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# A STEP TOWARDS EQUALITY? THE ADMISSION OF WOMEN TO GUARDIANSHIP IN THE AUSTRIAN CIVIL LAW IN 1914

*According to the Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch = ABGB) from 1811, there were almost no possibilities for a woman to obtain guardianship of a child. Instead, the married father possessed paternal authority (patria potestas), which included the sole guardianship of his legitimate children. If the father was unable to exercise paternal authority, the courts had to appoint a guardian for his minor children. Based on the assumption that the female gender lacked the necessary abilities, women were generally excluded from guardianship. Only at the end of the 19th century did the women's movement start to mobilize against the frequent exclusion of women from the guardianship of their own children. Moreover, the drastic neglection of the young made legal reforms ever more urgent. The legal possibilities open to women for taking over guardianship of a minor were first extended with the legislative amendment to the ABGB in 1914 (1. Teilnovelle 1914). This paper will focus on the causes for the extension of legal possibilities of women concerning guardianship due to the first legislative amendment.*

Key words: *Austrian Civil Code 1811. – Paternal/maternal/parental authority. – Guardianship for minors. – First legislative amendment 1914. – Women's rights movement.*

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## 1. INTRODUCTION

Nowadays, neither the Austrian legislation nor the legal science or the jurisdiction doubt that women are at least as capable as men to exercise the custody of a child.[1] However, this was not always the case. The Austrian Civil Code from 1811 (Allgemeines Bürgerliches Gesetzbuch = ABGB) gave a woman almost no possibility to receive the guardianship of a child. Instead, it stipulated paternal authority (*patria potestas*), which granted the father the sole guardianship of his legitimate children.[2] If the father died or was unable to exercise his paternal authority for some other reason, the paternal authority did not pass automatically to the mother. In this case the courts had to appoint a guardian for the minor children. Women were almost completely excluded from guardianship. An exception only existed for married mothers and paternal grandmothers of legitimate children. Nevertheless, if they became the guardian of a child, the courts always had to appoint another male guardian, who had to support and control the female one.[3]

Over illegitimate children, the father possessed no paternal authority. According to the Austrian Civil Code, illegitimate children belonged neither to the paternal, nor to the maternal family. They had no legal representative by law. Instead, the courts always had to appoint a guardian for them immediately after their birth had been registered. Although the unmarried mother was mainly responsible for her child's upbringing, the Austrian Civil Code excluded her from the guardianship of her illegitimate child.[4]

The first improvements in the legal status of women concerning guardianship took place about a hundred years after the Austrian Civil Code had come into effect with the first legislative amendment to the ABGB in 1914 (1. Teilnovelle 1914). The legislative change made it easier for the widow to demand guardianship over her own legitimate children. It also abolished the absolute exclusion of other women, apart from the married mother and the paternal grandmother, from guardianship.[5]

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1 The mother has the sole custody for an illegitimate child; Astrid Deixler-Hübner, „§ 177", Andreas Kletečka, Martin Schauer (eds.), *ABGB-ON*, https://rdb.manz.at/document/1101_abgb_p166?execution=e1s5&highlight=obsorge+uneheliche+kinder, last visited 14 March 2020; in child custody disputes the courts tend to grant the custody to the mother; Sorgerecht Vater: Wie sieht die rechtliche Situation für Väter in Österreich aus? *https://www.scheidungsinfo.at/sorgerecht-vater-wie-sieht-die-rechtliche-situation-fuer-vaeter-in-oesterreich-aus/*, last visited 14 March 2020.

2 § 189 Allgemeines Bürgerliches Gesetzbuch, *Justizgesetzessammlung*, No. 946/1811.

3 § 187 Allgemeines Bürgerliches Gesetzbuch, *Justizgesetzessammlung*, No. 946/1811.

4 § 192 Allgemeines Bürgerliches Gesetzbuch, *Justizgesetzessammlung*, No. 946/1811.

5 Kaiserliche Verordnung vom 12. Oktober 1914 über eine Teilnovelle zum allgemeinen bürgerlichen Gesetzbuche, *Reichsgesetzblatt*, No. 276/1914.

The following paper focuses on the motivations of the legislation for the legal changes in the area of guardianship through the first legislative amendment to the ABGB by using research literature and primary sources. Firstly, it reviews the legal provisions of the Austrian Civil Code from 1811 and the causes for the large exclusion of women from guardianship. With regard to the changing family structures and social rules, the legislative change in 1914 and its causes will be examined. The efforts and proposals of the Austrian women's rights movement concerning a change of the rules on guardianship will be taken into account.[6] The essay also considers the influences of international developments on the Austrian legislation in the field of guardianship. The provisions of the first legislative amendment concerning guardianship and the reactions of legal scholars and women's associations will be closely examined to show the still existing prejudices against female guardianship.

## 2. PARENTAL RIGHTS AND OBLIGATIONS IN THE AUSTRIAN CIVIL CODE FROM 1811

The Austrian Civil Code's rules on guardianship constituted a major step backwards in the emancipation of women in Austria. According to former regional laws, primarily the mother received the guardianship of her children, if the father was unable to exercise paternal authorithy, especially, if he had died. Sometimes even other female relatives, especially the older sister, were able to receive the guardianship.[7] However, during the legislative work, the status of women in guardianship law was more and more restricted.[8] It was no longer considered entrusting women other

6 Concerning the demands of the women's associations see also Ellinor Forster, „The Construction of 'Male Capability' and 'Female Inability' to assume Guardianship of Children in the Austrian 'Allgemeines Bürgerliches Gesetzbuch' (ABGB) in the 19th Century", Grethe Jacobsen, Helle Vogt, Inger Dübek, Heide Wunder (eds.), Less favoured – more favoured. Proceedings from a Conference on Gender in European Legal History. 12.– 19. Century, September 2004, Kopenhagen 2005, [Online-Publikation: http://www.kb.dk/da/nb/publikationer/fundogforskning-online/less_more/]; Elisabeth Frysak, *Legale Kämpfe: Der Einsatz des Petitionsrechtes als politische Strategie der österreichischen bürgerlichen Frauenvereine*, Diplomarbeit Universität Wien 2000; Elisabeth Frysak, „Legale Kämpfe: Die petitionsrechtlichen Forderungen der österreichischen bürgerlichen Frauenbewegung zur Änderung des Ehe– und Familienrechts um die Jahrhundertwende", *L'Homme* 14/2003, 65–82.

7 E. Forster, 2–3; Philipp Harras Harrakowsky, *Der Codex Theresianus und seine Umarbeitungen. Entwurf Hortens* I, Druck und Verlag von Carl Gerold's Sohn, Wien 1886, 178; Reinhild Schlüter, *Das Vormundschaftsrecht in den Kodifikationen der Aufklärungszeit*, Rhöndorf 1960, 173.

8 In detail cf. Elisabeth Roczek, *Geschichte der Vormundschaft und Pflegschaft seit dem Codex Theresianus*, Wien 1943.

than mothers and grandmothers with the guardianship.[9] One of the main arguments for the exclusion of women from guardianship was that they were particularly unsuitable for the ward's representation before the courts and thus unsuitable for one of the most important tasks of a guardian.[10]

The Austrian Civil Code from 1811 was rooted in the bourgeois paternalism. The female gender was subordinate to the male one. This was justified with the assumption that men and women had different personalities by nature. The drafters of the ABGB assumed that the male gender was both physically and intellectually superior to the female one. Therefore, men were considered as destined to rule over women as the weaker gender and to protect them. Women were regarded as more emotional, suitable to manage the household and to raise children, but in the need of somebody who made the important decisions for them. The presumed intellectual limitations of women and the far greater ability of the male gender provided the justification for the disadvantage of women in the family law of the ABGB.[11]

The distribution of the parental rights and duties followed these gender stereotypes.[12] Thereby, the rights and obligations between the parents and their children depended significantly on the marital status of the parents. Like virtually all other legal systems, the Austrian Civil Code distinguished between legitimate children, recognised as full members of the family, and illegitimate children or „bastards", the latter being mainly disadvantaged.[13] Illegitimate children were in general excluded from the rights of the family. They had no legal entitlement to the family name of the father nor to a title of nobility or other privileges of their parents (§ 165 ABGB). Moreover, the law disadvantaged them in the terms of upbringing, maintenance and legal representation.[14]

### 2.1. Legitimate children

Concerning legitimate children, the Austrian Civil Code stipulated legal rights and obligations which were incumbent upon both parents.

