presented legal arguments in accordance with the jurists' demands. This means, that jurists played a crucial role, when it came to defining women's rights to dispose of property. They evaluated the arguments of the plaintiffs and defendants; they also applied the contemporary legal discourses and different laws to the cases; they tipped, in fact, the scales and determined the more or less favored position of women in early modern legal practice.

Conflicts about remarriages will be taken as examples here. They appear to be more interesting than other conflicts, since they are woven into the changing legal status of women by remarriage. From being a widow, a woman became a married woman once more. This change of status affected on her ability to keep and freely dispose of property and seemed, furthermore, to be an invitation for suing her, if no contracts or wills stated, what should happen, if she remarried. But even if such direction did exist, children, creditors and others took the opportunity to sue for property.

'Rechtskultur in der Frühen Neuzeit. Perspektiven und Erkenntnispotentiale eines modischen Begriffs', *Historische Zeitschrift*, 278, 2004, 347-374.

[5] See Hendrikje Carius, Nicole Grochowina, '"uns zum ludibris machen"? Frauen in der Zivilrechtspraxis. Reußische Fälle', *Jahrbuch des Museums Reichenfels-Hohenleuben*, 49, 2004, 39-55.

The results presented here are drawn from the legal practice of the arbitration council in Jena. This council was established in 1566 at the university's faculty of law. During the early years, it consisted of three, during the 18th century of five, jurists, who were supposed to write down their experts' opinion and juridical advises on various types of civil and criminal cases all over the Holy Roman Empire. These advises were regarded as verdicts by the parties at court, so the importance of these councils cannot be overestimated. Many councils like this existed during the early modern period. Professional advice served an important function, as the different legal traditions and laws apparently overtaxed many lay lawyers everywhere. In many cases the *transmissio actorum* was issued in order to get a professional response to issue in question. In Jena the arbitration council reached its peak during the late 18th century, although the *transmissio* had been prohibited in many territories by that time, since as local authorities wanted to keep their own jurisdiction in the area they controlled.[6]

1. Remarriage as a legal issue

It is important to note that early modern laws and legal practice cannot be easily delineated. In fact, a great variety of local statutes, customs and laws existed, which were complemented by Roman law and the *ius commune*.[7] Moreover, research has concentrated on marriage and its arrangements,[8] and on widowhood.[9] Attention has been drawn especially towards the economic situation of widows.[10] In addition, recent research has analyzed the social perception of widowhood and also emphasizing its semantics.[11] This rather incomplete overview suggests that several aspects of marriage and widowhood have been studied so far, but

[6] For details see Nicole Grochowina, 'Ein "besonderes" Verhältnis. Der Jenaer Schöppenstuhl und die Universität in der Frühen Neuzeit, *Zeitschrift des Vereins für Thüringische Geschichte*, 57, 2003, 89-105.
[7] Oestmann illustrates the problems, which arose from this complex situation in early modern legal practice: Peter Oestmann, *Rechtsvielfalt vor Gericht: Rechtsanwendung und Partikularrecht im Alten Reich*, Rechtsprechung, 18, Frankfurt, Vittorio Klostermann, 2002.
[8] See Jack Goody, *Geschichte der Familie*, München, Beck, 125-167; Elisabeth Koch, 'Die Frau im Recht der Frühen Neuzeit. Juristische Lehren und Begründungen' in *Frauen in der Geschichte des* Rechts, ed. Ute Gerhard (note 1) 73-94; Ellinor Forster, Margareth Lanzinner, 'Situationen einer Ehe. Forschungsüberblick', *L'Homme*, 14:1, 2003, 141-156.
[9] See for details Martina Schattkowsky, (ed.), *Witwenschaft in der Frühen Neuzeit: Fürstliche und adelige Witwen zwischen Fremd- und Selbstbestimmung*, Schriften zur sächsischen Geschichte und Volkskunde, 6, Leipzig, Leipziger Universitätsverlag, 2003. Dealing with the Roman Republic: Jens-Uwe Krause, *Verwitwung und Wiederverheiratung*, Witwen und Waisen im Römischen Reich, 1, Stuttgart, Franz Steiner Verlag, 1994.
[10] See Berndt Wunder, 'Pfarrwitwenkassen und Beamtenwitwen. Anstalten vom 16. bis 19. Jahrhundert', *Zeitschrift für historische Forschung*, 12, 1985, 429-498. For the economic situation of widows at the University of Jena see Grochowina, 'Verhältnis' (note 6). For the situation in England see Amy Louise Erikson, *Women and Property in Early Modern England*, London, New York, Routledge, 1993.
[11] Bernhard Jussen, *Der Name der Witwe: Erkundungen zur Semantik der mittelalterlichen Bußkultur*, Veröffentlichungen des Max-Planck-Instituts für Geschichte, 158, Göttingen, Vandenhoeck & Ruprecht, 2000.

