The Construction of „Male Capability“ and „Female Inability” to assume Guardianship of Children in the Austrian “Allgemeines Bürgerliches Gesetzbuch” (ABGB) in the 19th Century”

by

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When the ABGB was published in 1811 it contained the provision that women were not allowed to take over guardianship of children except mothers or grandmothers.[1] If the father had not appointed a guardian in his last will, first the paternal grandfather, then the mother and after the paternal grandmother all other male relatives were considered as guardians.[2] In contrast to male guardians the mother and grandmother had the possibility to refuse. This can be seen as a reflection of old female “protective” measures to pretend them from acting against their advantage. It fits into the picture that whenever mothers or grandmothers took over guardianship they needed a so-called *Mitvormund* (co-guardian).[3]

The argumentation for prohibiting women other than mothers and grandmothers to take over guardianship was that they were thought not to have enough knowledge of business affairs. Franz von Zeiller, the person mainly responsible for the final formulation of the civil code, wrote in his law commentary: „Der Grund der Vorschrift ist offenbar, weil es diesen Personen gewöhnlich … an den nothwendigen Kenntnissen … mangelt.“[4] He saw the care of their own children as the mothers’ and grandmothers’ primary duty, but a co-guardian was needed, „um das vorzüglich in Rechtsgeschäften minder erfahrene Geschlecht in Führung derselben zu unterstützen.“[5] Both the father and the mother had the right to propose a co-guardian, but the court was not bound by this proposal.

Before I interpret these assumptions I want to take a look on the process leading up to this provision because looking at the history of the work on the codification, another outcome was also possible. After that I trace the development throughout the 19th century, take a look at the efforts of the women’s movement at the turn of the century and finally sketch the change of law right before the outbreak of World War I in 1914. At the center of my considerations are always the arguments used for explaining the different prohibitions or

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[1] *Allgemeines bürgerliches Gesetzbuch für die gesammten deutschen Erbländer der Oesterreichischen Monarchie*, I. Theil, Wien, k. k. Hof- und Staatsdruckerey, 1811, § 192, 75
[2] *Allgemeines bürgerliches Gesetzbuch* (Note 1) § 198, 77
[3] *Allgemeines bürgerliches Gesetzbuch* (Note 1) § 211, 82
[4] Franz v. Zeiller, *Commentar über das allgemeine bürgerliche Gesetzbuch für die gesammten Deutschen Erbländer der Oesterreichischen Monarchie*, 1. Band, Wien, Geistinger, 1813, 417
[5] Zeiller, *Commentar* (note 4) 442

demands because they throw a light on the representations of gender roles among different social groups and during different periods.

1. The idea of guardianship in law

Since the 16th century the main intention behind the regulation of guardianship of fatherless legitimate children was to eliminate misuse of the previous power of disposal within families. With new formulated laws the authorities wanted to intervene in this kind of family cooperative formed law.[6] The responsibility of the missing housefather for Christian and honorable behavior that would, moreover, conform to authorities was to be replaced by governmental higher guardianship.[7] This regulation of higher guardianship lead to a reduction of the special rights and privileges of the nobility because the principle of guardianship among the higher nobility as well as the haute bourgeoisie and the manorial rights had to be adapted to the new rules while still family oriented. To prevent wards from being disadvantaged magisterial confirmation of guardians was introduced. This involved also an examination of the guardian's qualification. He had to promise solemnly that he would perform his duty conscientiously. He received a document that certified his appointment; he had to make a deposit and to file an inventory of the ward's property with the court. Pledge against the guardian's property, which was taken from customary law, secured the ward's claims. The higher guardianship even intervened in the administration of the ward's property. Although the guardian was appointed to represent the ward legally he could not pledge the ward's property to other persons without asking the court for permission.[8] The ABGB of 1811 also considered guardianship to be a public matter.[9] The court should examine the guardian's measures with regard to lawfulness and expediency.[10]

2. Women's guardianship in law during the early modern period

In the late classical Roman law it was possible for a widow to become guardian of her children, if she made an application. In case she married again, she had to appoint another guardian. In Justinian law the mother and grandmother could be appointed as guardians even before other relatives. There were only a few situations in which a mother was passed over. One was the case of the father appointing another guardian, another of the mother refusing to

