

# ***Replacing the Father - Representing the Child. A Few Notes on the European History of Guardianship***

by

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## **Introduction: Parents, guardians and orphans**

Fatherlessness seems to be a social problem of long historical continuance. In contemporary social research we find numerous references to studies of the social effects of the absence of fathers. Divorces and new ways to structure sexual relations are, at least in Europe of today, more common reasons for this than loss through death. However, in the long historical period addressed by this publication, 1100 – 1900, there are some specific social, demographic, economic and even biological features that clearly distinguish these past societies from Europe of the present day. The immense importance connected to a person's belonging to and position within a household is one of them. A much higher mortality rate is another. Young children constituted an age group among whom the death rate was especially high. But young children were also much more often exposed to the loss of one or both parents compared with today. Due to this restructured families through remarriage were very common. So was single parent families headed by widows. However, the breaking up of families through the death of a father was often balanced by a partial, formal restructuring of the family, putting someone else in the father's place even when remarriage did not occur. To make an overview of this particular kind of guardianship, when and how someone in the legal sense replaces the father to represent the child, is the focus of this article. Regulating the succession of guardianship over children was an important task for families, kinship networks and more public institutions, especially the legal sphere, throughout this long period. Nevertheless, it is not easy to even try to tell a story covering all of Europe for so many centuries. A few notes are the most that can be achieved here, with the ambition to initiate a comparative and overriding discussion of these matters.

The children we have in focus here were not always orphans, but in many cases rather what we might call "semi-orphans".<sup>1</sup> Often, there were quite clear differences in the effects of losing a father, a mother or both parents. Social historians as well as demographers have

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<sup>1</sup> Barbara Hanawalt, *Growing Up in Medieval London. The Experience of Childhood in History*. Oxford University Press, 1993

measured this in a number of historical contexts.<sup>2</sup> We might assume that there was often more of a direct biological hazard involved if the child lost its mother at a very early stage in life, compared to the loss of a father. On the other hand, the loss of a father in a patriarchal, family-based society could give long-term social effects, and often implied some kind of downward social mobility, if not outright impoverishment.

However, none of these two generalisations are to be considered as self-evident or universal, they are highly connected to specific forms of societies and of course to the economic and social dynamics of class. A legal history perspective on this gives us on the one hand a clue to the construction of law as a means to moderate negative social consequences of the death of a parent. On the other hand we might also have to be open for instances where the law in itself was an important part of the forces that created socially difficult situations for the surviving family. The law was perhaps a part of the problem as well as the solution. Having gender in mind at this stage seems more than reasonable, but a few additional analytical categories ought to be brought into the picture. They are all connected to the construction of property and property relations. I will formulate a set of questions that I consider to be of help to form a framework for comparative analysis in order to help us clarify differences and resemblances between various forms of this institution.

### **Property, care and disposition**

#### *Protection of the person*

Protection is an important keyword in these matters. The guardian is appointed to protect somebody or something. *Who, then, is protected?* The protection of orphans has already been mentioned, but children are not the only group that is or has been considered as weak and frail. Generally, any person who is incapable of legal action could be in need for a guardian. However, the criteria for weakness and lack of agency, and the actual legal consequences of this, have by no means been absolute and stable through history.<sup>3</sup> Age, gender, civil status, somatic illnesses and mental conditions of different kinds are all variables that form a sort of matrix of legal agency.

To provide protection is thus a main task for the guardian. But to see the implications of this in a specific historical situation we might ask ourselves: *protection from whom?* Well, it seems as if it might quite often be a matter of guarding a person's interests in relation to his

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<sup>2</sup> Renzo Derosas & Michel Oris, (eds.) *When Dad Died. Individuals and Families Coping with Family Stress in Past Societies*, Bern, Peter Lang, 2002

<sup>3</sup> Inger Dübeck, *Købekoner og konkurrence. Studier over myndigheds- og erhvervsrettens udvikling med stadig henblik på kvinders historiske retsstilling*, Copenhagen, Juristforbundets Forlag, København, 1978

or her close relatives. To protect an heir or heiress from siblings or fatherless children from the mother's family or from stepfathers are common objectives.

Here we might also place the occasional guardianship of both wives and maids in Early Modern Germany, which was motivated by gender specific frailness and the need for women to have male representatives in court and when financial matters regarding marital property was to be settled. It could thus also be a matter of protecting a woman from her husband.<sup>4</sup> Guardians of orphans might often have had a considerable responsibility for the upbringing and education of their wards. The protection of the person is among other things a matter of care.