studies on remarrying men and women are missing completely still, although some hints can be found in a few books and articles.[12]

In order for scholars' want to analyze the problems arising from remarriage, they have first to take a look at the important laws from the early modern period.[13] Basically, it appears that the new legal status as a married woman reduced the women's scope of action compared to their status as a widow. As widows, women were allowed to dispose of their property; they did not need a special guardian like married women, and they were free to possess, administer and enjoy the usufruct of the property of their children. This changed, however, if they married again. In territories, where the *ius commune* was put into practice, they lost the right to administer the property of their children, unless the new husband allowed them to do so.[14] Moreover the "Allgemeines Preußisches Landrecht" from 1794 stated, that the new husband acquired the right to administer the wife's property. Nevertheless, it did not become his property as such. Different measures were taken in the Austrian "Allgemeinen Bürgerlichen Gesetzbuch" from 1811, which said, that the women kept the right to dispose freely of the property they had owned before the marriage.[15] In general, it can be concluded, that in most cases a change in the marital status of the women was accompanied by a change in their legal status. Usually, that meant, that women were hampered in disposing freely of their property in comparison to the range of action they enjoyed as widows.

Furthermore, different forms of the joint property deserve great interest, since a change in the women's legal status had even greater consequences, if she lived in community of property, as it was the case in many Saxonian territories.[16] This meant, that the husband had the right to administer and enjoying the usufruct of their wives' property during marriage, whether she possessed the property in the moment of the wedding or earned them during marriage.[17]

Finally, the statutes of Jena, for instance, stated, that the surviving wife or husband could still possess and enjoy the usufruct of all the property, if one marriage partner died, leaving children. The surviving partner had, however, to set up an inventory, in case he or she

[12] See, for instance, Anke Hufschmidt, *Frauen im Weserraum zwischen 1570 und 1700. Status, Rollen, Lebenspraxis*, Veröffentlichungen der Historischen Kommission für Westfalen, 22A, Münster, Aschendorff, 2001.
[13] A remarkable number of studies deal with norms, the latest is: Arne Duncker, *Gleichheit und Ungleichheit in der Ehe: Persönliche Stellung von Frau und Mann im Recht der ehelichen Lebensgemeinschaft 1700-1914*, Köln, Weimar, Wien, Böhlau, 2003.
[14] See Susanne Lepsius, 'Die privatrechtliche Stellung der Frau im Deutschland des 19. Jahrhunderts. Forschungsstand und -perspektiven', *L'Homme*, 14:1, 1993, 110-124, here 120.
[15] Duncker, *Gleichheit* (note 13) 1020-1022.
[16] Lepsius, 'Die privatrechtliche Stellung' (note 14) 117.
[17] Duncker, *Gleichheit* (note 13) 1019-21.

married again. Then, the property had to be passed along to the children.[18] Again, it seems, as if a change in the legal status entailed fewer rights to keep and freely dispose of property for women. Despite these laws and customs, it has to be kept in mind, that it was quite common to draw up marriage contracts and wills to regulate transfer of property in case of death and remarriage. Therefore, legal norms should be used with great care, since a remarkable number of couples drew up additional documents.[19]