9 E. Foster, 4.

10 Philipp Harras Harrakowsky, *Der Codex Theresianus und seine Umarbeitungen. Entwurf Martini's* II, Druck und Verlag von Carl Gerold's Sohn, Wien 1886, 57; R. Schlüter, 173.

11 O. Lehner, 26–27; M. Moser, 106; Franz von Zeiller, *Commentar über das allgemeine bürgerliche Gesetzbuch: für die gesammten Deutschen Erbländer der Österreichischen Monarchie* I, Geistingers Verlagshandlung, Wien – Triest 1811, 249 etc.

12 U. Floßmann, 131 etc.; O. Lehner, 27; F. Zeiller, 249 etc.

13 Stephen Cretney, *Family Law in the Twentieth Century: A History*, Oxford University Press, Oxford 2005, 545.

14 Moser, 78, 83–84.

The mother and father were entitled and obligated to raise their children. This responsibility included the care for the children's physical well-being and their mental development. Furthermore, both parents had to maintain their children and to educate them to be „decent citizens" through religious instruction (§ 139ff ABGB).[15] The responsibility for the upbringing of children included the authorization to use all necessary means to fulfil this task. The Austrian Civil Code even entitled the parents to use physical violence against their children, as long as it was not harmful to the children's health. On the other hand, the children owed their parents obedience. If the parents maintained their children, they could also use them for adequate services (§ 144f ABGB).[16]

Since the family law of the ABGB was based on the assumption that usually only the father was economically active and pursuing a job, he was primarily responsible for the maintenance of his children and his wife. Only when he was destitute did the maintenance obligation for the children pass on to the mother. On the other hand, care for the physical well-being and health of the children was primarily imposed on the „tender, more sensitive" mother (§ 141 ABGB). However, legally both parents had all these rights and obligations. Therefore, each parent could exercise or fulfil them alone without the other's involvement. In the upbringing of the child, the parents should proceed consensually (§ 144 ABGB). Nevertheless, if no agreement could be reached between the parents, the husband as the „head of the family" and (according to the legal materials) the intellectually superior spouse, had the ultimate decision-making authority (§ 91 ABGB). His wife was legally obliged to follow his instructions.[17] So, the married mother was indeed allowed to raise her children, but in doing so ultimately bound to the will of her husband.[18]

Upon a separation of the parents' domestic union, the parents were free to choose the children's place of residence and to make an agreement on which parent should mainly be responsible for the child's upbringing. If they reached no consent, the mother had the right to raise her children in their early years, because it was assumed that the care provided by the mother in the early childhood was in the best interest of the child. The

15 Staengel Walter, *Die elterliche Gewalt der Mutter im deutschen Rechtskreis seit 1794. Ein Beitrag zur Anerkennung der Persönlichkeit der Ehefrau und Mutter*, PAUL JLLG Photo-Offsetdruck Stuttgart, Stuttgart – Bad Cannstatt 1966.

16 § 144f Allgemeines Bürgerliches Gesetzbuch, *Justizgesetzessammlung*, No. 946/1811; W. Staengel 1966, 94.

17 F. Zeiller, 249, 329–330; W. Staengel, 102.

18 Monika Strobel, "Der Beginn eines langen Weges zu gleichen Elternrechten. Der Custody of Infants Act 1839", Stephan Meder, Christoph-Eric Mecke, *Reformforderungen zum Familienrecht international. Westeuropa und die USA (1830–1914)* I, Böhlau 2015, 434–460 (452).

mother lost this legal entitlement only when „important reasons coming to light, especially from the causes of the separation or the dissolution of the marriage, demand another disposition."[19] When male children reached the age of four, and female children the age of seven, the courts had to decide which parent was mainly responsible for the child's upbringing, in the case of a disagreement between the parents. Either way, the father was primarily responsible for the child's maintenance (§ 142 ABGB).[20]

In addition to these shared parental responsibilities, the ABGB also stated tasks which required greater intellectual skills. They were summarized under the term paternal authority (§ 147 ABGB) and entrusted to the father alone.[21] Therefore, the legal representation of legitimate children, the management of their property and also the right to make important decisions for them (for example the choice of their vocation or profession) were solely in the hands of the father.[22] The paternal authority generally ended when the children reached majority at the age of twenty-four (§ 172 ABGB). Even if the father was unable to exercise his paternal authority, these responsibilities did not pass to the mother. Instead, the court had to appoint a guardian for the minor children.[23]

### 2.2. Illegitimate children

The parental responsibilities for illegitimate children were distributed differently. Since the authors of the Austrian Civil Code assumed that the mother loved an illegitimate child more than the father, she had the sole right to raise it, as long as she was willing and able to do so (§ 168 ABGB).[24] Nevertheless, if proved, the child's father was not completely without duties. He was legally required to monitor the upbringing by the mother. If the mother endangered the child's well-being, for example through an immoral lifestyle or a neglect of care, the father had to separate the child from the mother and either organise a decent upbringing or otherwise raise the child himself (§ 169 ABGB). Furthermore, if the father wanted the child to be trained in a profession for which „the education and training of a man is usually required", he could also educate the child in his home.[25] On the other hand, the father was considered as the economically stronger parent. Therefore, he was primarily responsible for the mainte-

19 § 142 Allgemeines Bürgerliches Gesetzbuch, *Justizgesetzessammlung*, No. 946/1811.

20 M. Strobel, 453.

21 M. Moser, 65; F. Zeiller, 249 etc.

22 M. Moser, 65.

23 § 187 Allgemeines Bürgerliches Gesetzbuch, *Justizgesetzessammlung*, No. 946/1811.

24 F. Zeiller, 574.

25 *Ibid.*, 374.

nance of the non-marital child (§ 168 ABGB). If the father could not be identified or did not fulfil this financial obligation, the mother had to take care of the child's sustenance as well as its upbringing.[26]

The father had no paternal authority over his illegitimate children because to some point the drafters of the Austrian Civil Code distrusted him. They suspected that a man did not feel the same love for a child born out of wedlock as for his marital offspring and feared that he would be more likely to abuse the paternal authority over the non-marital children.[27] On the other hand, the rights of the paternal authority were also denied to the unmarried mother, who was considered as even less capable than the married one. Hence, illegitimate children had no legal representative by law. As a consequence, the courts always had to appoint a guardian for them to exercise the rights of paternal authority (§ 166 ABGB).[28]

## 3. THE GUARDIANSHIP: APPLICATION RANGE AND DUTIES

The Austrian Civil Code granted „persons, who do not benefit from the care of a father and are still minors or for some other reasons unable to take care of their own affairs", a special protection in form of a „suitable" guardian, who had to be appointed by the courts (§ 187 ABGB). Illegitimate children who were not under paternal authority always needed a guardian, whereas for legitimate children a guardian was only necessary if the father died or lost his paternal authority. A loss of paternal authority occurred when the father lost „the use of his reason", was declared prodigal or sentenced with imprisonment to a longer term than a year. In addition, the father lost his paternal authority if he was absent for more than a year, without giving notice of his place of residence. If these impediments ceased, the father entered again upon his rights. Only fathers who entirely neglected the maintenance and education of their children lost the paternal authority forever (§ 176f ABGB).[29]

The guardian essentially took over the responsibilities of the father concerning the paternal authority. Therefore, his main tasks were the legal representation of the ward and the management of the ward's assets. In addition, the guardian was obligated to take care of the child's education (§ 188, § 216 ABGB). If the father had not made any recognizable orders, the guardian – and not the mother – had the right to determine the educational

26 *Ibid.*, 371.