### *Protection of Property*

The care for individuals is not always the main object for guardianship, a guardian is often responsible for economic resources and assets of different kinds. So it might be of interest to ask: *protection of what?* Well, a major task is to monitor and safeguard inheritance and other forms of property. As an example here, we might note that Swedish maids, regardless of age, were not expected to have the legal agency to manage their inheritance and property, and thus needed a steady guardian until the middle of the 19<sup>th</sup> century. Inherited property was given special treatment in many aspects of the law. In matters of inheritance a guardian can serve the interest not only of individual children and other minors, but also the wider interests of family and lineage. At this point, another dimension than care for minors must be added. To protect property the guardian must be endowed with at least some amount of disposition over it.

If we turn our attention at the guardian and ask: *Who is fit to perform this protection?* we will find that a basic and important question to put forward here is whether the same person is supposed to take care of both the property and the minor person.<sup>5</sup> Is disposition and care placed in the hands of one single guardian, or can we find a division between two or even more? It seems to be an almost universal rule that widows lost the rights and obligations of formal guardianship over their minor children in the case of remarriage during the period in question. Any deviance from this would thus be highly interesting.

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<sup>4</sup> See for ex Robert Beachy "Women without Gender: Commerce, Exchange Codes and the Erosion of German Gender Guardianship, 1680 – 1830" in *Family Welfare. Gender, Property and Inheritance since the Seventeenth Century*, eds. David R. Green and Alastair Owens, Contributions in Family History nr 18, Praeger Publishers, 2004, 195-215, and Hendrikje Carius, "Strategien vor Gericht? Die „vellerianischen Freyheiten“ im sächsischen Recht (1648-1806)" in this collection

<sup>5</sup> Or the *ward*, as I will refer to the minor in relation to the guardian in the following.

The unmarried mother would often have a weaker claim for the guardianship over her children than a widow – especially if their father was of higher social standing than the mother and the children were bequeathed property from him or his family. However, quite a few historical studies can inform us that there might be a considerable difference between *de facto* guardians as opposed to *de jure* guardians. Sometimes the *de jure* guardian is expected to supply care of the ward as well as to handle the disposition of property, and sometimes these two tasks are separated. In this case, we can probably often find widows providing care and taking the responsibility for everyday life even if they are not legally fit to act as guardians

Both the Germanic and the Roman legal tradition have had a tendency to reject the competence of women to represent themselves as well as others in legally binding matters. Despite this, the widow as a guardian shows herself in many places and instances of European history.<sup>6</sup>

#### *The intersection between the private and the public sphere*

The usual dichotomy of gender that we tend to connect with public and private are at the simplest level: men – or the male – in the public and women – the female – in the private sphere. Challenging this dichotomy has been a major preoccupation for gender history, and the insights reached through this are probably one of its most widely acknowledged contributions. I actually would like to propose that exploring this intersection is still fruitful. Through scrutinizing guardianship we can investigate the division of tasks and responsibilities between the family, the surrounding community and the state. If the problem as such seems to be of almost universal presence, the solutions are not. Given the facts that we have a great diversity of family systems, combined with a large variety of public institutions, cultural or religious beliefs and material conditions for these to interact with, the possible institutional outcomes of this are numerous.

I would argue however, that we still might find quite a few points to depart from that gives us the opportunity to generalize over the historical development. I will try to find some of these. Throughout medieval and early modern Europe we find this area to be an intersection where the limits of the power and responsibility of the family as well as of the public sphere meet. Sometimes they leave a gap, and sometimes they overlap.

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<sup>6</sup> See for ex. Sandra Cavallo, Lyndan Warner (eds.), *Widowhood in Medieval and Early Modern Europe*, Pearson education, 1999, Lourens van den Bosch, Jan Bremmer, (eds.) *Between Poverty and the Pyre: Moments in the History of Widowhood*, London, Routledge, 1995

### **A chronological sketch**

What I am going to do now is to suggest some very broad generalizations of historical development. We depart from a medieval situation, where a modern observer might have great difficulties in perceiving the dividing line between public and private at all. In many cases family ties and kinship constitute the state. Guardianship is often usufructuary – as long as the minority of the ward lasts, the guardian has extensive rights to not only, or even not primarily, to protect but also to use and profit from the property.<sup>7</sup>

This is followed by an early modern situation with the rise of a new form of state power and often an establishment of new laws. Guardianship generally moves towards being fiduciary. A guardian holds the property in trust in the interest of the minor.<sup>8</sup> It is a possible hypothesis that more women enter legal guardianship at this stage.