[6] Ursula Floßmann, ‚Die Rechtsstellung der Witwe im Vormundschaftsrecht der Neuzeit', in *Frau. Recht. Gesellschaft. Seminar zur Frauenrechtsgeschichte*, eds. Ursula Floßmann, Oskar Lehner, Sozialwissenschaftliche Materialien, Linz, Universitätsverlag R. Trauner, [2]1986, 138-167, here 146
[7] Floßmann, ‚Die Rechtsstellung der Witwe' (note 6) 143
[8] Ursula Floßmann, *Österreichische Privatrechtsgeschichte*, Wien-New York, Springer Verlag, [2]1992, 124f.
[9] Zeiller, *Commentar* (Note 4) 413
[10] Floßmann, *Österreichische Privatrechtsgeschichte* (Note 8) 126

promise that she would stay unmarried, a third of her refusing to declare the renunciation according to the *Senatus consultum velleianum*. In case the mother broke the promise not to marry again without appointing another guardian she lost her right to inherit, ran the risk of being proclaimed dishonorable and had to face other legal disadvantages concerning property.[11]

These were the guidelines on which customary law was based during the early modern period up to the law codifications. The land laws of the Tyrol or Lower Austria for example allowed the widow and the grandmother to take over guardianship of their own children or grandchildren on these assumptions, but a co-guardian was appointed, who had to represent the ward in court. The primary maternal duty was the personal care for the children. This was even expected of mothers, who were not guardians, because it was seen as “natural maternal duties”. As a consequence of this they had only the right to be heard when important educational measures were concerned, especially when the ward was a boy. In the *Gerhabschaftsordnung unter der Enns* (the law of guardianship in Lower Austria) the mother could be asked to take over guardianship if the father had not appointed one in his last will or the appointed guardian turned out to be unsuitable. She was even considered a favored candidate if she asked to be guardian and there were no reservations against her. She usually got one or two co-guardians, preferably relatives, and she could take over guardianship only as long she did not marry again. In this connection it is interesting to note that a widower also got a co-guardian in case he remarried. In Upper Austria even women other than mothers and grandmothers had the possibility of taking on guardianship, if the father had appointed them in his last will. [12]

3. Codification during the 18th century

When it came to work on codification of laws– beginning in the middle of the 18th century – different opinions existed as to who should be allowed to take over guardianship. During the deliberations on the Codex Theresianus, which never went into effect, discussions about the status of women in the law of guardianship were included. Some argued that women actually had experience with regard to public authorities and courts, but the decisive opinion was that women were not capable of pleading a case in court. The fact that a mother could take over guardianship because „die heftige Liebe einer Mutter für ihre Kinder, die mütterliche Sorgfalt für ihre Erziehung und für die Erhaltung ihres Vermögens übertrifft

[11] Floßmann, ‚Die Rechtsstellung der Witwe’ (note 6) 145
[12] Floßmann, ‚Die Rechtsstellung der Witwe’ (note 6) 145-153

Alles, was diesfalls von den Seitenverwandten vermuthet werden kann“[13] was beyond doubt. So during the work on the other drafts the men responsible for the wording of the law adhered more and more to the opinion that mothers and grandmothers were qualified before others to take over the personal care of their children and therefore this possibility became included into the law. However, they needed a co-guardian. It was clearly stressed throughout that guardianship generally had to be a male duty because only men would posses the necessary understanding and power of judgment. This view corresponded exactly to the theory of gender characters at that time. The discussion was about the ranking of the mother. Should she be in the first rank if the father had not appointed a guardian or if this appointed guardian had not been found capable enough? From being the first choice she ranked behind the paternal grandfather in the final draft. The actual practice in parts of Austria to entrust women other than mothers and grandmothers with the office of a guardian was no longer considered.

4. Guardianship in the 19th century

The legal discussion during the 19th century conserved the opinion of the ABGB without looking at law practice. A lot of maternal guardians appeared in court or in public offices – sometimes accompanied by the co-guardians – but the active part mostly seemed to be taken over by the mothers.