Furthermore, contemporary discourses have to be considered, too, and arguments leave no doubt that the re-marriage of the widow was desirable. Widows were pressured to re-marry as soon as possible, because their new independent position in society could be accepted only for a limited period of time.[20] Nevertheless, only a few legal scholars took the time to consider the consequences of a remarriage for the legal status of women and for their right to dispose freely of property, as did the Saxonian legal scholar Justus Friedrich Runde in his work on German civil law from 1791, in which he stated that conflicts about second marriages had raised a lot of hatred in the German nation.[21] He did not go into details, but stated very clearly, that the rights of children – and not women's property – had to be protected, if women decided to remarry.

Five years earlier, the legal scholar August Ludwig Schott had stated, that the law had to ensure, that children were not discriminated against in property issues. Accordingly, a former widow should give up the guardianship of her children, and her new husband should not inherit more property than the children of the first marriage. Nevertheless, Schott suggests that a contract between the new couple and the children should be set up to prevent quarrels about property.[22]

Finally, it can be argued, that both norms and discourse intended to reestablish social order, which appeared to be threatened. A large number of conflicts concerning property suggests, that social order and gender hierarchy could not be easily restored, when the legal status of the women changed.

[18] Johannes Schmidt, Ältere und neuere Gesetze, Ordnungen und Circular-Befehle für das Fürstenthum Weimar und für die Jenaische Landes-Portion bis zum Ende des Jahres 1799 in alphabethischen wörtlichen Auszug gebracht; Bd. 7, Jena, Göpferdt, 1803, 418-20.

[19] This is probably one of the reasons, why arguments about inheritance occupy civil legal practice to a large extend.

[20] Ursula Machtemes, *Leben zwischen Pathos und Trauer: Bildungsbürgerliche Witwen im 19. Jahrhundert*, Osnabrück, Rasch, 2001, 49-63.

[21] Justus Friedrich Runde, *Grundsätze des gemeinen deutschen Privatrechts*, Göttingen, Dieterich, 1817, 604.

[22] See August Ludwig Schott, *Einleitung in das Eherecht zu akademischen und gemeinnützlichem Gebrauch*, Nürnberg, Felßecker, 1786, 571.

2. Conflicts

Conflicts about property not only illustrate the very different demands of plaintiffs and the defendants. They are also an indication of ongoing negotiation of a social order, which clearly defined which property belonged to whom and the consequence of the ability to own.[23] If men and women were involved in the conflicts, gender hierarchies mattered as well. Arguments of plaintiffs and defendants illustrate their understanding of gender relations – although it has to be kept in mind, that these arguments were utilized in order to gain or secure contented property. Since the main interest was acquisition of property, arguments based on gender have to be inferred from the testimonies. It is an exception, if men or women in their arguments evoke directly the gender of their counterparts – but it did, nevertheless, occur.

The sources show a wide range of issues concerning property, such as gifts, questions of inheritance concerning the special property of women, carrying out wills and marriage contracts, but also issues such as the right to build houses, to use paths and rivers, to take wood from the forests, and to deal with debts. When dealing with this great variety of property issues, one also has to be careful in distinguishing between the various types of property that women either brought to the marriage or were given to her by her husband after their first night together. Furthermore, one has to consider moveable and immoveable property that both spouses inherited or earned during the marriage, as well as property, which was taken back or kept after one spouse died. Finally, different forms of the community of property existed throughout the Holy Roman Empire during the early modern period, which determined the right of usufruct for a certain period – usually until the remarriage of the widow or the widower. At this point, joint property often became an issue of conflict, since property had to be redistributed. The children demanded their share, if the surviving spouse continued using the property, which she or he had owned as a widow or a widower.