These periodical generalizations of qualitative difference are still to some extent countered by the fact that we can see a remarkable continuity in the formal institutions.

#### *Feudal guardianship*

There are medieval European varieties of guardianship that is closely connected to feudal forms of power relations. In English feudal society, where inheritance practice was largely dominated by the principles of primogeniture, the oldest male heir of a deceased father would become the ward of the feudal guardian. The property was more or less inseparable from the heir or heiress, which meant that the ward in person at times was transferred to the actual care and custody of the guardian, together with the power to make marriage arrangements.

The heir could at the same time have had siblings who stayed in the custody of the mother, the surviving widow. If the heir died before coming of age, the guardian could claim the next in line of the siblings as the new heir. One might say that the difference in property rights makes all the difference. Sue Sheridan Walker said: “*Not sentiments to who would most suitably nurture the infant shaped minority in medieval England, but rules which governed land tenure*”.<sup>9</sup> The widow’s authority over and care for the non-inheriting children seems not to have been seriously contested, while her possibilities to exercise these over the heir had to be granted by the feudal guardian.<sup>10</sup> In fact, Walker claims that wards that were in royal custody frequently were left in the care of their mothers in exchange for maintenance paid by

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<sup>7</sup> Dübeck, *Købekoner og konkurrence* (note 3) 68

<sup>8</sup> Dübeck, *Købekoner og konkurrence* (note 3) 68

<sup>9</sup> Sue Sheridan Walker “Widow and Ward: The Feudal Law of Child Custody in Medieval England” in *Women in Medieval Society*, University of Pennsylvania Press 1976, 159-172, 160

<sup>10</sup> Walker “Widow and Ward” (note 9) 161

the guardian – a royal official. But this arrangement often did not last longer than the usual point in time for the settling of a marriage for the ward; Walker assumes this to be at an age of about seven years.<sup>11</sup>

### *The mother as a threat*

As widows, women of the feudal class could themselves obtain the position of having feudal wards in their custody. Noël James Menuge gives us a chance to consider different aspects of legal constructions, as represented in legal codes and cases as well as in the literature of romances.<sup>12</sup> The general picture that arises is that the genre of romances is greatly informed by the legal constructions of society. The theme of wardship and guardianship can be traced in several important texts, and can to some extent be read as acting out different scenarios that law and legal practice sought to regulate or perhaps to prevent.

In Menuge's reading, the apparent theme of the romances is often the threats to and then the upholding of the feudal order. The widowed mother seems all too often to be depicted as a threat, as someone who through remarriage creates stepfathers and through giving birth to new children jeopardizes the best interests - and often enough the life - of the rightful heir. The deceit and desires of these women threatens the patrilineal principle and in the end the feudal order itself.

However, stepfathers are equally abusive and prone to attempt to deprive the rightful heirs of their inheritance with the purpose of directing property and power into their own lineage, to their own children. It seems not to be an exaggeration to say that the task of the guardian in this social context is not only to replace the father and represent the child, but to actually *keep on representing the dead father*, until his heir comes of age, and may continue the lineage in his or her own person. The feudal lord as a guardian stands out as the recognized, lawful and safe alternative. He (or as we know, possibly she) has no possibility of becoming the actual heir of the ward's property – the property rights of the feudal lord is working on another level – and therefore has no obvious interest in seeing him or her killed or otherwise eliminated. This is a literary illustration of legal principles that seems to have been governing rules concerning who had the right to take on guardianship over children in a number of European regions.

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<sup>11</sup> Walker "Widow and Ward" (note 9) 161

<sup>12</sup> This part, on the picture of mothers as guardians, rests upon chapter 5 in Noël James Menuge, *Medieval English Wardship in Romance and Law*, Woodbridge, DS Brewer, 2001

*Guardianship as a safe alternative*

On the other hand, another picture of this feudal and medieval institution appears in an article by Peter Roebuck, who is examining the abolition of the above-mentioned institution of Royal wardship.<sup>13</sup> In the 16<sup>th</sup> century, this had developed into a dreaded fact among the landed gentry, and the usufruct of a ward's property as well as his or her marriage had become a commodity to be bought and sold. Gradually, from the 16<sup>th</sup> to the early 17<sup>th</sup> century these remains of feudal property rights disappear. The subsequent arrangement seems to follow a frequent early modern European pattern, where widowed mothers are viewed as natural guardians, followed by male kin. A testamentary appointment by the father is also possible. The primacy of the close family circle is established – or possibly re-established.

