EDITORIAL NOTE: NAMES AND/OR DETAILS IN THIS JUDGMENT HAVE BEEN ANONYMISED.

IN THE FAMILY COURT
AT WHANGAREI

FAM-2015-088-000162
[2016] NZFC 3974

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	BAS DEGARMO Applicants
AND	RACHEL NATHANIEL ALEX NATHANIEL Respondents
AND	PORSCHE DEGARMO Respondent

Hearing:	17 May 2016
Appearances:	Mr Bas Degarmo is self represented The Respondent Mrs P Degarmo attended by telephone late in the hearing Ms S Woods for the Respondents Nathaniel Mr D Whitehead as lawyer for children
Judgment:	3 June 2016

RESERVED JUDGMENT OF JUDGE M J HUNT

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[1] Mr Degarmo has made an application dated 23 December 2015, in accordance with the Hague Convention for the return of his children Theo Degarmo born [date deleted] 2012 and Patricia Degarmo born 2013[date deleted] to Australia.

[2] Mr Degarmo requested the Central Authority act on his behalf but they have declined to do so. Their decision in that regard was the subject of an application for

review or appeal lodged in the District Court and has been dismissed[1]. Accordingly Mr Degarmo prosecutes his own application.

[3] The basis for the Central Authorities decision to decline to pursue the application was by reason of previous proceedings initiated by Mrs Porsche Degarmo for the return of the children and decisions issued by the Family Court[2] and confirmed on appeal by the High Court[3]. Mr Degarmo was not formally a party to those proceedings but swore an affidavit in support of the application by his wife.

[4] This matter has been the subject of three pre-trial conferences. Those have dealt with this application but also the outstanding issues under Care of Children Act proceedings between Mrs Degarmo and Mr and Mrs Nathaniel, which have been running alongside these proceedings.

[5] On 29 April 2016, Mr Degarmo confirmed he wished to proceed with his application. He also indicated that he took no issue with the Judge who had dealt with the previous application in the Family Court dealing with this matter[4].

[6] The hearing on 17 May was dealt with on a submissions only basis. No request was made for leave to cross examine any of the deponents of various affidavits. Mr Degarmo participated by phone and Ms Degarmo arrived home late in the hearing.

The law

[7] The concession was made in this case (as it was the earlier litigation between Mrs Degarmo and Mr and Mrs Nathaniel) that:

(a) the children are in New Zealand,

(b) that they were removed from another contracting state (Australia),

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[1] In Chambers determination of Judge Hunt 4 April 2016
[2] Decision of Judge Hunt dated 16 June 2015 [2015] NZFC 4645
[3] BK v CJ [2015] NZHC 2169 per Duffy J
[4] Minute of Judge Hunt dated 29 April 2016

(c) that at the time they were removed, Mrs Degarmo and Mr Degarmo were exercising the rights of custody,

(d) that as at 24 October 2015 the children were habitually residing in Australia.

[8] These are material considerations in terms of s 105(1)(a) to (d) inclusive and mean that the Court's attention is then directed to the s 106 consideration to determine if the children should be returned to Australia.

[9] What was at dispute in the previous litigation and is in dispute here was whether or not consent had been given to the removal of the children.

[10] The Court has already made findings that Mrs Degarmo had consented to the removal os f the children and that aspect of the decision was upheld on appeal[5].

[11] What further arises in this proceeding is the question of whether or not s 106(1)(a) has application and if so what the implications of that are. The import of s 106(1)(a) is that if an application is made more than one year after the removal of a child and the child is now settled then there is discretion to refuse to make an order.

[12] I have adopted the methodology proved in *Basingstoke v Groot*[6] in terms of my approach to the assessment of the evidence and in particular I have looked to the contemporaneous words and actions of the parties and any independent evidence in my assessment of the factual matrix for this case.

[13] Mr Degarmo has in fact filed limited evidence but made extensive submissions on factual matters. The submissions by Mr Degarmo have attempted to supplement the evidence and at times have been contradictory to earlier statements.

