The use of Family Assistance Orders in divorce and separation cases

The Family Assistance Order (FAO) was introduced by the Children Act 1989 as a means of providing social work support to families experiencing difficulties after separation or divorce. The order is usually made where parents are having difficulty reaching agreement over arrangements for their children. This investigation of how the order is being used found widespread variation throughout the country. The study shows:

- Official statistics do not accurately reflect the numbers of FAOs made; services have been collecting statistics differently.
- The Home Office formula for funding family court welfare work can discourage family court welfare officers from recommending the use of FAOs.
- There is no consistent approach to the formulation of policy documents relating to FAOs. In some areas, policies have been jointly written with the courts but in others, judges fear agreed policies may limit their judicial discretion.
- There is a range of views as to the purpose of the FAO, but no consensus either between or within the groups of interviewees (consisting of family court judges and welfare service staff).
- There is no agreement as to the definition of the 'exceptional circumstances' which are meant to exist before an FAO can be made - this is left to the discretion of judges and, to a lesser extent, welfare officers.
- Some officers feel the use of family welfare reports or addenda to these can replace FAOs. However, FAOs, reports and addenda to reports are used in conjunction in many cases.
- There is no agreement as to how involved children should be in the orders. Although 71 per cent of orders specifically name children, direct work with children is only carried out on average in 55 per cent of orders (with the level of children's involvement fluctuating considerably between areas).

Background

The Family Assistance Order (FAO) was introduced by the Children Act 1989 as a means of providing social work support to families experiencing difficulties after separation or divorce. Judges and magistrates are able to make such orders in family proceedings, usually where parents are having difficulty reaching agreement over arrangements for their children. It is the only court order available in private law proceedings through which social work assistance can be provided. The making of such an order usually takes place following an investigation of the situation for a welfare report but need not necessarily do so.

This study set out to investigate how the order was being used throughout the country (in the areas defined by the probation services) and why different areas had differing rates of usage. The study began from the premise, based on official statistics, that some areas use FAOs more than others.

Statistics on use

The position with regard to official statistics is one of confusion. Those gathered centrally by the Lord Chancellor's Department and the Home Office are clearly incorrect, as the way these are gathered locally varies despite Home Office guidance recommending they should be recorded by child – some areas record FAOs by family, some by child/ren in the family and some by who is named on the order (whether parent or child).

The study found that those areas which central statistics showed as having low usage had in fact made higher numbers of FAOs. Some low-use areas were recording by family when they should have been recording by child, which made the figures appear lower than they actually were. Areas reporting high use were, as far as could be ascertained, recording by child.

Funding

In most areas, the main factor shaping the use of FAOs is their exclusion from the Home Office funding formula under which the family court welfare service is paid in arrears for work carried out. This is in direct contrast to writing welfare reports, where each report is given a weighting for the purposes of workload allocation and is also funded as an individual piece of work. Many family court welfare officers felt ambivalent about supervising FAOs because of the lack of funding and the nature of the resourcing and workload allocation systems. For this reason, none of the court staff in the study areas wished to undertake large numbers of FAOs. One senior family court welfare officer explained:

> "We make as few as possible, as we are not sufficiently resourced to undertake FAOs."

Another senior officer also reflected the general view:

> "[There is] a general view that FAOs are seldom made at the courts and are not an area of work we should be actively seeking, for resource reasons as much as anything else. Very low priority."

Furthermore, an FAO is felt to be more onerous than a report:

> "We get no workload weighting for FAOs, which is quite bizarre and irresponsible. They are an integral part of our work and the proper space, time and support ought to be afforded them while they exist. Instead the agency imposes upon us very heavy bureaucratic demands ... in what they require of us in terms of drafting out assessments of the situation in writing, discussion with the parties at fixed intervals ... it's a purely bureaucratic demand."

However, it is clear that family court welfare services have only limited control over the making of such orders, given that 55 per cent of FAOs in the study sample were made without a recommendation from the court welfare officer (92 cases), although this figure varied across the study areas from 10 per cent to 53 per cent of FAOs made.

Policy

Areas' policies on the use of FAOs varied, and fell into three categories:

- no policy at all relating to FAOs;
- adoption of National Standards for Probation Service Family Court Welfare Work; and
- guidance for officers as to when FAOs should be recommended to the court and/or when it is appropriate to use them.