Roebuck states that the very fact that from time to time, guardians other than the father or a male heir of age headed many families of the landed gentry was something they benefited greatly from. The more limited freedom of action left to a widow or other trustee led to periods of savings, cautious investments and consolidation. As we see in other national contexts, there was also a public supervision of affairs during guardianship, with possibilities to file complaints against a management that could be perceived as irresponsible. This is, I think, an interesting angle on the economic importance and impact of guardianship as a specific set of property rights.

**Urban guardianship and property relations**

We can also find more urban medieval forms of handling the issue of guardianship in England.<sup>14</sup> Barbara Hanawalt claims that the city of London provided mothers with quite extensive rights of guardianship over their children after the death of a husband.<sup>15</sup> Law and practice of the city was protective concerning the welfare and wealth of the orphans – given that they were children of citizens, “freemen”, of London. The mayor and other officials of the city also kept a “court of orphans” to keep record over these cases.<sup>16</sup>

We may recognize quite a few classical elements of patriarchal legal constructions, e.g. the fact that it is the loss of a father but very rarely the mother that gives us a case in the court of orphans, or the fact that stepfathers seems to have a much greater chance to benefit

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<sup>13</sup> Peter Roebuck, “Post-Restoration Land-Ownership: The Impact of the Abolition of Wardship” in *The Journal of British Studies*, Vol. 18, No 1 (Autumn 1978)

<sup>14</sup> An overview is given in Charles Carlton, *The court of orphans*, Leicester University Press 1974

<sup>15</sup> Hanawalt, *Growing Up in Medieval London* (note 1)

<sup>16</sup> See also Carlton, *The court of orphans* (note 14). A similar institution was founded in the Swedish capital in 1667, Stockholms förmyndarekammare. Another early modern example was the Orphan chamber in Amsterdam, see Anne McCants, “Family Networks and the Transmission of Assets” in Green & Owens (eds.) *Family Welfare* (note 4) 143-162.

personally from marrying a widow with minors than a stepmother would, marrying a widower with minors. Despite this, Hanawalt claims that the handling of guardianships had a specific social effect. Rather than promoting strong patrilineal families or clans with a very strong emphasis on male lineage, this became a part of a comparatively horizontal form of familial relations and networks. Both the relatively relaxed attitude towards mothers as guardians, and the acceptance of frequent and fast remarriages where the stepfather could assume the guardianship, has a part in this.

The guild, this specific form of social and economic relations and community that we so often see in the urban environments of medieval and early modern Europe, probably has a part in this too. Stepfathers, new male guardians to the fatherless and their property, often came from the same guild or trade as the deceased father. The urban economy had a different basis than the rural. Commercial and professional networks rather than landed property formed the nexus for social and economic relations.

Hanawalt also takes interest in another aspect that I find highly interesting, the possibility for the guardian to fail to see to the best interest of the ward and the ward's claim to property that he or she has been trusted to protect. It might be that in real life outside the feudal elite, the threat towards the welfare and property of wards more often came from other guardians than their mother. The alleged or actual violation of rules makes way for intervention from the authorities, and the abuse or neglect of a guardian is of course often the reason to why historians find interesting stories in the archives.

However, using the gender perspective, we can also observe, that female guardianship seems to have activated the interference or the responsibility of the public sphere even in cases where no crimes are being committed. Rebecca Lynn Weiner has showed how widowed mothers, in the Jewish community of medieval Perpignan, in the legal doctrine was highly doubted as guardians, but still often served in a panel of guardians, where they co-operated with male kin or members of the community in a way that male guardians did not have to.<sup>17</sup> Apart from the apparent tension between doctrine and the local practice, I consider this to be a good example of what Merry Wiesner has claimed: *"Thus, in the realm of work as well as in financial decision-making, women stressed the connection, not the distinction, between public and private."*<sup>18</sup>