27 F. Zeiller, 370.

28 M. Moser, 84.

29 R. Schlüter, 103 etc.

goals.[30] Overall, the position of a guardian was, therefore, similar to a father's. He was just under stricter control by the courts, particularly regarding the child's assets.[31] Furthermore, the guardian was not responsible for the child's maintenance. On the contrary, he had a legal claim to an annual compensation of 5% of the clear income of the child's assets, whereby the compensation was limited to 4,000 florins per year (§ 266 ABGB).[32]

### 3.1. Reasons for the appointment of a guardian

Every guardian had to be formally appointed by the courts. For the selection of the guardian the ABGB stipulated a three-part system. Thereby it distinguished between the testamentary, the statutory and the judicial guardianship. If a legitimate child needed a guardian, the three reasons for the appointment were applicable in succession.

The wishes of the father were primarily considered. His paternal authority included the right to provide for its loss and to choose a guardian for his children (*tutela testamentaria*). According to the drafters of the ABGB, the choice of the father was in the best interest of the child because he had the greatest insight into the actual living conditions. The father could not only nominate a guardian, but also exclude certain persons from guardianship (§ 193 ABGB). His disposal did not have to fulfil any formal requirements. It was enough if his will was clearly recognizable. However, the nominated guardian could refuse the guardianship.[33]

If the father had nominated no guardian or an incapable guardian (§ 191f ABGB), the statutory guardianship (*tutela legitima*) was applicable. This was also the case if the testamentary guardian refused his appointment. Statutory guardianship meant that the ABGB established a statutory order of priority of the ward's closest relatives, who were sequentially called to guardianship. Above all, guardianship was to be entrusted to the grandfather on the father's side, then to the mother of the child, then on to the grandmother on the father's side and, lastly, to another male relative (§ 198 ABGB). According to the statutory ranking, one after the other had a legal claim to guardianship, but was also obligated to accept the appointment. The legal succession was based on the assumption that the relatives took more interest in the child's well-being than strangers. The drafters of the ABGB also assumed that the will to pass on origin (in the sense of social position, nobility etc.) and name incited a special love for the de-

30 R. Schlüter, 179 etc.; F. Zeiller, 449.

31 O. Lehner, 45 etc.; M. Moser, 85; R. Schlüter, 179 etc.

32 M. Moser, 85.

33 F. Zeiller, 421.

scendants of one's own sons. Therefore, the law preferred the father's side of the family to that of the mother.[34]

The last alternative concerning marital children was the judicial guardianship. It was only applicable if neither a testamentary nor a statutory guardian could be found. Then the court had to appoint another guardian at its own discretion but to consider the skills, the status, the property and the domicile of a potential guardian (*tutela dativa*, § 199 ABGB). Like the statutory guardian, the judicial guardian had no right to refuse the guardianship.[35]

The legal situation was different concerning illegitimate children. In respect to them testamentary and statutory guardianship were no options. Since the non-marital father had no paternal authority over his illegitimate children, he also had no right to nominate a guardian for them. The statutory order of priority (§ 198 ABGB) was also not applicable because apart from its parents, the blood relatives had no legal responsibilities towards an illegitimate child (§ 165 ABGB). As a result, regarding non-marital children the judicial guardianship was the first and only alternative. Whereas the unmarried mother was excluded from the guardianship of her illegitimate child, the court could grant the guardianship to the unmarried father. Even in this case, the father had no paternal authority over the illegitimate child, but the similar rights and duties of a guardian. He was mainly under stricter control by the court, especially concerning the child's finances.[36]

### 3.2. The exclusion of the female gender from guardianship

The Austrian Civil Code considered guardianship as a public function which required certain intellectual and mental abilities. Minors and mentally ill persons were excluded from guardianship, as well as convicted criminals and other persons from whom the law did not expect a respectable education or a proper administration of the ward's property. The assumption was that the female gender in general lacked the necessary mental and intellectual abilities to take care of the child's finances and to guarantee a decent upbringing. Therefore, women were as a rule excluded from guardianship.[37]

34 P. Harrakowsky, *Entwurf Hortens*, 178; F. Zeiller, 423 etc.

35 They could be compelled to accept guardianship by suitable coercive measures (§ 203 ABGB). Only a few groups had a right to refuse guardianship, for example secular clergymen, military persons in active service and persons who already had to manage one irksome or three smaller guardianships (§ 195 ABGB).

36 M. Moser, 86.

37 R. Schlüter, 171; F. Zeiller, 192.

Bearing in mind that the paternal authority and the guardianship essentially consisted of the same duties, the exclusion of the female gender from guardianship as well as from paternal authority seemed conclusive. If women lacked the abilities to exercise paternal authority, this also had to count with regard to guardianship. The groups of people who were excluded from guardianship, however, clearly show how low the Austrian Civil Code deemed the intellectual abilities of women to be. In terms of guardianship, it put them on the same level as mentally ill persons, minors and convicted criminals.[38]

Unlike other women, married mothers and paternal grandmothers could become guardians of their legitimate children or grandchildren. This exception was justified by the supposed great love of these women towards their children and the descendants of their own sons, who carried the family name. According to the legislative materials, this love compensated for the limited intellectual abilities and the lack of experience of the female gender. Therefore, the guardianship of the mother or the paternal grandmother appeared to be in the child's interest, if the father had made no other arrangement and the paternal grandfather was not available. For illegitimate mothers the law made no exception from the exclusion of women from guardianship. They had, therefore, no possibility to receive the guardianship over their children.[39]

### 3.3. Special provisions for female guardians

The Austrian Civil Code stipulated some special provisions for female guardians, which also shows the extent of distrust the law had in the suitability of women as guardians. For every female guardian, the courts had to appoint a male co-guardian (§ 211 ABGB). Therefore, no woman, not even the married mother or the paternal grandmother, could exercise the sole guardianship of a child. The tasks of the co-guardian consisted initially in the control of the female guardian and providing support with „male advice". Only if he noticed any grievances did he have to intervene and, firstly, talk to the female guardian. If these conversations were unsuccessful, the co-guardian was obligated to notify the court of these grievances (§ 212 ABGB).[40]

Furthermore, the drafters of the Austrian Civil Code feared that the love of the mother or the paternal grandmother for the children from a

38 Similar rules could be found in the law of succession, the same groups of persons were incapable of being a witness to a will (§ 591 ABGB).