[5] Paragraph 54, Decision 16 June 2015 and paragraph 109 per Duffy J
[6] [2007] NZFLR

Facts

[14] The facts in this case are largely as set out under the heading "factual background" in the decision of 16 June 2015 at paragraphs 11 to 25 inclusive.

> "[11] Porsche and Bas Degarmo are young parents. Concerns were expressed from family and others about how they were coping with the demands of two young children and with difficulties in their relationship. There have been issues for them both but, in particular Bas, regarding alcohol use and at times there were pressures within the relationship. There is evidence over time of an accumulation of financial pressures as Bas was injured and then lost his employment. They had two young dependent children and Porsche found that responsibility a demanding one.
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> [12] The extent to which circumstances within the Degarmo home had deteriorated is the subject of some debate. Porsche does say that things were difficult. The couple did seek help from family which they received and appreciated however the criticisms which then emanated from family including allegations of squalid living conditions, drug use and neglect are said by them to be exaggerated or unfounded.
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> [13] In response to information from other family of difficulties in the Degarmo home the Respondents travelled to Australia on 19 October 2014.
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> [14] The visit by the Respondents was a surprise to Porsche. It was not unwelcome but it was accompanied by difficult issues around how the problems which had emerged should be addressed. The Respondents offered to assist in some practical ways and took immediate responsibility for the care of the children. They made enquiries of [name of childcare centre deleted] where the children had been attending and ascertained that there was a likelihood that there would be a report made to child welfare agencies of concerns relating to the children which in turn would likely lead to an investigation of Porsche and Bas.
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> [15] Porsche's initial response was one of gratitude. Things had become stressful. There were difficulties financially and the intervention of helpful grandparents was seen as positive.
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> [16] On arrival the Respondents described the Degarmo property as "a tip". They say there was a strong smell of faeces, a sense of disarray including a parrot that was loose in the room and creating mess within the household. The property was in a state of disrepair. They were concerned about Porsche who appeared to have lost a lot of weight and Bas who seemed to be behaving erratically. His preoccupation with financial matters meant he did not respond to the need to maintain a clean safe household and/or contribute meaningfully in family life. His behaviour raised the possibility of drug use.
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> [17] There were discussions between the parties and offers of help were accepted. The children went to stay at the hotel with the Respondents to give Porsche and Bas a chance to clean up the house and get organised. A trailer to assist with the cleaning up of the house and removal of a freezer of

rotting meat was sourced but that eventually required additional intervention from the Respondents for the trailer to be loaded and taken away.

[18] The Respondents say that based on what they observed they were very concerned and enquiries at [name of childcare centre deleted] confirmed that they were concerned as to evidence of neglect of the children including:

(a) Chronic diarrhoea for both children;

(b) Developmental delay for Patricia;

(c) Theo being constantly hungry;

(d) Theo having recurring nappy rash;

(e) Likelihood of disengagement from childcare; and

(f) Non-payment of the fees.

[19] The information was that a report to Queensland Department of Communities Child Safety and Disability Services ("DOCS") was planned and official intervention was imminent.

[20] A plan was discussed between the Respondents and Porsche and Bas. It was agreed the children would travel to New Zealand with the Respondents and stay with them. Plans were discussed as to whether one or both parents would accompany them or whether they would follow and if so in what order.

[21] The final form of that plan consummated by the purchase of tickets was that the children would travel with the Respondents on 24 October and Porsche travel on her own to join them on 29 October. The intervening time was to be used to try and resolve some of the outstanding issues. It was likely that Bas would follow at some point but that was to be decided later.

[22] Time pressure meant that decisions had to be made. The confirmation that the childcare facility was going to make a report to DOCS created pressure on Porsche and Bas. They were free to engage with that agency if they wished to do so but it was clear action was required. They chose the alternative of accepting help from the Respondents which served to allay the concerns of the child care facility and avoid the reporting. Porsche did report making some enquiries herself from a lawyer friend about whether or not removal of the children was likely but nevertheless chose to adopt the option offered by the Respondents. It was an informed decision.

[23] The children and Respondents departed for New Zealand on 24 October but the planned departure of Porsche did not occur.