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<sup>17</sup> Rebecca Lynn Weiner, "Family, community and motherhood: Caring for fatherless children in the Jewish community of thirteenth-century Perpignan", *Jewish History*, nr 16, 2002, 15-48

<sup>18</sup> Merry Wiesner, *Gender, State and Church in Early Modern Germany*, Longman, 1998 16f



## The Swedish example

It would, quite obviously, be impossible to compare Sweden to some kind of uniform “European” surrounding. As said before, there is a multitude of differing details. But, however great the cultural or socially determined variations might be, it seems reasonable to make use of regional generalizations to handle this on a more structural level. Possibly, Scandinavia is such a region, and maybe then, the Swedish case is to some extent representative, though not in full detail. In the following, I will try to use the Swedish example but still discuss the early modern development in general.

### *The medieval provincial laws*

During Middle Ages there seems not to have been a uniform legal situation neither concerning guardianship in general nor concerning women as guardians specifically. (So much for the regional generalization!) The emerging kingdom of Sweden was governed by provincial laws. In southern Sweden, these were actually prescribing guardianship over the widow; principally she should re-enter the guardianship of her father.<sup>19</sup> Therefore, it seems dubious that widows to any great extent could function as legal guardians for their children. In this sense, there are strong ties to the Germanic legal tradition, which is often stressed by older legal history. As said before, this might not be valid for the entire Swedish area, and we can rely on very little empirical research outside the study of legal texts.

### *The law on guardianship of 1669*

One of the most salient years in Swedish legal history is of course 1734, the year that has given name to the legal code that attempted to unify and harmonize the legal system of the realm. This code was preceded by a commission, working for at least half a century, but also by a lively discourse on jurisprudence. From the standpoint of legal history, seventeenth-century Sweden thus provides us with an interesting object of study. In late medieval and early modern period, rural Sweden was governed by one code for the rural areas, *Magnus Erikssons landslag*, and another code for the few urban areas, *Magnus Erikssons stadslag*. A revised common law for the countryside, *Kristoffers landslag*, was introduced during the 15<sup>th</sup> century, although the two codes seems to have co-existed for rather a long time. The agrarian codes did not explicitly recognize women as guardians, whereas the urban did, sometimes even after remarriage.

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<sup>19</sup> Estlander, del 1 1896

Well, the new law of 1734 was preceded not only by commissions, but also by a few instances of new legislation in the late seventeenth century. One of those was a separate law on guardianship “1669 års Förmyndareordning”.<sup>20</sup>

### *Urban and rural in Sweden*

I want to stress that *Förmyndareordningen* was intended for urban and rural society alike – and that this was a novelty. Pretty much in line with the somewhat different arrangements that we have seen exemplified in the English medieval case, we can see differences in the legal constructions concerning urban and rural laws, especially concerning property, in Sweden. Based on this, I suggest that we can also find differing urban and agrarian gender orders. The previous rules governing guardianship certainly had some differing traits connected to this. When we evaluate *Förmyndareordningen* from a gender perspective as well as from its ability to integrate urban and rural, we can come to some interesting conclusions.

Firstly, it seems obvious that the rural laws in a historical process have been open to a greater influence from the urban laws than the other way around. Accordingly, legal historians have tended to look upon the rural laws as more backwards than the urban.<sup>21</sup> Generally, *Förmyndareordningen* makes the guardian’s task resembling more a public office, and less a family affair. An example of this is that the law gives the right to the parents to name the guardian of their children in case of their death. This testamentary appointing of a guardian was given priority over any conflicting claim from family and kin to assume a guardianship. This is a development that was introduced in the medieval urban laws, and it brings about some new requirements for the person to assume guardianship as well as new tasks for the public authorities – not the least the legal arena.

### *Male and female guardianship*

When both parents were alive, the father was the proper guardian for his children. This was the principle in *Förmyndareordningen*, and this prevailed well into the 20<sup>th</sup> century. In the case of death of one of the spouses, *Förmyndareordningen* regulated the guardianship of a widower in two paragraphs, whereas the widow as a guardian was given five paragraphs. It might seem silly to pay attention to the number of paragraphs, but given closer scrutiny, this has its explanation in the more conditioned form of guardianship that was available for the widow. In all legal actions the law required the surviving party to take – such as presenting

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<sup>20</sup> Förmyndareordning 17 mars 1669, *Årstrycket*

<sup>21</sup> A. W. Gadolin “Bidrag till en jämförelse mellan 1734 års lags förmynderskapsinstitut och dess närmaste källor” in *Minnesskrift ägnad 1734 års lag*, Stockholm, 1934, 37

the court with an inventory of the estate – she needed consent and cooperation from the deceased husband's kin, whereas the father was able to act on his own authority.

