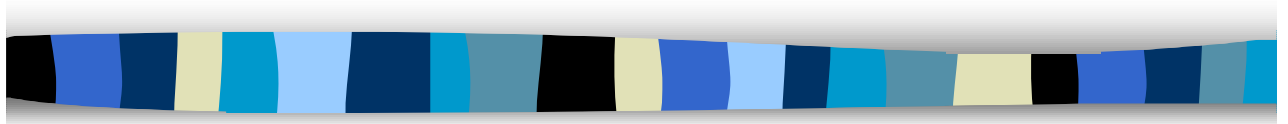


WELLCHI NETWORK Workshop 2:
**“Which are the provisions in Family Law that foster
children’s well-being and which kind of reforms should
be envisaged in this respect”**

**INSTITUTE FOR LEGAL STUDIES –
BULGARIAN ACADEMY OF SCIENCES
Sofia, 15-16 April, 2005**

Securing a legal relationship between children
and their carers - trial and error in England



Professor Judith Masson
Warwick University
England



Introduction: *Law for families*

Functionalist and pragmatic approach to family law

- **Substance**
- **form**
- **processes/ mechanisms**
- fit with community norms
- responsive to all types of families

to privilege one family type is to penalise others

- change attitudes?

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Mechanisms for recognition of carers

- **Automatic**
 - With or without conditions
 - no need for knowledge or claim
 - Non-negotiable – determined by law
- **Appointment**
 - Consent from person appointed not formally required
 - Private ordering
- **Agreement**
 - Private ordering
- **Court order**
 - authority and control placed in court
 - conditions for application + order; process; individualised?

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Examples: 1 Automatic recognition

- **Child ‘treated by both parties’ as ‘child of their family’**
 - aim: to extend powers of divorce court
 - duty to maintain after family breakdown
 - right to apply for residence/ contact
 - privileges married family
- **carer’s right to ‘do what is reasonable in the circumstances to safeguard the child’s welfare’**
 - sets (variable) balance between parents and carers



2. Recognition by court order

- **Step-parent adoption > custody and custodianship**
 - Enduring families - protection of parent’s rights + child’s identity
- (re-labelled) **Residence**
- additional powers and security > **Special Guardianship**
- More complex decisions for courts
- Court process > increased scrutiny and complexity
- longer and more costly process
- highly dependent on knowledge, advice - barriers
- negative effects of court proceedings



3. By Agreement

- **Historic negative attitude of law to ‘private ordering’**
 - except guardianship
- **Agreements about parental responsibility**
 - ‘unmarried’ fathers - Children Act 1989, s.4
 - keeping uncontentious cases out of the courts
 - problems of agreements - knowledge and communication
 - joint birth registration (appointment not agreement)
- **Agreements about step-parent’s parental responsibility**
 - another alternative to residence or adoption
 - requires consent of both parents - ‘bargaining chips’
- **But increasing acceptance of private ordering**

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Conclusion

- Legal frameworks should consider those who **do parenting** not just those who **are parents**
- **Substance + mechanism** impact on balance of relationships in family
- Realistic assessment of the impact of the mechanism chosen
- Adequate resourcing and investment in public information
- incremental legislation creates complex and confusing law
- and incomprehensible statute books

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