[24] On 29 October at 7:42 am she texted her father to advise that she would not be travelling. The txt said:

"Dad, we've been sitting outside the airport for the last 3 hours. He is not making me stay. I want to bring my family back to Australia, that is 100% my choice, whether right or wrong. Please support me in this: (I appreciate

> everything you and Rachel have done so much but I don't want to split my family up and going to New Zealand will do that."[7]
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> [25] The response of the Respondents was not to return the children to Australia but to reiterate that they were still concerned about the situation and wished the Applicant to travel to New Zealand as planned. There were a number of difficult and increasingly tense exchanges over that period."

Mr Degarmo's position

[15] Mr Degarmo's affidavit sworn 6 May 2015 was part of the factual matrix at the previous hearing. Mr Degarmo confirmed the contents of his wife's prior affidavit. He also confirmed as a result of a work accident and the subsequent effects that he experienced post traumatic stress disorder, severe anxiety and chronic depression[8]. He confirmed a loss of his employment and an outstanding claim for worker's compensation. There was confirmation of financial difficulties associated with a refusal by his employer to pay out sick leave and holiday pay and that the delays were associated with his worker's compensation claim.

[16] Mr Degarmo discloses an attempt to commit suicide and the subsequent intervention of professionals including a psychiatrist.

[17] Mr Degarmo confirmed that he was aware that the childcare centre where the children had been attending in 2014 was preparing a report to the Australian child protection agency and that he was;

> "worried about DOCS becoming involved because we knew that a our financial position was quite dire and maybe they would take our children from us if we could not show that we were in a better financial position"[9].

[18] Mr Degarmo says that his understanding of the arrangements for the children to stay in New Zealand were for "a few weeks" but not on an indefinite or permanent basis. The change of heart by Mrs Degarmo in terms of travelling to New Zealand herself is explained and subsequent demands were made for the children to be returned, which did not occur.

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[7] Exhibit C to the Affidavit of the Applicant sworn 16 March and is not in dispute.
[8] Paragraph 21
[9] Paragraph 51

[19] Subsequently Mr Degarmo filed an affidavit dated 23 December 2015 in support of his application for return of the children. Mr Whitehead made the point correctly that this document was not in fact sworn. However it is a statement of the facts Mr Degarmo relies upon and I deal with it on that basis.

[20] Mr Degarmo now asserts that the travel to New Zealand was without his consent[10]. However Mr Degarmo confirms at paragraph 55 of the affidavit of 6 May 2015 that he agrees with paragraph 73 of Mrs Degarmo's affidavit. Paragraph 73 of that affidavit recites:

> "On Wednesday 22 October, Bas and I sat down with my father and stepmother to talk about what we would do. Father said to us on several occasions during this conversation, just come over for a few weeks have a bit of a holiday, let us look after you and then you can go "*home*". Bas and I told my father and stepmother that we had decided that the children and I would go to New Zealand with them. We told them that we wanted the children to go a few days before I did so that Bas and I could have some uninterrupted time to make telephone calls and other arrangements that we needed to make to try to sort out our financial problems. We didn't ever specify a specific time frame that we would stay in New Zealand for. It was only ever discussed, however, in the context of a "break" or a "holiday" never anything more than that. We talked about a two-three week time frame but never decided how long we would stay."

[21] The document sworn in support of his wife's application confirms consent for the children to travel to New Zealand. He sought to distinguish the issue of "consent" from other terms such as "agree". I accept consent imports being informed but I am satisfied Mr Degarmo knew the children and his wife were to go to New Zealand. Health, financial matters and pressure of a report to the Department of Child Services (DOCS) were motivating factors. Findings have already been made that Mrs Degarmo's consent was for an indefinite period. Mr Degarmo consented to and cooperated with that course of action.

