

Analysis of congruence between Cafcass recommendations and the final court order

1. Aims

This research was commissioned by Cafcass. The driver for this research was to answer a question from a service user regarding the extent to which courts accept the recommendations of Cafcass, to which it was discovered that this area had not been the subject of previous research. It was carried out by Cafcass staff who were independent of the sample cases. The research aims were twofold:

1. In respect of applications made under section 8 of the Children Act 1989 ('private law proceedings') to establish the degree of congruence between:
 - a) The recommendations made by Cafcass Family Court Advisers (FCAs) in section 7 reports to court; and
 - b) The determinations arrived at by the court
2. To inquire into the circumstances of those cases where there was a difference between the recommendation made by the FCA and the determination arrived at by the court.

While recently published research (Hunt and Macleod, 2008) has looked into the outcomes of court applications for contact, there is no previous study into the more specific issue of congruence between the advice and recommendations provided to courts in section 7 reports by Cafcass Family Court Advisers (FCAs).

2. Legal Context

The legal context within which FCAs prepare court reports is in brief:

- Cafcass' statutory functions (as set out in the Criminal Justice and Court Services Act 2000) include: to safeguard and promote the welfare of children; and to give advice to the court about any application made to it in such proceedings.
- Cafcass is under a duty to comply with any request for a report under section 7 (Children Act 1989).
- A court may ask an officer of the service (Cafcass) to prepare a report on matters relating to the welfare of a child (Family Procedure Rules 2010).
- The extent to which a judge should follow the recommendations contained in a Cafcass report, including disregarding a report and making an order as they see fit, is set out in case law. The welfare report and recommendations that the children and family report makes, in private law cases, must be taken into account, but the final decision as to any question in issue rests with the court (Re P [1991] FLR 337). If the court decides not to follow the recommendation of the children and family reporter, it should give its reasons (Re J [2001] 2 FCR 44).

Analysis of congruence between Cafcass recommendations and the final court order

3. Methods

The study is based on a sample of 170 randomly selected private law residence and/or contact cases that were closed to Cafcass during June 2012, and where a section 7 report is recorded as having been requested of Cafcass by the court. Data was derived from Cafcass' Case Management System (CMS) and Electronic Case Files (ECF). Cases with significant missing information (n = 35) were excluded from the sample, specifically those cases where the final court order was not present on the ECF.¹

The first stage of the data analysis involved a quantitative assessment of the extent of congruence in the 170 sample cases (aim 1). Each case was coded according to the level of congruence observed. Where more than one report had been filed, only the recommendations of the final report were considered.

The codings used were as follows:

- Yes – where the final court order reflected exactly, or to a significant extent, the recommendation(s) made in the FCA's court report.² Minor variations in contact schedules or shared residence arrangements were coded as 'yes'.
- Yes (subject to review) - where the final court order reflected exactly, or to a significant extent, the recommendation(s) made in the FCA's court report, but the order was to be reviewed at a later hearing.
- Partial – where the final court order reflected one or more recommendations made in the FCA's report, but the court also made an order that the FCA had not recommended.
- No – where the final order did not reflect the recommendation(s) made in the FCA's court report. A 'No' coding was also given when the parties reached an alternative agreement by consent - to that which was recommended by the FCA - after the FCA's report was filed, or when new information came to the court's attention after the court report was completed.
- Not applicable (N/A) – where it was not possible to establish congruence for one or more of the following reasons: the application was withdrawn by the applicant; the application was dismissed or adjourned by the court; Cafcass did not complete a section 7 report.

The second stage involved a qualitative analysis in respect of cases for which there was 'Partial' or 'No' congruence (aim 2). Report authors were contacted and responses collected; following this the responses were examined to establish whether there were identifiable themes in the sub-sample of non- and partially congruent cases.

¹ Not all final court orders are routinely sent to Cafcass, and FCAs are not always asked by the court to attend the final hearing.