39 R. Schlüter, 169 etc.; F. Zeiller, 520.

40 F. Zeiller, 442 etc.

first marriage could decrease due to the love for another man and the children from a new partnership. Since the special love of these women for the wards was the only reason to admit them to guardianship in the first place, a remarriage of the mother or the paternal grandmother who was the guardian of a child had to be reported to the court, which then had to examine if the new partnership could lead to a neglection of the children from the first marriage. Based on the result of this examination, the court had to decide whether the mother or grandmother could continue the guardianship (§ 255 ABGB).[41] According to the older regional laws and the first drafts of the Austrian Civil Code (Codex Theresianus, Draft Horten), the remarriage of the mother had led *ipso iure* to the loss of guardianship.[42] However, the Austrian Civil Code from 1811 deviated from this strict rule, based on the consideration that the second marriage did not necessarily have to harm the well-being of the children from the first one, but could also be in their interest.[43]

### 3.4. The responsibilities of the mother beside a guardian

The appointment of a guardian did not change the fact that the mother also had parental responsibilities. Although the guardian was in charge not only of the care for the ward's property but also of the child's upbringing, „the care of the person of the orphan" was entrusted primarily to the mother. This rule even applied when the mother had not taken upon herself the guardianship and even if she remarried, because it was assumed that the upbringing by the mother corresponded to the alleged will of the father and the interests of the child. An exception was therefore made if the child's well-being required a different disposition (§ 218 ABGB).[44]

The guardian had not only the duty to assist the mother in the upbringing of the child, but also to monitor her and to ensure that the education was in accordance with the presumed will of the father, the future life of the child and its actual living conditions. In special cases, such as the unsuitability of the mother, bad behaviour of the child or a particularly intended future for the child, the mother's right to raise it could be withdrawn by the court. However, the guardian was never allowed to take the child away from the mother without authorization, but needed the preceding permission of the court. After the mother, primarily the guardian, close relatives of the child and other persons closely affiliated with the

41 F. Zeiller, 520.

42 P. Harrakowsky, *Entwurf Hortens*, 181; R. Schlüter, 171.

43 R. Schlüter, 171 etc.; F. Zeiller, 520.

44 F. Zeiller, 452.

parents were entitled to take in the child. Otherwise, the guardian had to accommodate the child in a public or private children's home. The guardian was free to choose between these options, but had to report his decision to the court (§ 238 ABGB).[45]

If the father possessed no means or was not available, the mother was initially responsible for the maintenance of the child. If the mother was also unable to provide the necessary sustenance, the maintenance obligation firstly fell upon the grandparents on the father's side, and after them upon the grandparents on the mother's side (§ 143 ABGB). On the other hand, neither the paternal nor the maternal grandparents had an obligation to support an illegitimate child. If nobody was obligated and able to pay maintenance for the ward, the ward's assets had to be used firstly (§ 220 ABGB). When the ward was destitute, which was mostly the case, an attempt to receive financial support from other close relatives had to be made. However, these relatives had no obligation to support the ward. If they refused or if the child had no relatives at all, the guardian had a claim on public charitable foundations and the existing institutions for the poor, as long as the minor was not able „to support himself by his own work and application" (§ 221 ABGB).[46]

### 3.5. Evaluation of the rules on guardianship in the Austrian Civil Code

Consequently, married and unmarried mothers were primarily responsible for the upbringing of their children and their maintenance if the father could not or did not fulfil his parental duties. On the other hand, the illegitimate mother was completely excluded from guardianship by law. The marital mother could receive the guardianship of her own children, but only if her husband had not disposed otherwise. In contrast to the upbringing and the maintenance of a child, the law preferred the paternal grandfather to the marital mother and even a stranger to the non-marital mother when it came to guardianship.

The regulations of the Austrian Civil Code 1811 concerning female guardianship were in accordance with other Civil Codes of the period of the Enlightenment, like the Codex Maximilianeus bavaricus civilis 1756, the General State Laws for the Prussian States 1794 and the Code civil des Français 1804. The discrimination of women was generally justified with their limited intellectual abilities and the superiority of the male gender. However, unlike the ABGB, all the other codes called the mother first in

45 M. Stubenrauch, 314; F. Zeiller, 453.

46 M. Stubenrauch, 315.

the statutory order of priority and, at least, preferred her to the paternal grandfather and any other man if the father had not disposed otherwise. All in all, the possibilities open to women for receiving guardianship according to the Austrian ABGB seemed even more restricted than in the other codes of the Enlightenment.[47]

## 4. THE DEFICIENCIES OF THE AUSTRIAN RULES ON GUARDIANSHIP

The rules of the Austrian Civil Code on guardianship from 1811 only corresponded with the living conditions of the social upper class. Following a bourgeois family model, the appointment of a guardian for the fatherless orphan was considered the general case. The assumption was that the ward would be supported and looked after within a large family association. However, a considerable proportion of births took place outside of marriage. The number of illegitimate births ranged from 10% to 16% between 1830 and 1910. In bigger cities, the number was much higher. For example, in Vienna between 30% and 51% of the births were illegitimate during the same period.[48]

The Austrian Civil Code overlooked the fact that a large part of guardianships would affect illegitimate children for whom the courts always had to appoint a guardian. By law, these children belonged to no family. In most cases they had no assets, thus a potential guardian could not expect any compensation. Whereas the few wealthy minors were coveted wards, there was a lack of suitable guardians for the many destitute children during the whole 19th century.[49]

The judges who were obligated to find a guardian for an illegitimate child developed various solutions. It was quite common to appoint an employee of the court as guardian for many minors.[50] The courts in Vienna often chose as guardians those persons who strived for the right of residence in the city and assumed that a guardianship would help them to receive it, because the law stipulated that charitable guardians would be

47 U. Floßmann, 119 etc.; in detail cf. R. Schlüter.

48 E. Foster, 12; Gudrun Hopf, *Ledige Mütter – Uneheliche Kinder. Aspekte städtischer Illegitimität in der Phase der Industrialisierung am Beispiel Wiens in der zweiten Hälfte des 19. Jahrhunderts*, Wien 1994, 117; O. Lehner, 23 etc.

49 Erläuternde Bemerkungen zur Regierungsvorlage (ErlRV) 2 BlgHH 21. Session, 68; Josef Kraus, „Zur Reform des Vormundschaftswesens", *Allgemeine österreichische Gerichts-Zeitung* 6/1904, 41–44 (43); O. Lehner, 77; M. Moser, 127.

50 A. Bloch, „Der richterliche Vormund. Ein Beitrag zum Capitel Kinderschutz", *Allgemeine Österreichische Gerichtszeitung* 7/1907, 52.

treated preferably.[51] Although sometimes the guardians only went to the court for their appointment and then did not care for their wards anymore, the rural population was also reluctant to take on a guardianship. The courts could not, therefore, attach any value to the qualifications of the guardians.[52] Since the majority of guardianships concerned illegitimate children, some courts requested the unmarried mother to choose a guardian for her child and invited her „in the company of a suitable guardian" to the court hearing for the appointment of the chosen man. The illegitimate mother's choice was, of course, just as limited as that of the court. Often the „suitable guardian" demanded payment from the mother for his trip to the court in the form of money or labour.[53] The guardians whose appointment was compulsory often took little pains with their job and especially neglected the care and the upbringing of the mostly destitute wards.[54] Sometimes the guardians did not even know the state of residence of their wards.[55]

The Austrian Civil Code only included detailed regulations to secure the property of the ward, whereas it hardly ensured its maintenance, the protection of its personality, or protection against labour exploitation..[56] Therefore, the children of the working class who had no property were not protected at all. The guardians were supposed to be chosen within the social classes of the wards. Especially the guardians of the lower classes often had huge economic concerns themselves, which made it difficult to take proper care of a ward.[57] The courts mostly had no knowledge of specific grievances. In general, the state authorities had hardly any information about the actual living conditions of children in the Habsburg Empire, not only of those under guardianship but of the other children as well. In most cases, the courts had no opportunity to intervene anyway. There was a great lack of suitable public institutions and foster parents to remove children from a detrimental family environment and to accommodate them elsewhere.[58]

The industrial revolution and the migration towards urban areas led to the dissolution of large family associations. As a result, the lack of suitable guardians increased. In general, the situation of the youth deteriorat-

51 M. Stubenrauch, 305.

52 A. Bloch, 52 etc.

53 *Ibid*., 53.