[22] Mr Degarmo's says his lack of consent is supported by a contemporaneous document he drafted, but which was not signed, and which sets out the terms of the arrangement. The document did make reference to a "holiday" but other than dealing with Mrs Degarmo following the children to New Zealand and assuming responsibility for their care and Mr Degarmo purporting to reserve an absolute right

[10] Paragraph 14

of control, the document does not corroborate Mr Degarmo's assertion that it was agreed the visit would be of short duration or that he did not consent. In fact it confirms he knew of the arrangement, consented to it and purported to reserve control over it. The document was not approved or signed and is not proof of a lack of consent in the way Mr Degarmo submitted.

[23] What changed the arrangement was Mrs Degarmo's change of heart and failure to join the children. That was brought about by Mr Degarmo's apprehension at the point of her departure that it would mark an end to his family and a change of heart by Mrs Degarmo at the point of departure rather than a lack of consent at the outset. His consent may have been in response to a variety of pressures but it was nevertheless informed consent.

Mrs Degarmo's position

[24] Mrs Degarmo has filed an affidavit dated 7 December 2015 in the context of the Care of Children Act proceedings. It is intituled with both Mr and Mrs Degarmo's name but the affidavit indicates that this process, under the Hague Convention, has been instituted by Mr Degarmo only and that he is not part of the Care of Children Act proceedings.

[25] Mrs Degarmo's affidavit seeks to revisit many of the matters determined in the context of the previous proceedings suggesting that the concerns are exaggerated or incorrect and challenging the determination not to return the children. That Court ruling is beyond challenge and many of the other matters can be explored and determined if necessary in the context of the Care of Children Act proceedings. Mr Degarmo too sought to re-examine the issue of the Hague Convention rulings in Mrs Degarmo case suggesting that her statements had been misconstrued.

Respondents' position

[26] In submissions filed for the Nathaniel's and in particular the content of their affidavit dated 4 May 2016, they assert that the children have now been in their care since 24 October 2014 and that the children are settled. They say the children have

consistency in terms of their childcare arrangements and place of residence. They say there have been some instances of childhood accidents but they are not an indication of neglect or lack of care simply that from time to time children will experience accidental injury. There is nothing to contradict this proposition.

[27] They say there has been continuing contact regularly by way of Skype with Mr and Mrs Degarmo. They also say that they are concerned that matters are not as represented by Mr and Mrs Degarmo including that the financial security which was claimed is not real and that the Degarmos' home has been repossessed by the Bank.

[28] They note that a drug test promised by Mr Degarmo and which was said to have been completed had not been returned. This was addressed by Mr Degarmo who subsequently filed the test. Although it was acknowledged he could do by so memorandum, the explanatory note in relation to the drugs that were shown to be present needed to be verified by more than unsigned copies of letters.

[29] The Respondents say the children are settled in their current care arrangements and that the prospect of returning them to Australia and to the Degarmos is too uncertain to be confident that the children would be safe and appropriately cared for.

Section 106(1)(a) Care of Children Act

[30] The submissions filed on behalf of Mr and Mrs Nathaniel and those filed by Mr Whitehead as lawyer for the children adopt a similar position. In factual terms they rely on the fact the children had been resident in New Zealand since 24 October 2014 and the earlier rulings.

[31] It is conceded that the application for return by Mr Degarmo was not filed until 23 December 2015. The calculation of the one year period referred to in s 106(1)(a) commences from the time of removal of the child. In this case there is no suggestion of clandestine removal and all parties were aware of the location and whereabouts of the children from 24 October 2014.

[32] Mr Degarmo sought the assistance of the Central Authority in prosecuting his application. He says that the Australian Central Authority received his application on 15 October 2015 and the New Zealand Central Authority on 20 October 2015 but his application was not refused until 28 October 2015. He attaches the Central Authority's response which was to decline the application. He then lodged an appeal against or an application under s 123(3) to review the decision to the Central Authority but that was dismissed[11]. The delay in seeking a review was explained by reference to matters relating to Mr Degarmo and was significant.

[33] Mr Degarmo acknowledged the significance of s 106(1)(a) at paragraph 12 of his application where he said;

> "Furthermore, the NZCA was made aware that proceedings needed to commence before 24 October 2015. Due to the NZCA's refusal, the NZCA has in effect guaranteed the respondents a s 106 defence. Such an act is contradictory to the CA's role under the Convention."