Both a widow's and a widower's position changed in the case of remarriage. A widowed father was obliged to divide the estate and make sure that the children's portion after their mother was clearly separated from his own property. He was then expected to take advice from the next male kin on the mother's side in financial matters and in matters concerning the upbringing of the children. His power was thus somewhat limited by the interest of the mother's lineage, but the law explicitly says that his guardianship as such can never be questioned.

The remarriage of a widow had larger consequences. Basically, *Förmyndareordningen* leaves no room for the remarried widow to continue to be the legal guardian. Nevertheless, the law expects her to keep the children in her "house and bread". It is important to note that the stepfather was not assumed to take on guardianship, the preferred solution was a new guardian from the deceased father's male kin, appointed by the court. Again, the interest of lineage is clearly stated and severely limits the power of the new husband and head of household.

Apart from the larger consequences brought about by the remarriage of a widow, there were also explicit regulations of what would happen if the widow, as a guardian, came in conflict with the father's kin. In such a situation the court was given the power to deprive the widow of her guardianship if its members judged this to be in the best interest of the children.

Even if I am emphasizing the restrictions on the widow's guardianship we should, of course, observe that her agency in these matters now gets clearly and legally specified. A legal historian, Johannes Hellner, was firmly convinced that the very fact that disposition of property as a component in guardianship was growing more important compared to the public representation of the minor, i.e. in court, was an important reason to the explicit recognition of widows as guardians in the 17<sup>th</sup> century.<sup>22</sup>

### *Inheritance and self-interest*

At this point, I would like to put forward another question about the principles that lies behind the legal constructions. As we have seen in some of the examples I have referred to before, it is not unusual that guardians were chosen from the principle that they should not have a stake in the property of their ward themselves. It was preferred that they were not in the possible

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<sup>22</sup> Johannes Hellner, *Hustrus förmåga af rättshandlingar efter svensk förmögenhetsrätt*, Gleerups, Lund, 1895, 57

position of becoming heirs of the ward.<sup>23</sup> The guardian would have no interest in eliminating the ward, one way or another, in order to get hold of the property. Well, this principle seems not at all to be present in the older Swedish rules of guardianship. Quite the opposite, the succession order of guardians is very similar to the one concerning inheritance.<sup>24</sup> The principle that develops here is thus that the guardian *should be* a potential heir of the ward, with an interest in keeping and at even better enhance the value of the property given in trust. These differences are something I would like to see a comparative historical analysis of. Can we ascribe them to different legal traditions? Or are they to be explained through more material causes?

The widow was not an heir of her children's property from the father's side, but there might have been other connections to inheritance and gender. Some legal historians claim that the reason that widowed mothers gradually gained the articulated right to assume guardianship over their fatherless children in the later medieval laws of Sweden, is the fact that women's right to inherit becomes formally codified during this period.<sup>25</sup> In my own research on guardianship in a Swedish city from late eighteenth century to the mid-nineteenth, I can observe what appears to be an increasing formal acceptance of widowed mothers' authority as guardians.<sup>26</sup>

### *Gender and citizenship*

Lastly, one has to consider the fact that there are other gendered differences in this. This applies to those cases where both parents are dead or for some reason unfit to assume guardianship, but also seems to be expected to be a frequent choice in the case of the father's death. Widowed mothers are given the right to assume guardianship, but are not clearly obliged to do so. In this case there might not be any male kin available, and this is where the trusted members of community enters the stage as *tutela dativi*, the non-parental guardians.

I would like to emphasize what seems to be a common feature between Sweden and most of Europe: no women are expected to assume guardianship over any other children than their own. Guardianship over children might thus have been a possible and quite frequent course to authority for mothers – but very seldom for *women*.