54 A. Bloch, 52.

55 ErlRV 2 BlgHH 21. Session, 68.

56 O. Lehner, 76.

57 *Ibid.*, 41–43.

58 J. Kraus, 42; O. Lehner, 77.

ed dramatically. In many cases, the parents were unable to care for their children properly. Often not even the children's material existence was guaranteed. The result was an increasing negligence of the youth affecting both marital and non-marital children of the rural and urban lower classes. By the end of the 19th century so many children suffered from a lack of care that they were considered as a problem for society as a whole and a threat to state security. On the one hand, juvenile delinquency was high, on the other hand, the precarious state of the youth weakened the economic and military potential of the state.[59] After the problem had been ignored for a long time, a further escalation seemed no longer tolerable. Therefore, a large discussion about child protection began in the late 19th century. As part of this public discourse, a reform of the ABGB's rules on guardianship was also proposed.[60]

## 5. THE REFORMS PROPOSED BY THE AUSTRIAN WOMEN'S RIGHTS MOVEMENT

Although the ABGB's rules on guardianship soon proved to be insufficient, until the end of the 19th century there seemed to exist almost no opposing opinion against the large exclusion of women from guardianship.[61] Only then did the bourgeois women's associations call for an improvement in the legal status of women within the family, as well as concerning paternal authority and guardianship. Through their periodicals they tried to shape public opinion.[62] They also used their legal rights and submitted three petitions to the parliament between 1904 and 1908. In the petitions the women's associations basically demanded a replacement of the paternal authority with a parental authority for legitimate children,

59 J. Kraus, 41; O. Lehner, 63 etc.

60 *Ibid*.

61 E. Foster, 12.

62 For example Marianne Hainisch, „Zur Vormundschaftspflege", *Frauen-Rundschau* 6/1902, 617–621; Henriette Herzfelder, „Mutterrecht und Gesetz", *Der Bund* 4/1910, 9–10; Henriette Herzfelder, „Mehr Mutterschutz", *Der Bund* 6/1910, 6–9; Henriette Herzfelder, „Zur Jahrhundertfeier des allgemeinen buergerlichen Gesetzbuchs", *Der Bund* 7/1911, 4–6; Henriette Herzfelder, „Zur Stellungnahme der Frauen zum Reformentwurf des buergerlichen Gesetzbuchs", *Der Bund* 4/1913, 13–14; Henriette Herzfelder, „Die Vormundschaft und die Frauen", *Der Bund* 2/1915, 5–7; Leopoldine Kulka, „Der I. österreichische Kinderschutz-Kongress", *Die Frauenbewegung* 13/1907, 68–69; Marie Rosenthal, „Der Entwurf einer Novelle zum Bürgerlichen Gesetzbuch im Lichte der Rechte und Interessen der Frau", *Neues Frauenleben* 2/1908, 67–72; Marie Rosenthal, „Der Entwurf einer Novelle zum Bürgerlichen Gesetzbuch im Lichte der Rechte und Interessen der Frau (Fortsetzung)", *Neues Frauenleben* 3/1908, 67–72; Wihelmine Wiechowsky, „Die Ledige Mutter", *Neues Frauenleben* 9/1908, 217–220.

which should be equally shared between the parents. According to their requests, an appointment of a guardian would not have been necessary if only one parent had been unable to exercise the parental authority. In this case, the other parent should automatically have the parental authority, without a judicial appointment. Moreover, they opposed the exclusion of women from guardianship and demanded the general admission of women to the public function of a guardian. They believed that the unmarried mother should have the sole guardianship over illegitimate children.[63]

The bourgeois women's associations used two main arguments to justify their requests: the more progressive part of the civic women's movement claimed that the changed economic conditions had improved the business qualifications of women, which made the prohibition for other women than the mother or grandmother to take over the guardianship of children outdated and no longer justified. The conservative part of the women's movement used gender stereotypes to substantiate their demands and argued that because of their female character and maternal abilities women were even better qualified to take care of children than men and therefore suitable for guardianship as well.[64] To demand women´s rights based on their special nature was on the one hand a tactical decision, but it also rose from the conviction that women had special abilities to add something to the state which men could not and that the state would only be complete with women´s participation. Other than sounding, above all, conservative, this is also a strong and – until now – an unproven claim.

The Socialist Party had the equality of genders since 1901 in its program, but at that time the socialist women's movement focused on socio-political reforms, which the socialist movement considered as more important.[65] The socialist women also criticized the use of the petition right, because the parliament was not obliged to deal with the petitions.[66] The success of the petitions depended on the exclusively male members of the parliament. Therefore, the bourgeois women's associations cooperated with some liberal and socialist members of the parliament and tried to get their support. This strategy of cooperation was not uncontroversial within the women's movement, but considered as necessary.[67]

63 E. Foster, 9–10; E. Frysak, *Einsatz des Petitionsrechtes*, 113 etc.; E. Frysak, *Petitionsrechtliche Forderungen*, 76 etc.; O. Lehner, 72 etc.

64 E. Foster, 9 etc.

65 O. Lehner, 73–74.

66 E. Frysak, *Einsatz des Petitionsrechtes*, 35 etc., 71 etc.; E. Frysak, *Petitionsrechtliche Forderungen*, 82.

67 E. Frysak, *Einsatz des Petitionsrechtes*, 68 etc.

## 6. THE REFORM OF THE AUSTRIAN RULES ON GUARDIANSHIP

One supporter of the demands of the bourgeois women's associations was the politician and delegate Julius Ofner,[68] who picked up their proposals and tried to improve the legal status of women in the civil law by a parliamentary request in 1901. According to the wishes of the women's movement, it stipulated that the paternal authority should be shared between the parents and renamed into parental authority. In contrast to the proposals of the women's associations, the parliamentary request wanted to maintain the father's ultimate decision-making authority. Over illegitimate children the mother should have the sole guardianship. Initially, the parliament entirely rejected this far-reaching and progressive proposal.[69] Especially, the introduction of a shared parental authority was seen as a threat to the peace and tranquility in the family. It was also pointed out that neither the German Civil Code nor the Swiss Law draft contained such a „harmful rule".[70]

However, at that time, the Austrian Civil Code had been in force for almost 100 years without changes. Not only the family law, but also the property law, the law of obligations, and the inheritance law no longer met the requirements of the time in many respects, hence, the demand for a revision of the ABGB became increasingly louder. The immediate cause for the start of the reform work was an article by Joseph Unger[71] concerning the revision of the Austrian Civil Code in 1904.[72]

In his article Joseph Unger called the general exclusion of women from guardianship outdated and unjustified.[73] Nevertheless, unlike Julius

68 Julius Ofner (* 1845, † 1924) was an Austrian jurist and politician who contributed to the legislation against child labour, the protection of workers and the partial emancipation of women as well as the criminal law reform; Andreas Thier, „Ofner, Julius", Historische Kommission bei der Bayerischen Akademie der Wissenschaften (ed.), *Neue Deutsche Biographie* XIX, Duncker & Humblot, Berlin 1999, 485.

69 Übersicht über die Anträge und Anregungen zur Revision des Bürgerlichen Gesetzbuches, Österreichisches Staatsarchiv, Allgemeines Verwaltungsarchiv, Karton 41, 10, 15; O. Lehner, 79; see also Julius Ofner, „Die Frau im österreichischen Privatrecht", *Dokumente der Frauen* 17/1899, 439–443.

70 E. Frysak, *Einsatz des Petitionsrechts*, 125.

71 Joseph Unger (* 1828, † 1913) was one of the leading jurists in the middle of the 19th century and the prime mover behind the change of the „exegetic law school" to the „historical law school", professor of civil law at the universities of Prague and Vienna, member of the Austrian parliament, from 1871 to 1879 Minister without Portfolio and President of the Imperial Court of Justice; Wilhelm Brauneder, „Unger, Joseph", Historische Kommission bei der Bayerischen Akademie der Wissenschaften (ed.), *Neue Deutsche Biographie* XXVI, Duncker & Humblot, Berlin 2017, 634–636.