[34] The argument was that he didn't participate in his wife's application but nevertheless accepted the legal advice (without providing details of that advice) to her that it would be successful. In the face of an unexpected result he says the time frame should be extended because the unlawful detention really only commenced once those proceedings were concluded. I reject that. It is contrived. He was able to prosecute an application and chose not to. That choice is one he must now live with.

[35] His seek to relitigate that case despite Mr Degarmo acknowledging that this was not an appeal and that case had been determined. This approach is misconceived and I am not prepared or able to revisit earlier findings.

[36] It is the application under s 105 that is relevant for 106(1)(a) purposes. The removal of these children occurred on 24 October 2014 and the year runs from then.

[37] There can be no dispute that the period of one year has passed since the children to New Zealand relocated to New Zealand and s 106(1)(a) applies.

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[11] Minute of Judge Hunt dated 29 April 2016

Are the children settled?

[38] I am required to consider if the children are settled. The question of what constitutes being settled is a case of applying the "ordinary natural meaning" to the words[12]. Children are settled in an environment if they have an established place of abode, are attending a school and are involved in childhood education, develop friendships and interests in the new neighbourhood, have a close relationship with family members and opportunity to engage in cultural activities and mix with others in their cultural group.

[39] It does not require that it be the optimum environment or that it be permanent but it reflects the fact that after a year, issues of disruption to routines and stability need to be considered. Being settled is related to age. The children are very young and the time that has passed represents a significant portion of their life. There is a physical and emotional element.

[40] The children are of an age where their particular views have not been able to be ascertained but there is credible evidence that the children have settled in to a routine and established environment in the care of their grandfather and step grandmother.

[41] There is no suggestion of any itinerancy or regular change for the children in New Zealand.

[42] In terms of emotional security the children are said to have bonded and to be thriving in the care of the Nathaniels. Mr Degarmo's assertion of distress and emotional harm are based on general assertions in submissions of upset and harm. The reference to a relationship with their brother Stephen is difficult to understand given he was born only after these proceedings were initiated. The children have not been separated from their sibling. They have in fact never lived together.

[43] I find the children are settled in New Zealand.

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[12] S v S [1995] SC134 per Lord Sutherland

Discretion to refuse return

[44] Once the period of one year has elapsed and if the children are settled the Court has a discretion to refuse to make an order for the return of the children.

[45] The Supreme Court in *Secretary for Justice v H J*[13] summarised at paragraphs 85 to 87 the approach that the Court should take in exercising its discretion under s 106(1)(a):

> "[85] …The discretion requires the Judge to compare and weigh two considerations. One concerns the welfare and best interests of the child or children involved in the case. The other concerns are significance of the general purpose of the Convention in the circumstances of the case. These two considerations will not necessarily be in conflict.
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> [86] When undertaking this exercise the Judge should consider whether return would or would not be in the best interests of a child who has necessarily already been found to be settled in their new environment. That very settlement implies that an order for return may well not be in the child's best interests. Matters relevant to the assessment include the circumstances in which the child is now settled; circumstances in which the child can be wrongfully removed or retained; and the degree to which the child would be harmed by return. Other factors capable of being relevant will be the compass and likely outcome of the dispute between the parties, and the nature of any evidence directed to another ground of refusal, whether or not that ground is made out. In short everything logically capable of bearing on whether or not it is in the best interests of the child to be returned should be considered.
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> [87] If the Judge considers that return is not in the best interests of the child, the issues becomes whether some feature of the case, such as concealment by the party responsible for removal, nevertheless requires that the s 106(1)(a) discretion be exercised in favour of return so as to avoid the perverse incentive inherent in refusing to order return. Unless the Court finds that such competing factors as may exist clearly outweigh the interests of the child, return should not be ordered."…

[46] In this case a ruling has already issued that the return of the children in response to a timely application by Mrs Degarmo should not be directed. That decision considers the concerns as to the situation in Australia and the consent given by Mrs Degarmo to the children relocating. She now takes issue with that but credible concerns were expressed about the safety of the children and their wellbeing at the time.