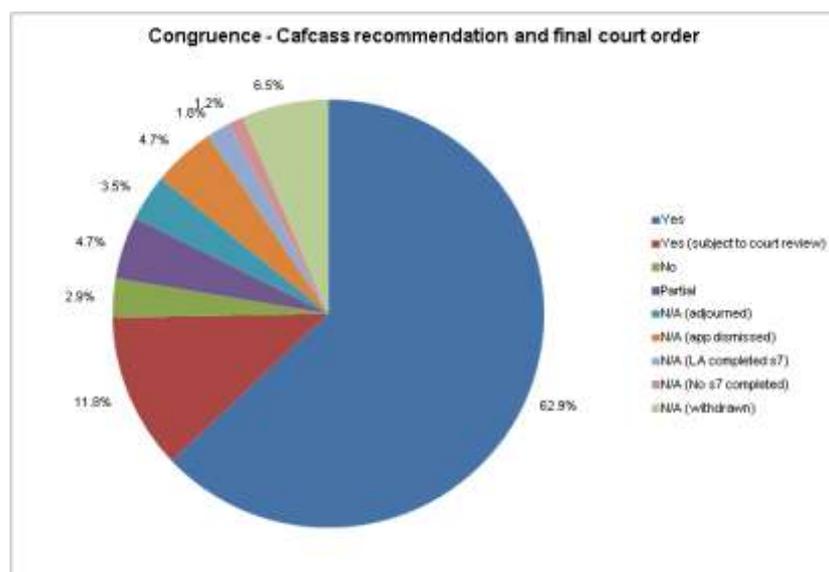
² A 'final court order' is the final legal output as recorded on Cafcass' case management system.

Analysis of congruence between Cafcass recommendations and the final court order

4. Results

4.1 Degree of congruence (aim 1)

Figure 1 – Congruence between Cafcass recommendation and final court order – all cases



Congruence	# of	% of
Yes	107	62.9%
Yes (subject to court review)	20	11.8%
Partial	8	4.7%
No	5	2.9%
N/A (withdrawn)	11	6.5%
N/A (app dismissed)	8	4.7%
N/A (LA completed s7)	6	3.5%
N/A (LA completed section 7 report)	3	1.8%
N/A (No section 7 completed)	2	1.2%
Total	170	

In the sample of 170 cases there was full congruence ('yes') between the section 7 report recommendation(s) and the final order made by the court in 107 cases (62.9%). In a further 20 cases (11.8%) there was congruence (subject to court review). Eight cases (4.7%) were assessed as partially congruent, while in 5 cases (2.9%) there was no congruence. Thirty cases (17.6%) were found to be 'not applicable', in terms of congruence.

Further interrogation of the data revealed the following:

- In respect of the 20 coded 'yes (subject to court review)' the lead application was either contact (11 cases) or residence (9 cases). However, the matter to be reviewed almost always related to contact arrangements where concerns had been raised during proceedings regarding: the likelihood of a party/parties complying with the court order; arrangements that had been agreed 'with flexibility'; a safeguarding concern to be monitored, such as parental drug/alcohol misuse; a family member/agency being ordered to support or observe contact sessions.
- In respect of the 8 cases coded as 'partial' a common feature was the court accepting most recommendations on an interim basis, but requesting additional work when the FCA had recommended no further role for Cafcass.
- In the cases (n = 13) for which there was partial or no congruence, the lead application was either for contact (10 cases) or residence (3 cases).

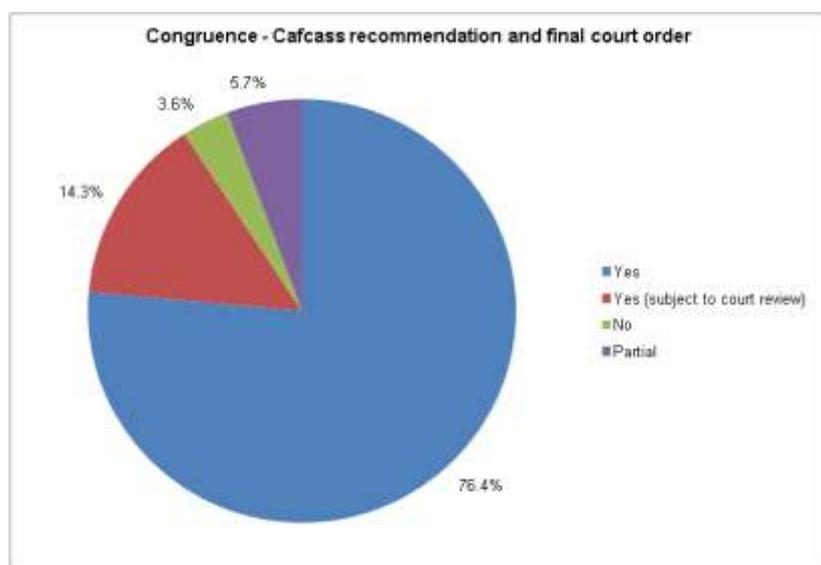
Analysis of congruence between Cafcass recommendations and the final court order