In interview, however, the majority of officers could not recall any policy in their area and revealed considerable confusion about the purpose of the

order in practice. Most officers distinguished between the notion of what an FAO should be in the broadest sense - namely a piece of short-term, focused work with families experiencing difficulties after divorce or separation - and what it actually is in practice when applied to individual circumstances and difficulties - namely an order that is used for a multitude of reasons in a wide variety of situations.

Some areas have developed protocols with local courts as to when FAOs can be most appropriately used. However, once again, there was some confusion, with some judges taking the view that the purpose of the order is self-evident while others had difficulty even recalling the relevant legislation. Some judges were reluctant to agree protocols as they felt this might limit their judicial discretion.

Exceptional circumstances

The Children Act 1989 states that the FAO should only be used in "exceptional circumstances" but the study found no common understanding of the meaning of this term, with it being interpreted in various ways. The comments of two family court welfare officers highlight this difficulty:

> "I have no real clear idea of exceptional circumstances, that's really why there's such a small number [of FAOs]."

> "I don't have a definition for myself, I don't think anybody does, it's a very elastic concept."

Similarly, comments by judges showed they also felt there was a distinct lack of clarity about when FAOs were appropriate:

> "Almost every case can be described in some way as exceptional. It's not one of the better parts of the drafting of the Children Act if I may respectfully say. I think what the draftsman intended was that we shouldn't make them in every case."

> "It's difficult to define exceptional circumstances, it's more a feeling about the parties. Are they going some way towards each other and need a bit of help? That's what I'm looking for."

A senior family court welfare officer summarised the problematic nature of the legislation:

> "It's completely unhelpful for any law to use the word exceptional, it's saying there's a presumption that they shouldn't be made. It implies there are some circumstances in which they should be made, about which the law is silent, unhelpfully so. Also, it's saying that the state of affairs in which the orders are appropriate occurs very rarely. That's an empirical question, which is not in the context of the legislator. It's simply a way of giving discretion to the decision taken in court and an unhelpful concept. It would be much better to sit down with the local judiciary and work out the circumstances in which it's appropriate and leave out the question of how often that state of affairs comes about."

Addenda to reports

Throughout the study, interviewees suggested that areas making lower numbers of FAOs might make more use of addenda to full welfare reports as a means of working with families without recommending an FAO. One family court welfare officer said:

> "One of the ways to have ongoing intervention is to put it off for a period of time and have another report, so you're working with the family but calling it a report instead of an FAO."

However, case records show that areas making a relatively high number of FAOs also prepared a relatively high number of addenda to reports (although the precise definition of an addendum is unclear and again how they are recorded varies between areas). Clearly, there is no 'either/or' situation with regard to FAOs and addenda, as in 120 case records (71 per cent) there had already been several reports and addenda before the FAO was made.

Children's involvement

The study also highlights some difficulties surrounding the role of children within the FAO. Seventy-one per cent of orders (119) were made naming the children but only 55 per cent of case records (92) contained some evidence of working with the children and this fluctuated considerably between areas, from 33 per cent to 63 per cent of cases.

The nature of 'work' with children proved difficult to define and thus all forms of contact with children were included. Six of the eight fieldwork areas undertook work with fewer children than were

named in the respective orders. However, the remaining two fieldwork areas undertook work with 18 and 19 sets of children respectively, even though no children had been named in the orders in those areas. It is clear that there is a lack of agreement between judges and the family court welfare service about when it is appropriate to undertake direct work with children, and judges may wrongly assume this is done as a matter of course.

Conclusions

The researchers conclude that the usage of Family Assistance Orders is confused and contradictory. Much time and effort is involved in working with these orders and yet the process is fraught with difficulty, from orders being recorded incorrectly through to policy and practice issues. These would seem to require some careful thought if courts and service providers are to operate with a shared perception of the FAO. The many issues raised by this study have potentially far-reaching implications for the review of support services for the family courts which is currently being undertaken.

About the study

The project was carried out between late 1996 and the end of 1998. A multi-method approach was used in order to address a broad range of issues. A national survey of family court welfare services was carried out, followed by a period of fieldwork in eight probation areas, four of which were low in terms of FAO use and four of which were high. The fieldwork consisted of interviews with 12 judges, 11 senior family court welfare officers and 32 family court welfare officers. Case records were examined, 168 where an FAO had been made and 76 where a report and subsequent addenda had been written. Finally, ten telephone interviews were carried out with senior family court welfare officers to discuss issues that emerged from the fieldwork.

How to get further information

The full report, Helping families after divorce: Assistance by order? by Adrian L James and Louise Sturgeon-Adams, is published for the Foundation by The Policy Press (ISBN 1 86134 163 6, price £10.95).

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