Conflict about property issues due to remarriages was not the dominating theme of the cases heard at the court in Jena during the last decade of the 18th century. Between 1780 and 1800, 10,124 reports were written, which dealt with questions of inheritance, donations, rights, struggles of neighbors, and criminal law. Four to six times a year, conflicts about property due to a second or third marriage appeared, which make up about 0,5% of all cases. Nevertheless, these cases have to been considered together with those cases in which women struggled to protect, misappropriate or gain property. If the latter cases are added to the former, they make up on average of almost 25% of all cases heard during that period. It is

[23] Further insights are given by Hannes Siegrist and David Sugarman, 'Geschichte' (note 4).

remarkable, that in all cases, when remarriages lead to trouble concerning property, women were sued by their children or by close relatives. There are only a few cases, in which a widower had to secure property against his children. This gives a first impression of the challenge and the fragility of the idea that women had the right to dispose freely of their property. In the following examples from early modern legal practice, this impression will be looked at more closely.

Children from the first or second marriage, especially, challenged women's position, when they denied their mother the right to keep their father's property. The new marriage offered them the opportunity to sue for this property, even if marriage contracts or wills tell a different story about its distribution. The intention and methods of children from former marriages in suing their mother can be seen clearly from the legal practice of the arbitration council of Jena. The children simply wanted to their mother's property regardless of existing contracts or of previously paid compensation.

The example of Johannes Löhr's now remarried widow illustrates this utilitarian thinking, which – as a consequence – not only questioned the woman's right to dispose freely of her property, but also expresses a certain attitude towards women and their legal status as such.[24] In Dillenburg, the former widow was sued by the children of her deceased husband, because they wanted to get hold of the house, she was still living in. The children strongly emphasized their demands by claiming that the now married wife was not supposed to keep their father's property – and, consequently, should move out of the family home. At the arbitration council of Jena, the jurist Carl Friedrich Walch[25] had to deal with the arguments. He agreed with the children and decided that the former widow was not entitled to the house any longer. Since neither a marriage contract nor a will by her previous husband existed, which clearly stated that she was supposed to keep this house, Walch came to the conclusion, that the wish of the children had to be granted, and the former widow had to leave the house, she had been living in for the last years.

The case of Johannes Löhr's widow marks a gray area between continuing having usufruct of property and misappropriating property. Remarrying had as consequence that the wife was asked to leave her house and move in with her new husband, while her children remained in the former family's home. It is important to note, that Löhr's widow was not ask to set up an inventory of all the property, she had been using in the house after her re-marriage. This

[24] See Thüringisches Hauptstaatsarchiv Weimar (= ThHStA Weimar), Schöppenstuhl, no. 2429, fol. 93r-97r.
[25] Carl Friedrich Walch (1734-1799) became professor at the University of Jena in 1759. After working in the Aulic Court, he turned to the arbitration council in 1764. For details of his biography see Johannes Günther, *Lebensskizzen der Professoren der Universität Jena seit 1558 bis 1858*, Jena, Mauke, 1858, 73.

suggests, that Walch did not come to the conclusion, that she defrauded her children intentionally.

But there is no doubt, that a remarkable number of women were suspected of misappropriating the property of their former families after remarriage, even if they knew quite well, that they were supposed to pass it on to the children. Conversely, women were apparently not willing to accept the change in social status and rank after remarriage, since this definitely led to the loss of property. On April 11th 1783 Johann Valentin Rothnern from Kaltennordheim sued his mother Catharina Elisabeth Voigt.[26] He argued, that she was still gaining advantages from the inheritance of her first husband, although she had been married again and Rothnern asked that she be ordered to give up the property of her first husband – as the local laws required. It is important to note, that Rothnern also refers to laws, which were practiced in his community. This not only strengthens his argument, but also stresses his mother's offence of misappropriating property and the jurist of the arbitration council of Jena, Johann Ludwig Schmidt,[27] did not deem it necessary to give these arguments a second thought. He simply decided that in accordance with the given legal practice, the inheritance had to be passed on in case of a second marriage, if no other contracts had been set up and Rothnern won his case.