- In respect of the 30 'not applicable' cases, 11 entailed a withdrawn application. Common reasons for withdrawing an application included the expense of court proceedings for the applicant party, or the anticipation by the applicant, part-way through the case, that it was not fruitful to continue the proceedings as the final court order was unlikely to be made in their favour. Of the 8 cases (4.7%) that were dismissed, common reasons included a lack of engagement by the applicant with support services and/or a failure to attend court hearings. 6 cases (3.5%) were adjourned because of court timetable pressures or to allow additional time for the assessment of interim residence or contact arrangements; and in 5 cases (3%) Cafcass did not complete a section 7 report (in 3 of these cases, a Local Authority prepared a report, instead of Cafcass).

Figure 2 shows the breakdown of results after removing the 30 'not applicable' cases in which no final order was made. Only in these 140 cases could Cafcass' recommendation and the final order made by the court be robustly assessed for congruence.

The removal of the 'not applicable' cases reveals that: 76.4% of cases were fully congruent; 14.3% of cases were congruent (subject to court review); 5.7% of cases were partially congruent; and 3.6% of cases were not congruent.

Figure 2 – Congruence between Cafcass recommendation and final court order – cases in which a final order was made



Congruence	# of cases	% of cases
Yes	107	76.4%
Yes (subject to court review)	20	14.3%
Partial	8	5.7%
No	5	3.6%
Total	140	

4.2 Circumstances of cases that were not congruent (aim 2)

All of the cases assessed as having no or partial congruence involved at least one complicating factor (as did some of those cases coded as congruent). The following text provides examples of complicating factors identified in this study:

Analysis of congruence between Cafcass recommendations and the final court order

- Partial congruence – In one residence application, the FCA advised the court that a section 37 (Children Act 1989) welfare investigation report should be provided by the local authority in light of concerns about the applicant mother’s mental health, while at the same time recommending no direct contact with the respondent father. The court accepted this but chose to use Rule 16.4 (Family Procedure Rules 2010) to appoint a Children’s Guardian, which the FCA had not recommended. After receiving the section 37 report, the court ordered residence in favour of the applicant mother and indirect contact with the respondent father.
- Partial congruence – In one contact case, which brought together separate applications from two different fathers and two sets of grandparents, the court accepted the FCA’s recommendations relating to contact but requested additional work in the form of an addendum report (which had not been recommended by the FCA).
- No congruence – In one residence case the FCA recommended a split residence and contact arrangement, in accordance with the subject children’s differing but clearly expressed wishes and feelings. The applicant opposed this arrangement up to the final hearing and the FCA was cross-examined in court by the applicant’s solicitor. The court ordered a continuation of shared residence in respect of two of the subject children, but no order in respect of the third subject child.
- No congruence – The FCA recommended defined daytime contact with no staying contact due to the risks associated with the applicant’s alcohol misuse. Late in proceedings, and after the court report was filed, the parties reached a consensual agreement which involved the applicant promising to avoid alcohol prior to and during contact, and the respondent promising to promote reasonable contact. The court made no order.³

³ Under the ‘no order principle’ a court shall not make an order unless doing so would be better for the child than making no order.

Analysis of congruence between Cafcass recommendations and the final court order

5. Conclusions

This study affirms the task of advising the court about the outcome of private law contact and residence cases as being amongst the most important of Cafcass' responsibilities, because of the direct impact that their advice to the courts is likely to have on the future lives of children and families.

This study has revealed that the recommendations of FCAs were accepted by courts in just over 75% of the sampled cases; or 90% of the sampled cases if those in which there was to be a further review of the case by the court are included. The research shows that the court will, in some cases, make an order different to that which was recommended by Cafcass, and confirms that the court can respond to concerns or alternative arrangements put by either party at court. This demonstrates the independence of the court and its role as final decision maker in family proceedings.

References

Hunt, J. & Macleod, A. (2008) *Outcomes of applications to court for contact orders after parental separation or divorce*. Ministry of Justice.