4.1. Legal discussion

Law commentaries upheld the argumentation that women in principle were not capable of taking over guardianship. Even Moriz Stubenrauch’s law commentary from 1854 argued in this way:

> “Personen weiblichen Geschlechtes sind mit Ausnahme der Mutter und der väterlichen Großmutter (§. 198) zu einer Vormundschaft nicht zuzulassen, weil sich schon ihrer gesellschaftlichen Stellung zu Folge eine zweckmäßige Erziehung und besonders eine nützliche Verwaltung des Vermögens der Waisen von ihnen nicht erwarten ließe; ja selbst Müttern und Großmüttern, welche eine Vormundschaft übernehmen, muß deßhalb nach §. 211 ein Mitvormund zugegeben werden.“[14]

[13] Philipp Harras v. Harrasowsky, *Der Codex Theresianus*, Der Codex Theresianus und seine Umarbeitungen 1, Wien, Carl Gerold’s Sohn, 1883, 178

[14] Moriz Stubenrauch, *Das allgemeine bürgerliche Gesetzbuch vom 1. Juni 1881 sammt den dazu erflossenen Nachtrags-Verordnungen und den über die Einführung dieses Gesetzbuches in Ungarn, Croatien, Slavonien, Serbien, dem Temeser Banate und Siebenbürgen getroffenen Bestimmungen, mit Rücksicht auf das praktische Bedürfniß*, 1. Band, Wien, Verlag Friedrich Manz, 1854, 496f.

When the subject of female guardianship was discussed in law periodicals the only issue was whether mothers and grandmothers were obliged to take over guardianship of their children or whether they had the possibility to reject it. Ignaz Graßl[15] for example – together with a lot of other legal experts – favored the first option. In the law provision (§ 195 ABGB 1811) that listed the persons who could put forward a legal excuse not to take over guardianship, mothers and grandmothers were not mentioned. Concerning their “worse qualification” in business matters, which was the argument of the opposing side, he stated that already the provisions of the law had taken precautions in the person of the co-guardian.[16] Bluntly stated, they could not do much damage. As the law provisions could be interpreted in different ways the actual reason for obliging mothers and grandmothers to take over guardianship was the growing need for capable guardians already in the first half of the 19th century.

4.2. Relationship between the maternal guardian and the co-guardian

The legal provisions stated the duties of the co-guardian as follows:

> “§ 212. Auch der Mitvormund muß eine Beglaubigungsurkunde vom Gericht erhalten, und angeloben, daß er das Beste des Minderjährigen befördern wolle, und er muß zu diesem Ende der Vormünderinn mit seinem Rate beystehen. Sollte er wichtige Gebrechen wahrnehmen; so muß er sich bestreben, denselben abzuhelfen, und nöthigen Falls dem vormundschaftlichen Gerichte Anzeige davon machen.
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> § 213. Eine andere wesentliche Pflicht des Mitvormundes ist, daß er bey vorfallenden Geschäften, zu deren Gültigkeit die Einwilligung des vormundschaftlichen Gerichtes nothwendig ist, das Gesuch der Vormünderinn mit unterzeichne, oder seine besondere Meinung beilege, so wie er auch auf Verlangen des Gerichtes über ein solches Geschäft unmittelbar sein Gutachten zu erstatten hat.
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> § 214. Ein Mitvormund, welcher diese Pflichten erfüllet hat, bleibt von aller ferneren Verantwortung frei.“[17]

These duties only had a very formal character if the mother wanted. According to the legal provisions it was also the maternal guardian and not the co-guardian who had to render account of the ward’s property. Guardianship files show us which duties the mother as guardian and which the co-guardian usually performed whereas estate files allow an insight into the

[15] Ignaz Graßl was „Professor des Allgemeinen bürgerlichen Gesetzbuches“ at the University of Vienna in 1826.
[16] Ignaz Graßl, ‚Ueber die Verbindlichkeit der Mutter und väterlichen Großmutter eines Minderjährigen, die Vormundschaft über denselben, wenn sie die gesetzliche Ordnung trifft, zu übernehmen, nach dem österreichischen allg. bürgerl. Gesetzbuche’, *Zeitschrift für österreichische Rechtsgelehrsamkeit und politische Gesetzkunde*, 1826:2, 1826, 289-298
[17] *Allgemeines bürgerliches Gesetzbuch* (note 1), 82f.