More details are revealed by this case: In his argumentation Schmidt dealt quite severely with the charge of misappropriation of property. He apparently assumed that Catharina Elisabeth Voigt deliberately had misappropriated the property and was not willing to leave it to her son after her remarriage. Consequently, he not only ordered her to pass the property along to her son, he also demanded that Voigt set up an inventory of all the immoveable property she had been taking care of while married, giving her son the opportunity to sue her for compensation, if it was revealed that her having the usufruct of the disputed property had been to his disadvantage. Schmidt went even further: In order to confirm the validity of her testimony she was also asked to swear an oath that all the property had been passed on to her son. All in all, it becomes quite clear, that Schmidt found Voigt guilty of misappropriating the property of her former husband and intended to punish her for this behavior in a harsh way.

The same happened to Charlotte Schrader in the year 1787, who had married again, leaving behind two children from her first marriage. She, too, had to present an inventory of the inherited property so that they could be distributed between her children. The new mar-

[26] For all the details see ThHStA Weimar, Schöppenstuhl, no. 2376, fol. 120r-127r.
[27] Johann Ludwig Schmidt (1726-1792) studied at the University of Jena, and became a professor of law in 1756. In 1766 he joined the Aulic Court and the arbitration council. See Günther: *Lebensskizzen* (note 25) 74.

riage definitely put an end to her administering and having usufruct of her former husband's property – even if she had not accepted this in the beginning.[28]

Local laws or common practice on the right of usufruct and donation of property strongly influenced the reasoning of the jurists in these cases – and plaintiffs were more likely to win their cases, if they kept this in mind. Nevertheless, it cannot be ruled out, that the desire to reestablish or support gender hierarchy had an effect on decisions as well. Here, it is important to compare the legal status of the remarried woman with her right to own and dispose freely of property. Usually, being married again meant, that women's rights in property matters were reduced, since the *cura maritalis* was revived. But despite these considerations, it has to be stated, that the jurists of the arbitration council of Jena never referred to this *expressis verbis*, even if they might have outlined their special attitudes towards gender relation in legal discourse. They held strictly to legal arguments – but by applying local laws to actual conflicts they helped secure the gender hierarchy of the late 18th century.

In the sources, emotions – perhaps even directed towards the gender of one party – could not be a substitute for legal arguments or appeals – at least not in the legal practice of the arbitration council of Jena. One example from the year 1780 illustrates this quite well. The widow of Johann Hartmann Gürtlers from Friedberg had married into the Steinberg family after the death of her former husband.[29] According to local law she had to give up the inheritance of her first husband and half of the property which both of them had earned during their marriage. In this case, both a marriage contract and a will existed. The contract stated that the will would not be carried out, if she remained unmarried. But if she married again, she would have to pass on the property to the children of the first marriage. Instead, the now newly married widow argued, that handing over the property would be a very unfair measure. Referring to the marriage contract, which she had signed, she demanded, that her property be protected. In so doing, she ignored the will, which her former husband had drawn up later, and which clearly stated, that she was supposed to lose the property to the children, if she married again.[30] Consequently, the children emphasized this particular phrase.

In his decision, the jurist Johann Ludwig Schmidt hints, that Gürtler's widow argued in a very emotional way. He states, that she had exclaimed, she could not believe that her former husband would harm her in any way, that losing property due to the instructions in his will would cause her great harm, that she apparently was the only one who had to endure dis-

[28] For details see ThHStA Weimar, Schöppenstuhl, no. 2417, April 1787.
[29] For the case see ThHStA Weimar, Schöppenstuhl, no. 2343, fol. 109r-113r.
[30] In the will it says, that she might keep the property, "solange sie unverheiratet bleibt". See ibid., fol. 112v.

advantages as a result of the will and that this was neither fair nor according to the intention of her former husband.[31]