72 O. Lehner, 79.

73 Joseph Unger, *Zur Revision des allgemeinen bürgerlichen Gesetzbuches*, Wien 1904, 391.

Ofner, Joseph Unger wanted to maintain the rules on paternal authority and not involve the mother, as long as the father was able to exercise his sole responsibilities.[74] Furthermore, he considered it as self-evident that the father's vote should be decisive in the case of a disagreement because, in his opinion, the subordination of the female gender corresponded to the natural order. Thereby, Unger also referred to the German Civil Code from 1900, which expressed this clearly. Joseph Unger only suggested that, as in the German law, the guardianship should pass to the mother automatically if the father lost it.[75]

After the publication of Unger's article, the Justice Department elaborated a draft law which came to the House of Lords as a government bill in 1907. The House of Lords assigned the government bill to a subcommittee of the parliament's legal commission for consultation. The subcommittee suggested some modifications. The House of Lords discussed the improved bill and approved it in 1912. The outbreak of the First World War in 1914 led to the closure of the parliament that same year and prevented the House of Representatives from passing the bill as well.[76] At the same time, the outbreak of the war made the reform of the ABGB's family law and in particular its rules on guardianship all the more urgent. The long-standing shortage of guardians now had to be remedied quickly, as the male population was needed in the war and large human losses were expected. The Austrian government also realized the special urgency of the problem and decided to make provisions despite the closure of the parliament. Therefore, the first part of the draft law, which contained almost exclusively provisions relating to family law and inheritance law, passed by the House of Lords and was put into force in October 1914 by an imperial emergency ordinance.[77]

## 7. THE CHANGES IN THE RULES ON GUARDIANSHIP THROUGH THE FIRST LEGISLATIVE AMENDMENT TO THE AUSTRIAN CIVIL CODE IN 1914

The first partial amendment to the ABGB pursued, among other things, the goal of expanding the circle of potential guardians. The difficulty of finding suitable male guardians made it necessary to open the

74 *Ibid.*, 391.

75 *Ibid.*, 393.

76 O. Lehner, 79.

77 Barbara Dölemeyer, „Die drei Teilnovellen zum ABGB (1914–1916)", Helmut Coing (ed.), *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte* III/2, München 1982, 1784–1799 (1789f); O. Lehner, 84 etc.; M. Moser, 119.

guardianship to women. The legislative materials expressed clearly that there was no other way to meet the demand for guardians.[78] The admission of women to guardianship appeared to be harmless, above all because many other European countries had already admitted women to the function of the guardian since the ABGB had entered into force. For example, a Hungarian law from 1877 granted the sole guardianship to the married mother if her husband lost his paternal authority. Moreover, in Hungary the unmarried mother was the sole guardian of her illegitimate child by law. The Italian Civil Code from the year 1865 granted both parents a shared paternal authority over legitimate children, whereas the unmarried mother even had the sole guardianship of her illegitimate children. Nevertheless, apart from the unmarried older sister of a ward, the Italian law excluded women from the guardianship of someone else's children.[79]

According to the German Civil Code from 1900, which was the role model for the Austrian legislative amendment, the married mother received the paternal authority over her children automatically if the father lost it. In contrast, the illegitimate mother had no paternal authority by law. Similar to Austria, the German courts had to appoint a guardian for any illegitimate child, whereby the mother had no legal claim to be appointed. Nevertheless, the courts in Germany were free to grant her the guardianship. The Swiss law draft gave the paternal authority over legitimate children to both parents and over illegitimate children to the mother alone. Neither the German nor the Hungarian civil law, nor the Swiss law draft excluded women from guardianship.[80]

Furthermore, many women participated in the economic life, therefore, the preconception that women had too little business sense to exercise the guardianship sensibly seemed no longer justified. Moreover, most of the wards had no assets whose management required special business skills anyway. If the argument that women lacked the necessary business skills to exercise the guardianship was unfounded or at least insignificant, then there was no reason at all to further exclude women from guardianship. The explanatory remarks to the government bill even assumed that women were better qualified than men to care for a child's physical and emotional needs due to their natural aptitude.[81] These were also the arguments the women's associations used in their petitions submitted in

78 Bericht der Kommission für Justizgegenstände über die Gesetzesvorlage, betreffend die Änderung und Ergänzung einiger Bestimmungen des allgemeinen bürgerlichen Gesetzbuches, 78 BlgHH 21. Session 1912, 29; ErlRV 2 BlgHH 21. Session, 68–69.

79 ErlRV 2 BlgHH 21. Session, 69–70.

80 *Ibid.*

81 *Ibid.*, 70.

parliament.[82] With this justification, the first legislative amendment to the Austrian Civil Code removed the general exclusion of women from guardianship.[83]

Nevertheless, according to the explanatory remarks to the government bill, even within the conjugal partnership a wife could only receive and exercise guardianship with the permission of her husband, who could also withdrew his approval.[84] Only concerning the guardianship of her own children, the law gave priority to the interests of the mother and waived the approval of her new spouse.[85] On the other hand, a married man could receive and exercise guardianship even for someone else's children without the permission of his wife.[86]

To reduce the demand for guardians, the scope of co-guardianship was limited. The mandatory addition of a male guardian to any female guardian was abandoned. The explanatory remarks to the government bill explained that the well-being of the wards would not be affected by this, as in practice the co-guardian had hardly taken on any tasks anyway.[87] Instead of a mandatory rule, the law stated certain cases in which a co-guardian beside a female guardian was required. This was especially necessary when the married father had demanded a co-guardian for his wife, because according to the explanatory remarks, he was best able to decide whether his wife would need support in the exercise of guardianship. In addition, the courts were authorized to appoint a co-guardian for the unmarried mother if this was necessary to enforce the child's claims against the father. Furthermore, the appointment of a co-guardian beside a female guardian was also possible if the ward possessed a large fortune. Finally, the female guardian could also request the addition of a co-guardian if she doubted her own skills.[88] For the same reason, women, apart from the ward's mother and grandmothers, were not obligated to take on guardianship. Unlike men, they had the right to refuse the guardianship of someone else's child.[89]

82 E. Foster, 9 etc.

83 Art. 21 Kaiserliche Verordnung vom 12. Oktober 1914 über eine Teilnovelle zum allgemeinen bürgerlichen Gesetzbuche, RGBl 276/1914, 1118.

84 Bericht der Kommission für Justizgegenstände über die Gesetzesvorlage, betreffend die Änderung und Ergänzung einiger Bestimmungen des allgemeinen bürgerlichen Gesetzbuches, 78 BlgHH 21. Session 1912, 29.

85 *Ibid.*

86 ErlRV 2 BlgHH 21. Session, 70.

87 *Ibid.*, 71.

88 *Ibid.*, 70.

89 Bericht der Kommission für Justizgegenstände über die Gesetzesvorlage, betreffend die Änderung und Ergänzung einiger Bestimmungen des allgemeinen bürgerlichen Gesetzbuches, 78 BlgHH 21. Session 1912, 29.

The governmental bill from the year 1907 did not plan a change in the statutory order of priority. This was criticized in particular by Armin Ehrenzweig, because on the one hand, after the father, the mother (and not the grandfather) was primarily responsible for the child's maintenance and its upbringing, whereas concerning the guardianship the paternal grandfather was the first and the married mother only the second in the order of priority.[90] Later on, the subcommittee of the parliament's legal commission changed the statutory order of priority and appointed the married mother as first in line for the guardianship.[91] In addition, the first legislative amendment also established legal foundations for local authority care, which meant that a public institution and bodies of the public administration could act as collective guardians to many wards. However, the collective guardianship was subsidiary to the individual one and only applicable when a suitable individual guardian could not be found.