tradition of appointing males or mothers respectively grandmothers as guardians. I have analyzed the guardianship files (1816) [18] and estate files (1820/21)[19] of the Stadt- und Landrecht Innsbruck that was the competent court for the citizens of Innsbruck, the officials and nobles in the Tyrol. It appears that at this time male guardians were appointed in most cases. Mothers taking over guardianship were primarily members of the nobility, whereas in cases concerning officials an almost equal number of male or female guardians were appointed. Among the trades and crafts, male guardians predominated. However, when mothers were guardians and they wanted to change their co-guardian, the competent court complied with these requests in almost all cases. The law provision concerning the choice of the co-guardian that put the father's will first, then the mother's propositions and finally the proposals of other relatives[20] were apparently not strictly adhered to judging from the frequent cases in which mothers changed the co-guardians. However, the father's will was still seen as being very important as an example from the end of the 19th century will show below. Moreover there seems to be no distinction between maternal guardians and co-guardians taking the service of a legal representative in court. So already at this time the often expressed opinion about men being more capable in business matters than women did not correspond to practice.

Another insight into legal practice is possible through decisions of the Supreme Court, *Oberster Gerichtshof*. These decisions had to be published with the reasons of the decisions starting in the middle of the 19th century. However, cases concerning the relationship between maternal guardians and co-guardians appeared more often from the 1880s. This can be due to an increased uncertainty about this relationship or a growing practice for women to also file an appeal.

The predominant opinion at this time was that the maternal guardian alone managed the ward's property. This meant that she alone was responsible if something went wrong. In 1884 a daughter who came of age in 1880 sued her former co-guardian for not having recovered the outstanding interests of a dept. Interestingly enough, the second instance decided that it was the fault not only of the maternal guardian but also of the co-guardian. As is would not be possible to determine the exact responsibility for the failure to recover the money, he would have to pay but could use his right of recourse against the maternal guardian, a decision bringing to mind the *Senatus consultum velleianum*. However, the Supreme Court decided to dismiss the complaint because the duties of the co-guardian would only refer to the wards themselves and the integrity of the nominal property but not to the administration of property.

[18] Tiroler Landesarchiv, Stadt- und Landrecht, Vormundschaftsakten 1816
[19] Tiroler Landesarchiv, Stadt- und Landrecht, Verlassenschaftsakten 1820/21
[20] *Allgemeines bürgerliches Gesetzbuch* (Note 1) § 211, 82

Moreover, the maternal guardian had not sought the co-guardian's advice in this business.[21] So the co-guardian seemed no longer to be expected to interfere in the maternal guardian's decisions on his own.

The importance of this development we may see in a case from 1889. The court rejected an application of a co-guardian acting for his ward because the maternal guardian had failed to sign it. The Supreme Court argued that both guardians should be represented in court not by the co-guardian alone.[22]

That it was actually quite common for the maternal guardian to manage the ward's property by herself is demonstrated by a case from 1895. In the last will of a husband and father a co-guardian was appointed with the provision that he had to receive 500 fl. (Gulden) annually and should not be allowed to renounce the guardianship. The mother managed her children's property very well on her own and because there was not enough property to pay the co-guardian, she filed an application to have him removed from office and to appoint another who would not get a salary. The lower instances allowed the application whereas the Supreme Court insisted on the execution of the father's last will.[23] So even when the maternal guardians showed that they were able to perform the guardian's duties concerning all business matters their arguments could not in the end carry the same weight that was traditionally accorded the husband's opinion.

The exact position of the maternal guardian and the co-guardian are determined in a case that came to the Supreme Court in 1910.[24] In the first instance a co-guardian got rejected as witness because he was seen as party of the wards. However, the upper instances allowed his testimony to be heard. The argumentation was that “der Mitvormund nur Beistand und Berater der mütterlichen Vormünderin (sei). Vormund im Sinne des Gesetzes und daher gesetzlicher Vertreter des Minderjährigen bleibt die mütterliche Vormünderin selbst.“[25]

A decision of the Supreme Court in 1913 also emphasizes the right of the maternal guardian compared to the co-guardian.[26] A maternal guardian submitted a motion to dismiss