Despite her emotional turmoil, she could not deny, that she had signed both the contract and the will – and that was decisive in her case. The jurist, Johann Ludwig Schmidt, left no doubt, that the former widow had misappropriated the money of her husband. He explained, that the marriage contract and the will were in perfect order, that mistakes caused by lack of clarity in legal aspects were not recognizable – and that the instruction, that she would have to distribute the property, if she married again, was clearly stated and beyond doubt. She could not deny this, as she had done during sessions in court. Finally – and this marks another aspect of emphasizing the correct way of dealing with legal documents – contract and will have been read out aloud to her, before she had signed both of them. This is a quite remarkable aspect, and one Schmidt bases his arguments on, Gürtler's widow had signed both the marriage contract and the will. Although she argued, that signing the will was merely done to suit her husband, this did not have any impact on Schmidt's decision. Her signature determined the case. In conclusion, Schmidt explains, that she was not a widow anymore. Instead, she had gained a new legal status as a married woman – and this entailed, that the instructions of the marriage contract and the will of her former husband had to be fulfilled.[32] It is noteworthy, that Schmidt obviously needed the reference to contract and will in order to support his argument and to tear apart the emotionally based arguments of the former widow. However, it remains to be seen, whether this reflects the changing legal status of women during the end of the 18th century.[33]

Another example should be added, confirming the idea, that legal arguments overruled emotional arguments at the end of the 18th century. This example is remarkable, because the defendant is a widower and the plaintiff his daughter, making this one of the exceptional cases, involving a widower.[34] Auguste Elisabeth Sanderin sued her father Johann Heinrich Schreiner in August 1783. She claimed, that the marriage contract drawn up between her parents stated, that the daughter was granted 250fl., if her mother died and her father married again. The jurist, Johann Ludwig von Eckardt,[35] decided, that she was right, although the marriage contract from 1779 had been changed a few years later. However, only minor

[31] See ibid. fol. 112r.
[32] See ibid.
[33] See Ursula Vogel, 'Gleichheit und Herrschaft in der ehelichen Vertragsgesellschaft. Widersprüche der Aufklärung', in *Frauen in der Geschichte des Rechts*, (note 1), 265-293.
[34] For all the details see ThHStA Weimar, Schöppenstuhl, no. 2378, fol. 38r-42r.
[35] Von Eckardt (1732-1800) came to Jena in 1783, turned a professor of law and took part in the Aulic court and the arbitration council. This was one of his first cases at the council. For biographical details see Günther: *Lebensskizzen* (note 25) 76.

changes were made at that time, leaving the statement concerning the daughter's money untouched, and Schreiner was asked to pay the money.[36]

It can be assumed, that Schreiner anticipated this verdict, as he added emotional motifs to his legal arguments: His daughter was extremely quarrelsome, and all her objections could only be judged as being insignificant.[37] In general, Schreiner devoted a great deal of his argumentation to characterizing his daughter – but failed in the end. Johann Ludwig von Eckardt concentrated on the legal issues and clearly dismissed Schreiner's references to emotionally based arguments.

This example not only shows the importance of contracts as legal evidence. It also shows that the jurists did not consider how their decisions on the issues within civil legal practice would influence contemporary debate, for instance on the legal status of women and the understanding of gender hierarchy. In this particular case, the widower Schreiner had to accept the obvious consequence of this attitude – as he was asked to pay the demanded amount of money.

The examples given so far illustrate, that emotional motifs could not influence the legal practice of the arbitration court. Instead, laws, contracts, wills and other legal features decided whether women were put into a more favored or less favored position, after they had changed their legal status due to a remarriage after widowhood. But solving legal conflicts and giving verdicts became more complicated, if more than one legal instrument was involved, such as different forms of joint property.

The following example not only illustrates the problems arising from different understandings of the joint property, it also raises the issue of debts which still had to be paid after the former husband's death and the remarriage of the widow. In this case, the wife was sued not by her children, but by the creditors of her former husband. In September 1789 Georg Christian Lang appeared in court on behalf of his new wife.[38] In Erbach, she had been married to Johann Michael Hein, who was deeply in debt, when he died. His creditors sued his widow in order to get their money back, won at the court of the first instance and now Lang appealed in order to reverse the verdict. Defending the point of view, that the former wife was not supposed to pay for the debts, her husband had been responsible for, he argued, that the couple had held their property in common during their marriage.[39] This meant, that the wife could not be forced to take over debts, if she did not know about them. Moreover, he argued, that many