The legislator did not want to go as far as to give the illegitimate mother statutory guardianship over her children. The subcommittee of the legal commission claimed that the intention behind this decision was not moral censure of illegitimate mothers.[92] Instead, the legal materials explained that an illegitimate mother and her child sometimes had different interests, because the mother was probably most interested in a marriage with the child's father. Therefore, it seemed obvious that the illegitimate mother would spare the father, to the disadvantage of the child, and, for example, not claim maintenance for the child, so as not to anger the father and reduce her prospects of a marriage with him. As the illegitimate child could also damage the mother's future, the legislator did not expect that illegitimate mothers would be reliable guardians.[93]

Nevertheless, after the first legislative amendment to the Austrian Civil Code, the courts were at least free to appoint a woman and, there-

90 Armin Ehrenzweig, *Gutachten über den Entwurf eines Nachtragsgesetzes zum allgemeinen bürgerlichen Gesetzbuche*, Verlag des XI österreichischen Advokatentages, Wien 1908, 29.

91 Bericht der Kommission für Justizgegenstände über die Gesetzesvorlage, betreffend die Änderung und Ergänzung einiger Bestimmungen des allgemeinen bürgerlichen Gesetzbuches, 78 BlgHH 21. Session 1912, 31.

92 Bericht der Kommission für Justizgegenstände über die Gesetzesvorlage, betreffend die Änderung und Ergänzung einiger Bestimmungen des allgemeinen bürgerlichen Gesetzbuches, 78 BlgHH 21. Session 1912, 31.

93 Bericht der Kommission für Justizgegenstände über die Gesetzesvorlage, betreffend die Änderung und Ergänzung einiger Bestimmungen des allgemeinen bürgerlichen Gesetzbuches, 78 BlgHH 21. Session 1912, 31; ErlRV 2 BlgHH 21. Session, 70; Othmar Wentzel, „Von den Vormundschaften und Kuratelen", Heinrich Klang, Franz Gschnitzer (eds.), *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch* I, Druck und Verlag der Österreichischen Staatsdruckerei, Wien 1962, 311.

fore, also the illegitimate mother as a guardian of her children. Unmarried mothers were now at least able to apply for guardianship of their children. Unlike married mothers, however, they had no legal entitlement to guardianship. In reality, the guardianship was rarely transferred to unmarried mothers by the courts, which was probably due to the still widespread prejudice that they lacked moral qualities.[94]

After the first legislative amendment had entered into force in the year 1914, the rules of the Austrian Civil Code concerning the legal position of women within the family and concerning the guardianship in particular were almost identical to the legal provisions of the German Civil Code from 1900 (= Bürgerliches Gesetzbuch BGB). In both states, the father had the ultimate decision-making authority within the family and the sole guardianship over his children in the form of paternal authority in Austria and parental authority in Germany.[95] He was also free to choose a guardian for his children. However, if he had not made an order, the guardianship was granted to the married mother by law. Illegitimate mothers had no legal entitlement to guardianship but could be appointed by the courts. Women were not excluded from guardianship but in general needed the approval of their spouses. Apart from the wife of the ward's father in Germany, and the mother as well as the grandmothers of the ward in Austria, women had the right to refuse guardianship. Only for women a co-guardian, in Germany called assistance, could be named for similar reasons.[96]

The actual provisions stayed far behind the demands of the women's movement. While the women were enthusiastic about the possibility to receive guardianship for minors and especially their own children more easily, they criticized the fact that the father still had the sole paternal authority over legitimate children. The denial of legal guardianship to the unmarried mother was also opposed. The regulations on co-guardians, the fact that married women needed the permission of their husbands to take over guardianship, the right of the father to choose another guardian than the mother and his power to exclude his wife from guardianship were other points of criticism. The only change, which was unreservedly approved, was that the married mother was now the first in the statutory order of priority, before the paternal grandfather.[97]

94 O. Lehner, 288; O. Wentzel, 200.

95 The term parental authority is misleading and did not change the fact that it was solely granted to the father as long as he was able to fulfil his duties.

96 Art. 1783–1788 Bürgerliches Gesetzbuch 1900, Reichsgesetzblatt No. 21/1896, 195; Art. 21–29 Kaiserliche Verordnung vom 12. Oktober 1914 über eine Teilnovelle zum allgemeinen bürgerlichen Gesetzbuche, RGBl 276/1914, 1118–1119; to the rules of the German BGB on guardianship cf. Staengel, 152 etc.

97 E. Foster, 12; E. Frysak, *Petitionsrechtliche Forderungen*, 77–78, 82 and in more detail E. Frysak, *Einsatz des Petitionsrechtes*, 144 etc..

## 8. THE EVALUATION OF LEGISLATIVE CHANGES BY THE LEGAL SCIENCES

The legal sciences generally approved the admission of women to guardianship.[98] However, in contrast to the civic women's rights movement, the male legal scholars did not strive for equality of the genders neither concerning the paternal authority, nor the guardianship.[99]

For example, Joseph Unger wanted to give the paternal authority solely to the married father. Only if he could not exercise the paternal authority, should it pass to the married mother.[100] The Austrian civil law professor Armin Ehrenzweig considered the general admission of women to guardianship as too extensive. „Instead of immediately overturning the whole rule", in his opinion, additional exceptions to grant certain other women the guardianship, besides the married mother and the marital grandmother, would have been more reasonable. However, Ehrenzweig was convinced that even if women were generally admitted to guardianship, „life itself" would restore the right rule „tacitly". To prove his claim, Ehrenzweig referred to the situation in the German Reich. Women were generally admitted to guardianship in Germany, but rarely appointed by the courts, although the female guardians proved themselves as excellent.[101]

In addition, Ehrenzweig pointed out that on the one hand, the legislature complained about the deficiencies of judicial guardianship, but on the other hand, it still gave illegitimate children no legal representative by law. In his opinion, it was not the unmarried mother, but the maternal relatives who would have been particularly suitable to become the statutory guardians of the non-marital child. Moreover, he considered as wrong that the father of a marital child was only allowed to appoint a co-guardian for his wife but not for other females, for example for his sister. Furthermore, Ehrenzweig criticized the solution that left unmarried mothers with no right to refuse guardianship like other women (other than the mother and the grandmothers of a legitimate child) when they were appointed. They could simply be forced to take over guardianship, even if they considered themselves as unsuitable. According to Ehrenzweig, this rule was based on the idea: „Even an unreliable guardian is better than none." He pointed

98 Max Burckhard, „Die Frau als Vormund", *Neue Freie Presse. Morgenblatt* 15413/1907, 2–3; A. Ehrenzweig, 28; Karl Schreiber, „Die Revision des allgemeinen bürgerlichen Gesetzbuches", *Allgemeine österreichische Gerichts-Zeitung* 2/1905, 11–13 (13); J. Unger, 391.