[21] Joseph Unger, Joseph v. Walther, Leopold Pfaff (eds.), *Sammlung von Civilrechtlichen Entscheidungen des k. k. obersten Gerichtshofes*, 22. Band, Wien, Carl Gerold's Sohn, 1887, Nr. 10222, 514-516
[22] Leopold Pfaff, Joseph v. Schey, Vincenz Krupský (eds.), *Sammlung von Civilrechtlichen Entscheidungen des k. k. obersten Gerichtshofes*, 27. Band, Wien, Carl Gerold's Sohn, 1893, Nr. 12746, 330f.
[23] Leopold Pfaff, Joseph v. Schey, Vincenz Krupský (eds.), *Sammlung von Civilrechtlichen Entscheidungen des k. k. obersten Gerichtshofes*, 33. Band, Wien, Carl Gerold's Sohn, 1899, Nr. 15590, 470f.
[24] Leopold Pfaff, Joseph v. Schey, Vincenz Krupský (eds.), *Sammlung von Civilrechtlichen Entscheidungen des k. k. obersten Gerichtshofes*, 47. Band (Neue Folge 13. Band), Wien, Verlag der Manzschen k. u. k. Hof-Verlags- u. Universitäts-Buchhandlung, 1912, Nr. 5185, 587f.
[25] Pfaff et al., *Sammlung* (note 24) 588
[26] Leopold Pfaff, Joseph v. Schey, Vincenz Krupský (eds.), *Sammlung von Civilrechtlichen Entscheidungen des k. k. obersten Gerichtshofes*, 50. Band (Neue Folge 26. Band), Wien, Verlag der Manzschen k. u. k. Hof-Verlags- u. Universitäts-Buchhandlung, 1915, Nr. 6298, 144f.

the co-guardian because she felt animosity towards him. The court of first instance allowed this motion whereas the court of second instance rejected it. However, the Supreme Court reinstated the first decision even while admitting that the guardian had done his best concerning the ward's property. "Allein der Mitvormund hat nach § 212 ABGB. zum Besten der Minderjährigen auch der Vormünderin mit seinem Rate beizustehen, was nicht leicht möglich ist, wenn er mit ihr in Feindschaft lebt."[27]

It became increasingly difficult to find appropriate guardians. Those appointed in last wills or by the competent courts tried to put forward legal excuses. The Supreme Court decided for example in 1877 against a man who had refused to take over guardianship of eight children arguing that he already had seven wards and that there would be other qualified male relatives available. [28] The restrictions of the law that still excluded all other women except mothers and grandmothers became more and more apparent. In 1911, when there was even a greater need for capable and willing guardians, the Supreme Court had to decide against a stepmother and according to strict law.[29] The lower courts had argued that the stepmother could take over guardianship because the father had appointed her in his last will. When the grandparents, who got excluded from guardianship in the will, objected they were rejected by the lower courts but allowed by the Supreme Court. The argumentation followed strictly the legal provisions:

> "Es bildet einen offenbar gesetzwidrigen Vorgang, wenn die Vormundschaft einer Stiefmutter anvertraut wird; denn gemäß §§ 192 und 198 ABGB. soll die Vormundschaft einer Person weiblichen Geschlechtes nur dann aufgetragen werden, wenn sie die leibliche Mutter, bzw. väterliche Großmutter ist. … Im Hinblick auf die offenbare Unfähigkeit der A [the stepmother] zur Führung dieser Vormundschaft muß dieselbe gemäß § 254 ABGB. von Amts wegen entlassen werden und dasselbe muß in Ansehung des Mitvormundes eintreten."[30]

To sum up: in the legal practice of the 19th century the main task of maternal guardians was not (only) the personal care of the children but also the managing of the ward's property. The later in the 19th century the more mothers became guardians. The law provision in § 192 ABGB that women should not usually take over guardianship gave way to the legal custom that mothers got increasingly appointed as guardians.

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[27] Pfaff et al., *Sammlung* (note 26) 144
[28] Julius Glaser, Joseph Unger, Joseph v. Walther (eds.), *Sammlung von Civilrechtlichen Entscheidungen des k. k. obersten Gerichtshofes*, 15. Band, Wien, Carl Gerold's Sohn, 1880, Nr. 6540, 287
[29] Leopold Pfaff, Joseph v. Schey, Vincenz Krupský (eds.), *Sammlung von Civilrechtlichen Entscheidungen des k. k. obersten Gerichtshofes*, 48. Band (Neue Folge 14. Band), Wien, Verlag der Manzschen k. u. k. Hof-Verlags- u. Universitäts-Buchhandlung, 1913, Nr. 5630, 699-701
[30] Pfaff et al., *Sammlung* (note 29) 700f.