[36] See ThHStA Weimar, Schöppenstuhl, no. 2378, fol. 41r.
[37] See ibid., fol. 41v.
[38] For the case see ThHStA Weimar, Schöppenstuhl, no. 2452, fol. 99r-106r.
[39] See ibid., fol. 101r-103v.

cases from Erbach illustrate this common practice. In addition the new husband also argued, that she was even more indebted – and this was not linked to the debts of her former husband. So if anyone wanted money from her because of the actions her former husband had taken, he would have to stand in line with the other creditors.[40]

Referring to the arguments already mentioned, the jurists could be tempted to agree with this line of arguments, since it has been emphasized, that the change of marital status also entailed a complete stop for any claims on property which had accumulated during the first marriage. But – as the jurist Johann Ludwig von Eckardt argued – this practice could not be applied to debts. Instead, local law, as it was being interpreted in Erbach, the hometown of Hein's widow, said, that wives remained responsible for the debts of their husbands, even if they did not know about them, also after their husbands had died and after a new marriage.[41] The laws of Erbach stated, that in case of joint property the couple was responsible for paying of the debts – even if this meant, that wives and children would lose everything.[42]

Although von Eckardt was confident, that this reference to joint property and local law was sufficient enough to solve the case, he also referred to a contract, which had been signed by the wife and Hein's children. According to this, she agreed to take over the inheritance and pay all the debts. So if she did not want to accept his interpretation of local law, she could not ignore the implications of the contract she had signed.[43]

In this case, local laws and a signed contract led to a less favored position of the former widow. She not only lost the property of her former husband due to her new social and legal status as a wife, she also had to pay off the debts of her husband. Arguing, that she had to cope with her own debts, did not effect von Eckardt's decision, which was based on legal assessments of the case.

3. Conclusion

Despite these cases given, which seem to underline and confirm the attitudes of Runde and other legal scholars mentioned earlier, it cannot be stated, that the jurists of Jena were only interested in supporting the children's demand – and consequently reduced the mothers' rights to free disposal of property, thereby emphasizing contemporary attitudes towards the relationship of men and women. In fact, the situation of remarried women and men was far more complex, if they were sued for not handing over property and paying off debts or compensa-

[40] Ibid., fol. 102r.
[41] Ibid., fol. 103v.
[42] Ibid., fol. 104v.
[43] Ibid., fol. 103r.

tion for misappropriated property. Although in most of the cases children sued their mother upon her remarriage, we also find creditors seeking to enforce their rights, with both groups referring to local laws and statutes, common practice concerning joint property, marriage contracts, wills and individual contracts between widows and stepchildren. Moreover, emotional arguments were added. Plaintiffs and defendants were described as quarrelsome, they claimed, that great harm came upon them, if property had to be passed on, and they argued, that they were the only ones suffering disadvantages after the decision was put into practice.

Taking a look at such a complex social practice revealed in court, when property was demanded and negotiated by very different legal instruments, the question of less favored or more favored women arises again: How did early modern jurists judge the women's approaches to property, if a woman's legal status changed from widow to a married woman? It became quite clear, that women could hold to their property if they were able to present some kind of contract or will, which protected their rights concerning certain property. But the instruction of these documents had to be expressed clearly, and remain beyond questioning. If no special instructions were presented, the laws of the towns and territories, where the women were being sued, had to be followed. Still, the courts had to distinguish between local and territorial, and between Roman and German law.

In the end, women could and did benefit from instruments of the early modern property culture, whenever jurists at the faculties of law or in arbitration councils enforced them. That is a very important point. It was the jurists who evaluated the arguments of the plaintiff and defendants, they decided which laws should be applied, and which local statutes and objections of the parties were to be dismissed. In doing so, the jurists heavily relied on existing contracts and wills, if they were presented in the case. Furthermore, they put local laws strictly into practice, if wills and contracts did not exist. This could also mean, that they might leave the women without any property apart from locally accepted ones, which were designated to be passed on in the female lineage. By solving conflicts about property, jurists also prescribed the relationship between men and women. Although legal practice was not relying on arguments based on gendered or emotional motifs, and although critical arguments concerning women, which have been raised in the contemporary legal discourse, were not considered, the enforcement of existing laws and the application of contracts, negotiated and set up by the spouses, stabilized contemporary gender hierarchy. Focusing on property, this meant, that women (and a small number of widowers, who have been sued, too) were brought in a less favored position – compared to their former status.