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<sup>23</sup> Another example of this, from Italy, can be found in Giulia Calvi, "Widows, the state and the guardianship of children in early modern Tuscany", in Sandra Cavallo, Lyndan Warner (eds.) *Widowhood in Medieval and Early Modern Europe* (note 6)

<sup>24</sup> Ernst Estlander "Studier i svensk förmynderskapsrätt", in *Tidskrift utg. af Juridiska föreningen i Finland*, 1897pp 353-456, 388

<sup>25</sup> Estlander "Studier i svensk förmynderskapsrätt" (note 24)

<sup>26</sup> Forthcoming dissertation. Some preliminary results can be found in Ann Ighe, "Minors, Guardians and Inheritance in Early Nineteenth-century Sweden: A Case of Gendered Property Rights", in Green & Owens (eds.) *Family Welfare* (note 4) 217-242

I think that the move from usufructuary to fiduciary is possible to observe in the Swedish laws, and that we can observe this in many other cases. I also think that this is important for the more conditioned but legally recognized guardianship of widowed mothers that we find in so many places.

The era of modernization in the 19<sup>th</sup> and 20<sup>th</sup> centuries brought about new forms of individualism, in which civil status and sex lost relatively in importance as a marker of legal capacities. The social importance of ones position within a household was eroded – but not eradicated - by the forces of modernization, including the growth of a partially new kind of public sphere. This reconstruction of female legal identity meant that women's guardianship lost its particularity. There was no longer a specific need to legally replace the father but still for representing the child.

## **Zusammenfassung**

*Den Vater ersetzen – das Kind vertreten: Zu Vormünderinnen und Vormünder in der europäischen Rechtsgeschichte ca. 1200-1900*

In der europäischen Geschichte war die Abwesenheit der Väter ein soziales Problem vom ganz anderen Charakter wie heute. Die Sterblichkeitszahl erreichten höhere Stufen und brachte eine Umwandlung der Haushalte mit. Die Kinder mußten unter eine neue Vormundschaft gestellt werden. Die Vertretung von den Kindern und von anderen Mündeln gehörte zur Aufgabe vom neuen Vormund/von den neuen Vormünderinnen. Dies war der Fall bis die Mündel für sich selbst sprechen dürften.

Die rechtliche Situation des Mittelalters zeigt eine Palette dieses Systems auf. Darin befindet sich starke "patrilineära" (linear patriarchalische?) Systeme, das oft in Zusammenhang mit dem feudalen System für das Besitzrecht steht. Nicht wenigstens gilt dies das System, das die zentrale Basis für Landbesitz bildete. Das mittelalterliche Europa aber, scheint auch vom Unterschied der agraren und urbanen Gesellschaft geprägt zu sein, und dies in wirtschaftlichen, sozialen und rechtlichen Hinsicht. Die städtische Vormundschaft wurde allmählich zum Teil ein öffentliches Amt. In den europäischen Städten wurden dauerhafte Institutionen für Sorgung elternloser Kinder und für die Erbschaftsverwaltung gegründet.

Die Frühe Neuzeit brachte eine wohlbekannt Tendenza nach einer Verstärkung der Unterschiede zwischen der männlichen und weiblichen Sphäre und Gerechtigkeiten mit. Der Vormundschaft folgte auch eine noch stärkere Fokuzierung auf der Familie. Als Vormünderinnen wurden häufiger die Wittwen gewählt, möglicherweise auf Kosten der Ansprüche von den männlichen Verwandten. Im allgemein dürften, wie es scheint, die wiederverheirateten Wittwen die Vormundschaft ihrer Kinder nicht weiterführen. Sehr selten wurden die Frauen als Vormünderinnen für andere als die eigenen Kinder bestellt. Möglich wurde sie jedoch als Vormünderin der Enkelkinder. Wittwen, die Mütter waren, konnten also im Rahmen von einem relativ großen Aktionsradius handeln. Jede Frau hatte aber nicht eine solche Freiheit.

Beispiele der schwedische Rechtssprechung und Rechtssatz wird auch besprochen, vor allem die Vormundschaftsverordnung von 1669. Sie weist auf eine ähnliche Entwicklung hin, wie wir im Zentraleuropa sehen können. Allmählich gingen im Zeitraum 1800-1900 die genus-spezifisch charakteristische Vormundschaft für unmündige Kinder in eine modernisierte Form über. Männer wurden nicht mehr von Frauen getrennt, Väter nicht von Müttern. Dieses Phänomen sehe ich im Lichte einer sowohl allgemeinen Individualisierung der wirtschaftlichen und sozialen Prozesse, als auch einen kräftigen Expansion der öffentliche Sphäre.