5. Reforming the law

By the beginning of the 20th century the ABGB was being questioned. Some were of the opinion that the entire law code needed to be replaced because it was too old to fit the current social, economical and political situation; others – more conservatives – pleaded for reforms where necessary. Several possibilities appeared at that time. Associations for the reform of special parts of the civil law were founded – for example the *Scheidungsreformverein* at Vienna, a association which fought for the possibility of divorces also for Catholics, not only the separation of table and bed, which meant that the spouses were not allowed to marry again as long as the other spouse lived.

Women's associations especially tried to get through a lot of provisions, which were more tolerable to women. Through their periodicals and petitions to parliament they tried to shape public opinion.[31] We have to distinguish between women's movement of the bourgeois and the working class as in most other countries. However, also the middle-class associations were divided into a more conservative and a more progressive camp.

The situation concerning guardians was highly problematic by this time. Fewer and fewer males were ready to take over guardianship. They tried to put forward legally recognized excuses or they did not correspond to the legally defined "male capability" to take over guardianship.

In the periodical of the more progressive women's association, *Dokumente der Frauen* from around 1900, women and men argued that the assumption that men would have more knowledge of life and laws was outdated, that because women had to work for a living, as not many households could live on the man's income only, they had gained a lot of knowledge of life, and that only a few men would know more about the laws than women – men would also have to get legal advice.

> „Der Einwendung, dass der Vormund eine grössere Lebenserfahrung und mehr Gesetzeskenntniss besitzt, sei erwidert, dass die um ihre Existenz ringende Frau schwere und bittere Kämpfe bestehen muss, die ihr, wie dem Manne Lebenserfahrung und Menschenkenntniss bringen. Uebrigens ist auch nur ein kleiner Theil der Männer,

[31] Elisabeth Frysak, *Legale Kämpfe: Der Einsatz des Petitionsrechtes als politische Strategie der österreichischen bürgerlichen Frauenvereine*, Diplomarbeit, Wien, 2000. Elisabeth Frysak, ‚Legale Kämpfe: Die petitionsrechtlichen Forderungen der österreichischen bürgerlichen Frauenbewegung zur Änderung des Ehe- und Familienrechtes um die Jahrhundertwende', in *L'Homme. Zeitschrift für Feministische Geschichtswissenschaft*, 14:1, 2003, 65-82

> welche Neigung oder Beruf dazu trieb, gesetzkundiger als sie. Die Andern müssen wie die Frauen in juristischen Fragen einen Advocaten zu Rathe ziehen.“[32]

So the tendency in the arguments was to emphasize the changing economic situation that would make the prohibition for women other than mother or grandmother to take over guardianship of children obsolete. Moreover, if the government wanted to adhere to the institution of a male co-guardian for the mother, which was thought to compensate for the loss of the father, it would as a consequence also have to appoint a female co-guardian to the father to compensate the children for the loss of the mother.

Even Joseph Unger,[33] a still important legal voice within the reform process, stated in his proclamation for a reform of the ABGB in 1904 that the exclusion of women from guardianship in principle would be antiquated and unjustified.[34]

Reading the law petitions that were submitted to parliament from around 1904 to 1908 and articles during the process of reforming the code of law, we get another picture. Concerning guardianship of children the authors emphasized to a lesser degree the changed economic situation. On the contrary – women referred especially to their maternal role and to female gender character. Along the same line of thinking they denied men’s ability to take over guardianship because they would not be able to care for children due to “their nature”.[35]

This changed tendency of arguing could be due to the thought that a petition formulated in that way would have more success. This is supported by the fact that sometimes the very same people – for example the *Reichsratsabgeordnete* Julius Ofner who were very concerned with women’s demands – changed their arguments during the reform process into a more conservative way – placing more emphasis on the natural vocation of women to care for children. Julius Ofner wrote 1899:

> „Diese Verfügungen beruhen auf der Ansicht, dass die Frau im Allgemeinen nicht so erwerbstüchtig und in den Angelegenheiten des äusseren Lebens so bewandert ist, wie der Mann. Sie soll deshalb in der Regel nicht zum Vormund oder Curator bestellt werden … jedoch mit Unrecht. … Die Praxis könnte viel freier sein, als sie ist, ins-