99 O. Lehner, 72 etc.

100 J. Unger, 393.

101 A. Ehrenzweig, 28.

out that with such a rule the problem of finding a guardian for illegitimate children was indeed solved „but only on paper".[102]

The civil law professors Ernst Till and Horaz Krasnopolski assessed the situation differently and wanted to make guardianship a general duty for all citizens, without privileges for „the weaker gender". In their opinion, women should not have the right to refuse guardianship because otherwise the state would lose many suitable guardians. Furthermore, they considered it as necessary that women, who strived for equality, became aware that getting the same rights did not only mean pleasures, but also worries. However, neither Ernst Till nor Horaz Krasnopolski proposed that the paternal authority be shared between the parents.[103] Even Julius Ofner, whose proposals were most progressive, intended to grant the married father the ultimate decision-making authority within the family.[104]

The judge and legal scholar Albert Wehli assessed the situation most pragmatically. He pointed out that on the one hand, the state had great difficulties to find people who were willing to sacrifice „time and effort" for someone else's child. On the other hand, unless the first observations from the field were wrong, there was a whole group of people who would be happy to take over this task.[105] In contrast to other areas, when it came to guardianship the replacement of men by women and problems of rivalry between the genders seemed unlikely to Wehli because "at least in the in past the men have clearly shown that they do not attach importance to becoming the guardian of someone else's child anyway."[106] However, Wehli also showed some doubts about the suitability of females to become guardians. He, therefore, considered it as sensible to appoint a co-guardian for every female guardian. Since the co-guardian had hardly any tasks other than to control and support the main guardian, Wehli assumed it would be easy to find enough co-guardians.[107]

Albert Wehli even saw a possible advantage to female guardians. He assumed that women would attach less importance to the remuneration for their function as a guardian than men and would, hence, be more willing to become the guardian of a destitute child.[108] In cases in which the

102 *Ibid.*, 28–29.

103 Ernst Till, *Der Entwurf einer österreichischen Zivilgesetznovelle*, Manzsche k. u k. Hof-Verlags– und Universitäts-Buchhandlung, Wien 1908, 4–5.

104 J. Ofner, 18; Übersicht über die Anträge und Anregungen zur Revision des bürgerlichen Gesetzbuches, in: Österreichisches Staatsarchiv, Allgemeines Verwaltungsarchiv, Karton 41, 10.

105 A. Wehli, 205.

106 *Ibid.*, 206.

107 *Ibid.*

108 *Ibid.*, 205.

guardianship involved extensive wealth management and which, therefore, required a greater business sense, the courts could still give preference to the male gender. For Albert Wehli the question was a very simple one: „Is it true that our legal awareness still demands or even allows us to exclude the female gender from a function, for which it is not only qualified but often also the only applicant?"[109]

## 9. CONCLUSION

The admission of women to the guardianship of minors corresponded to a demand of the women's rights movement, which was partially fulfilled with the first partial amendment to the Austrian Civil Code in 1914. 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. Some of the arguments used by the women's associations were also picked up in the legislative materials. Although many limitations remained, the law change was a step forward for women, because they were no longer generally excluded from guardianship.[110] This was also an extension of female participation in the male public area, because the guardianship was considered as a public function to which, until then, only the male citizens had access.

However, the first legislative amendment did not bring a real equality of the genders, neither concerning the paternal authority nor the guardianship.[111] As long as the father was able to exercise the paternal authority and did not grossly neglect his duties, he alone had the rights and duties of paternal authority and guardianship alike. A great move forward was that if the father lost his paternal authority, the statutory guardianship was now primarily granted to the married mother instead of the paternal grandfather. Nevertheless, it has to be considered that the testamentary guardianship took precedence over the statutory one. As part of his disposition right, the father could still nominate another guardian, simply exclude his wife from the guardianship of their children, or demand a co-guardian for her.[112]

Some specific regulations also show that the legislator still considered women as less qualified than men to exercise the guardianship of a minor. A co-guardian could only be appointed for a female guardian. Only women were entitled to refuse the guardianship if they considered themselves

109 *Ibid.*, 206.

110 E. Forster, 12; E. Frysak, *Petitionsrechtliche Forderungen*, 82.

111 O. Lehner, 80; M. Moser, 118 etc.

112 O. Wentzel, 306–307.

as unsuitable for this function and only women needed the approval of their spouses if they wanted to take over or continue guardianship over someone else's child after their wedding. With these rules, the first legislative amendment ensured that neither the interests of the marital father nor the husband of a (potential) female guardian were affected. The legislature was particularly suspicious of the illegitimate mother who, although entrusted with the upbringing and the maintenance of her child, had no legal claim to receive the guardianship as well. The legal scholars showed similar reservations towards female guardians. While they generally approved the admission of the female gender to guardianship, they were still not convinced that women made just as suitable guardians as men.

The reason for the admission of women to the guardianship of minors was primarily the already existing great lack of suitable male guardians. The opening of the legal institution of guardianship to women appeared to be the „only mean" to meet the great need for guardians, whose further rise was to be expected because of the First World War. In the interest of state security and administration, as well as for the protection of the youth, the Austrian politics and legal science considered it as expedient to expand the circle of potential guardians. The legislative change only went as far as it was considered necessary to achieve this goal without restricting the marital father's supremacy.[113] The far wider requests of the women's rights movement for real equality of the genders within the family were not fulfilled. Therefore, it is not surprising that the legislative change as a whole was uncontroversial within the male dominated politics and the legal science. For them, the improvement of the legal status of women concerning the guardianship of minors was simply a necessity to ensure that enough guardians were available and it was not a goal in itself, but mainly a consequence of the change in regulation. On the other hand, the still existing discrimination of women concerning paternal authority and guardianship was not lost on the women's associations and activists and was heavily criticized by them. However, they considered their new possibilities as at least the first step in the right direction and announced that they would continue to fight for a shared parental authority,[114] unaware that it would take another sixty years until this goal was finally reached.[115]

113 This conclusion is also drawn by E. Frysak, *Einsatz des Petitionsrechtes*, 129 etc.; E. Frysak, *Petitionsrechtliche Forderungen*, 75.

114 E. Forster, 12; E. Frysak, *Einsatz des Petitionsrechtes*, 144 etc., 174 etc., 181 etc.

115 The great family law reform in 1975 finally brought equal parental rights and duties concerning legitimate children and the sole legal guardianship of unmarried mothers in Austria, for example see Ingrid Bauer, „Frauen, Männer, Beziehungen ... Sozialgeschichte der Geschlechterverhältnisse in der Zweiten Republik", Johann Burger, Elisabeth Morawek (eds.), *1945–1995. Entwicklungslinien der Zweiten Republik*, Wien

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Мр Сара ШТУЦЕНШТАЈН*

# КОРАК КА РАВНОПРАВНОСТИ? СТИЦАЊЕ ПРАВА ЖЕНА НА СТАРАТЕЉСТВО У АУСТРИЈСКОМ ГРАЂАНСКОМ ЗАКОНИКУ 1914. ГОДИНЕ

*Сажетак*

Према Аустријском грађанском законику из 1811. године (*Allgemeines Bürgerliches Gesetzbuch = ABGB*), жене нису имале скоро никакве могућности за вршење родитељског права над децом. Уместо тога, ожењени отац је имао тзв. „очинску власт" (*patria potestas*), која је подразумевала самостално старатељство над његовом законитом децом. Уколико отац није био у могућности да спроводи поменуто право, судови су били у обавези да одреде старатеља његовој малолетној деци. Полазећи од претпоставке да женски пол не поседује потребне способности за то, жене су генерално биле искључене из старатељства. Тек крајем XIX века је женски покрет почео да се мобилише против израженог искључивања жена из старатељства над сопственом децом. Додатно, драстично занемаривање младих је чинило реформе права још хитнијим. Законске могућности жена за преузимање старања о малолетницима су први пут биле проширене Првим законодавним амандманом на *ABGB*, из 1914. (1. Teilnovelle 1914). Овај рад ће се фокусирати на узроке који су довели до таквог проширења законских могућности за жене, у контексту поменутог првог амандмана.

Кључне речи: *Аустријски грађански законик из 1811. – Очинска власт. – Старатељство над малолетницима. – Први законодавни амандман. – Покрет за женска права.*

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