In order to take these results further, one must explore, whether property rights were the only reason, that a number of widows remained unmarried. Anke Hufschmidt has recently suggested, that emotional aspects have to be considered, too.[44] If economically secure, women rather enjoyed the new independence, regarded the death of her former husband and their new status as God-given or did not want to separate themselves from their children by remarriage. These results are drawn from research about noble women, but the same questions have to be raised for all the women, who became widows and gained new rights to dispose of their property. So far the question whether women were less favored or more favored in cases of contented property cannot be fully answered, although the close look at conflicts, presented here, suggests an answer to it.

[44] See Anke Hufschmidt, *Frauen* (note 12) 255-262.

Zusammenfassung

Die Frauen- und Geschlechtergeschichte hat in den letzten Jahren auch auf den Gebiet der Rechtsgeschichte zu vielen neuen Fragen angeregt. In der Folge entstanden unterschiedliche Studien aus dem Bereich der Strafgerichtsbarkeit, die etwa nach den Motiven der Hexenverfolgung fragten oder die Konstruktion von Geschlecht vor Gericht in den Blick nahmen.

Die zivile Gerichtsbarkeit blieb von geschlechtergeschichtlichen Untersuchungen zunächst ausgespart. Nun jedoch geben einzelne Studien Hinweise auf das Wirken von Frauen als Ehefrauen, Witwen. All diesen Studien ist gemeinsam, dass sie im Eigentum einen gemeinsamen Referenzpunkt sehen.

Im vorliegenden Beitrag setzt sich diese neue Fokussierung der Forschung fort: Am Beispiel von Wiederverheiratungen im ausgehenden 18. Jahrhundert wird der Frage nachgegangen, ob sich die Frauen durch Aufgabe der Witwenschaft in der europäischen Rechtskultur in eine günstigere oder weniger günstige Rechtsposition begaben und wie sie in der sozialen Praxis damit umgingen. Dazu werden Konflikte um Eigentum und Eigentumsrechte thematisiert, in denen Frauen von ihren Kindern aus erster Ehe, aber etwa auch von Gläubigern des ersten Ehemannes verklagt wurden, um Eigentum herauszugeben oder Schulden zu bezahlen.

Gezeigt werden kann, dass die frühneuzeitliche Jurisdiktion geschlechtsspezifischen Argumenten und emotionalen Motiven kaum Aufmerksamkeit schenkte. Wesentlicher waren Elemente, welche in den Gesetzen niedergelegt und deshalb vor Gericht verhandelt werden konnten. Daraus ergab sich für Frauen eine günstigere Rechtsposition, sofern sie Verträge, Testamente oder andere Zeugnisse beizubringen vermochten. Und dennoch: Das Interesse der Juristen lag nicht darin, die frühneuzeitliche Geschlechterhierarchie zu hinterfragen, die bestand ungeachtet einer offenkundig geschlechtsneutralen Rechtsprechung fort. Außerdem konnte die Berücksichtigung von Rechtsmitteln und juristischen Dokumenten gegebenenfalls auch dazu dienen, die Geschlechterordnung zu manifestieren, wenn sie von der gegnerischen Partei eingebracht wurden.

Zur besonderen Bedeutung von Eigentum und der Situation von Frauen, welche durch Wiederverheiratung ihren Rechtsstatus änderten, bedarf es noch weiterer Forschungen. Dieses Feld ist nicht zuletzt deshalb so komplex, da neben der Auseinandersetzung um das Eigentum auch gesellschaftliche Ordnungen und das Geschlechterverhältnis verhandelt wurden.