[32] Emma Freundlich, ‚Das gesetzliche Recht der Mutter’, *Dokumente der Frauen,* 6:18, 1901, 505-510, here 507
[33] Joseph Unger was the leading jurist in the middle of the 19th century who was the prime mover behind the changing of the „exegetic law school“ to the „historical law school”.
[34] Joseph Unger, *Zur Revision des Allgemeinen Bürgerlichen Gesetzbuchs: Eine legislativpolitische Studie*, Wien, Alfred Hölder, 1904, 3
[35] ‚Petition des Bundes österreichischer Frauenvereine vom 6. Mai 1905’ in *Familie – Recht – Politik: Die Entwicklung des österreichischen Familienrechts im 19. und 20. Jahrhundert*, ed. Oskar Lehner, Linzer Universitätsschriften 13, Wien-New York, Springer Verlag, 1987, 559-566

> besondere könnte einer Kauffrau anstandslos die Vormundschaft übertragen werden.“[36]

In 1907, he submitted an interpellation in parliament in which he emphasized stronger the fact that women were especially qualified for care:

> “Die Erfahrung hat das Mißtrauen in die praktische Fähigkeit der Frauen zerstört, und namentlich im Pflegewesen haben sie sich auf das Beste in allen Staaten bewährt, die ihre Mithilfe aufgenommen haben.“[37]

To get the wanted provisions through women argued with everything that promised success, for example that the German law code, published in 1900, contained no more prohibition for women to take over guardianship. They even used the lawgiver’s assumed convictions:

> „Allein aus der Erkenntniss, dass dem Manne die Zeit sowie die Gabe fehlt, wirksam die Heranwachsenden in seine Hut zu nehmen, dürfte die deutsche Gesetzgebung in das neue bürgerliche Gesetzbuch des Deutschen Reiches die Vormundschaft von Frauen aufgenommen haben. Es müssen die Gesetzgeber völlig überzeugt gewesen sein, dass nur von der Heranziehung der Frauen eine Verbesserung der Waisenpflege zu gewärtigen sei, da die deutsche Gesetzgebung in keiner anderen Richtung die Tendenz aufweist, den weiblichen Staatsbürgerinnen gerecht zu werden.“[38]

The reform process itself lasted until 1914 due to several dissolutions of parliament. The change of law finally got through under the special circumstances of World War I – through an emergency degree. Because of the war even fewer men were available to take over guardianship.

The results for the law of guardianship were that all women were allowed to take over guardianship of children. There was no need for a co-guardian any more. However, married women had to ask for their husband’s permission to take over guardianship. A new institution was created – the so-called *Vormundschaftsräte*, a state institution for orphans. The stated arguments for this resolution were the urgent need of new guardians and the efforts of the women’s movement.[39]

Of all the provisions demanded by the women’s movement the permission to take over guardianship of children was one of the few that were realized. This may be due to the economical conditions but above all because in this subject there was no confrontation with the

[36] Julius Ofner, ‚Die Frau im österreichischen Privatrecht’, *Dokumente der Frauen*, 2:17, 1899, 439-443, here 440
[37] Julius Ofner, ‚Ein Nachwort (zur Frau als Vormund)’, *Neues Frauenleben*, 19:7, 1907, 4f., here 5.
[38] Marianne Hainisch, ‚Zur Vormundschaftspflege’, *Dokumente der Frauen*, 6:22, 1902, 617-621, here 620
[39] Ernestine v. Fürth, ‚Die Teilnovelle zum allgemeinen bürgerlichen Gesetzbuche’, *Der Bund: Zentralblatt des Bundes österr. Frauenvereine*, 9:9, 1914, 1-5

Catholic Church as it would have been with changes of matrimonial law. Women were enthusiastic about this final resolution – always with the expression of regret that married women needed the permission of their husbands.

> Durch die Einschränkung der Mitvormundschaft wird erfreulicherweise anerkannt, dass die Mutter ‚auch ohne männliche Beihilfe', wie der Motivenbericht erwähnt, ‚in der Regel geeignet erscheine, ihre Kinder zu erziehen und zu schützen'. Andererseits legt ihr das Gesetz leider eine empfindliche Beschränkung auf durch die Anordnung, dass die verheiratete Frau zur Übernahme der Vormundschaft über fremde Kinder der Einwilligung des Ehemannes bedarf.“[40]

They founded associations to prepare women for this new possibility. Soon a long list of names willing to take over guardianship was presented to the public authorities.[41] However, all the praise for this new resolution moved in the direction of welcoming a new field of female, maternal activities, corresponding to the special female ability to care for children.