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[13] [2007] 2 NZLR 289

[47] There are assertions by Mr Degarmo that the finances are under control and that health and wellbeing issues have been addressed but there remains aspects that require further clarification including but not limited to, the issue of the mental health of Mr and Mrs Degarmo, their finances, the foreclosure in respect of their home, the current living conditions and support and the way in which the children might properly be reintegrated to the family unit which now includes a third child born after these proceedings commenced.

Findings

[48] I am satisfied that the arrangements made for the children to come to New Zealand were arrangements made with the consent of Mrs Degarmo and with the understanding and consent of Mr Degarmo. Whilst it is open to him to make this further application on the basis he was not the applicant previously the evidence as filed satisfies me that there was consent to the arrangement. A finding has been made that there was an open ended arrangement for children to remain indefinitely in New Zealand.

[49] I do not accept assertions that he did not agree to the children travelling to New Zealand. It was agreed that Mrs Degarmo would join them. Her change of heart about that was a defining point of this dispute but that does not alter the fact there was consent. Mr Degarmo's document is not evidence of a contrary intention but rather an indication that he too agreed the children would travel to New Zealand and I conclude that was for an indefinite period.

[50] The children are settled in New Zealand. The welfare and best interests of the child are relevant once the Court is satisfied that the child is settled. The Supreme Court in *Secretary for Justice v HJ*[14] held at paragraph [81] that s 106(1)(a), "Very much engages the best interests of the child" and that, "Questions of underlying merits are capable of featuring in that respect". Mr Degarmo's submissions are based on generalised assertions of the effect of separation on his children rather than a specific examination as to the children's circumstances. The cases referred to by Mr Degarmo have been considered. They assist only in terms of

[14] [2007] NZLR 289

the application of the principles of the convention generally. They do not change my findings on key issues of consent, the time period or the fact the children are settled.

[51] Mr Degarmo's assertions of financial security are not consistent with the evidence of foreclosure in respect of the property and the issues relating to Mr Degarmo's mental health and questions of drug use have not been satisfactorily resolved. The evidence on the issue of drug use was of a positive test with unsigned letters providing further explanation about the use of prescribed drugs. Details of the need for the prescribed drugs were not clear. There is the added factor of a new baby and the demands of that child on the resources and abilities of the parents.

[52] The concern previously expressed by child care agencies were serious and extreme. Care is required before the children are simply returned to the same environment without clear evidence of sustained change and a safe environment.

[53] Mr Degarmo's thinking on the issue of the return of the children was very limited and superficial. There is real doubt in my mind as to the stability and security that Mr and Mrs Degarmo can provide if the children were to be returned to Australia on the material I have before me at this stage.

[54] The best interests of the children at present lie in remaining in New Zealand, pending a comprehensive enquiry into the circumstances in Australia for the Degarmo's and an evaluation of the respective merits of the caregiving arrangements which include being satisfied about the safety and security and wellbeing of the children if they are to return to Australia and the Degarmos.

[55] The delay by Mr Degarmo in prosecuting his application is lengthy. His explanation for that seeks to shift responsibility to others. He knew what was occurring and was content to let it run its course. However the decision to pursue a separate Hague Convention application has exacerbated delay and his attempt to re-litigate some aspects of the prior rulings is misguided. His preoccupation with that at the expense of working constructively with the Respondents leaves me concerned that Mr Degarmo has not understood or accepted that concern for the welfare of his

children is justified and that caution is appropriate. Furthermore Mrs Degarmo's limited involvement in this case leaves me in doubt as to her situation.

[56] All of this means that while the return of the children is in fact a desired outcome by all parties I am not yet able to predict whether that will occur and if so when and how and cannot conclude the children would be best served by a return now.

[57] The orders sought by Mr Degarmo are declined.

[58] Costs are reserved. Mr Degarmo was on notice that costs would be sought. Any application is to be filed on or before 17 June 2016. Any response by 1 July 2016. It will then be determined on the papers.

M J Hunt
Family Court Judge