So looking at the development of about 150 years we have to state that the practice of women other than mothers or grandmothers to take over guardianship of children was not codified in the ABGB of 1811. This new code of civil law represented the views and convictions of the social upper class underpinned with arguments of the female inferior ability to take over guardianship – corresponding to the theory of gender characters. During the 19th century there seemed to exist almost no opposing opinion even in spite of the fact that women continued to represent their children in front of public authorities or in court – which could have been an expression of women's capability to do business. The progressive bourgeois women's movement stated that changed economic conditions had made women better at business affairs while the conservative part of the women's movement emphasized the fact that women were better qualified to take care of children than men were. These were also the arguments women used for their petitions submitted in parliament. They apparently knew very well that the use of gender characters promised a greater success in changing law provisions. However, we must not deceive ourselves into believing that these arguments were put forward only because of their perceived usefulness. Many women and men also believed in the arguments.

[40] Marie Spitzer, ‚Zur Reform des bürgerlichen Gesetzbuches', *Der Bund: Zentralblatt des Bundes österr. Frauenvereine*, 3:2, 1908, 4f., here 4
[41] ‚Zentralstelle für weibliche Vormundschaft', *Neues Frauenleben*, 16:11, 1914, 256f.

Zusammenfassung

Die Konstrukte der „männlichen Fähigkeit“ und „weiblichen Untauglichkeit“ zur Vormundschaft im Spiegel der juristischen Diskussion und Rechtspraxis im Wirkungsbereich des Allgemeinen Bürgerlichen Gesetzbuches

Das Rechtsinstitut der Vormundschaft benachteiligte Frauen insofern, als sie laut dem Allgemeinen Bürgerlichen Gesetzbuch von 1811 (ABGB) über fremde Kinder keine, über die eigenen Kinder nur als Ausnahme zusammen mit einem Mitvormund die Vormundschaft übernehmen konnten. Dieser Regelung war eine Diskussion vorausgegangen, in der – bemüht um Vereinheitlichung der bisher geltenden Landesgesetze – schließlich den Frauen ein „ihrem Geschlechtscharakter entsprechender“ Platz zugewiesen wurde. Der erste Vereinheitlichungsentwurf des Codex Theresianus 1754 argumentierte mit der schweren Bürde des vormundschaftlichen Amtes, und dass es deshalb die damit verknüpfte Verantwortung nicht gestatten würde, das weibliche Geschlecht damit zu belasten. Auch das ABGB hielt an dem Bild fest, dass die Mutter wegen ihrer „natürlichen“ Liebe zu den Kindern zwar für das Amt der Vormundschaft geeignet sei, Vormundschaften grundsätzlich aber ein männliches Geschäft darstellten, da nur Männer die dafür erforderliche Einsicht und Stärke des Urteils besitzen würden.

Diese juristische Festlegung traf auf eine ambivalente Haltung der Öffentlichkeit und Rechtspraxis: Trotz formalem Mitvormund ging der Handlungsspielraum von Müttern in der Vertretung ihrer Kinder sehr weit und doch war es für Viele bis Anfang des 20. Jahrhunderts kaum denkbar, mit einer ausformulierten Gleichberechtigung im Gesetzestext den Frauen die gleiche Fähigkeit zur Vormundschaft wie Männern zu attestieren. Im Zuge einer angestrebten allgemeinen Reform des ABGB kam gegen Ende des 19. Jahrhunderts von Seite sowohl der Frauen, als auch einiger Juristen eine Vielzahl von Vorschlägen, die von der Hoffnung, das Privatrecht zu Gunsten der Frauen umgestalten zu können, getragen waren. In den Argumenten für die Einforderung des Vormundschaftsrechts wird die große Kluft zwischen den tradierten idealtypischen Geschlechterrollen und der gesellschaftlichen Realität noch einmal deutlich. Zu einer Änderung der entsprechenden Regelungen 1914 kam es aber nicht zuletzt vor allem aus dem Grund, dass kaum noch genügend Vormünder gefunden werden konnten, die den rechtlich formulierten Anforderungen genügten, man also auch auf weibliche Vormünder angewiesen war.