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Neutral citation: [2023] EWFC 290 (B)

Case No: ZC23P01248

IN THE CENTRAL FAMILY COURT

First Avenue House

High Holborn

London

WC1V 6NP

Date: 11th September 2023

Before:

HIS HONOUR JUDGE TALBOTT

Between:

A Father

- and -

A Mother

Respondent

Appellant

MS A MCKENNA KC (instructed by **Osbornes Solicitors LLP**) appeared on behalf of the **Respondent**

MR P HEPHER (instructed by **Howard Kennedy LLP**) appeared on behalf of the **Appellant**

APPROVED JUDGMENT

HIS HONOUR JUDGE TALBOTT:

Introduction

1. The applications before me on behalf of the proposed appellant, the mother in this case, are for permission to appeal out of time, if deemed necessary, permission to appeal and to appeal decisions made by Deputy District Judge Kumar (“the Deputy District Judge”). The Deputy District Judge handed down a written judgment, in draft form initially, on 13th June 2023 following a fact-finding hearing which took place as part of private law child arrangement order proceedings on the 2nd, 3rd, 4th and 5th May of this year.
2. The appellant mother is represented by Mr Hepher and the respondent father by Ms McKenna KC, neither of whom appeared below. I am grateful for the excellent and considered advocacy that both have displayed on behalf of their lay clients. It would have been impossible for any counsel to have made the points that each sought to make with any more persuasive force than they have today.

The Grounds of Appeal

3. The grounds advanced by the appellant mother are five-fold. I summarise them as follows:
 - i) The Deputy District Judge gave insufficient weight to a number of aspects of the evidence before the Court;
 - ii) The Deputy District Judge did not properly balance the evidence and failed to give sufficient reasons for not making certain findings;

- iii) The Deputy District Judge failed to make reasonable allowances nor give appropriate recognition or consideration to the fact that the appellant mother was a victim of domestic abuse in two ways. Firstly, by virtue of an insufficient consideration of participation directions. Secondly, in failing to consider the impact on the appellant mother's evidence that her status as a victim of domestic abuse under the Domestic Abuse Act 2021 may have had;
- iv) The Deputy District Judge failed to analyse the respondent father's admissions of domestically abusive behaviour in the context of their impact on other allegations made by the appellant mother and, in particular, failed to take a step back from those admissions and view them in the context of the other allegations;
- v) The Deputy District Judge was wrong to order unsupervised contact by way of an interim child arrangements order at the conclusion of the fact-finding hearing.

The Positions of the Respondent

- 4. The respondent father's case is that the Judge considered all of the evidence before the Court given over the numerous days of the hearing by the witnesses called, in particular the appellant mother and the respondent father, and also had the benefit of over 1200 pages of documentation within the bundle which the Deputy District Judge had considered fully.
- 5. It is argued on the respondent father's behalf that, whilst at some points the judgment could properly be described as "short", it is an adequately reasoned judgment which explains sufficiently why the Deputy District Judge made the findings that she did and failed to make the findings she did not. It is in that context, it is said on behalf of the

respondent father, that the welfare decision made by the Deputy District Judge to order a progression of contact, after two sessions of supervised contact, to unsupervised contact is not one with which this Court should interfere. It is submitted on behalf of the respondent father that, whilst short, the analysis contained within the final paragraph of the Deputy District Judge's judgment is sufficient to assure this Court that the decision made was not wrong.

The Law

6. In respect of judgments delivered after a contested fact-finding hearing an appellate court will be loath to interfere with assessments of witnesses and determinations in respect of allegations made when it is the first instance judge, in this case Deputy District Judge Kumar, who had the distinct benefit of witnessing and observing not only the giving of evidence by each parent but also their reactions and conduct throughout the fact-finding hearing.
7. In respect of permission to appeal, under Rule 30.3 (7) of the Family Procedure Rules 2010, permission to appeal may only be given where the Court considers the appeal would have a real prospect of success or that there is some other compelling reason why the appeal should be heard. "Real prospect of success" simply means "realistic" as opposed to "fanciful".
8. In respect of the substantive appeal, as set out within Family Procedure Rule 30.12 (3), an appellate court will only allow an appeal where the decision of the lower court was either "wrong" or was "unjust because of a serious procedural or other irregularity". Of course, an appellate court has a range of powers following the determination of an appeal.

9. The appellate court will not interfere with finding made by a trial judge unless the decision was plainly wrong, which means that the decision under appeal is one that no reasonable judge could have reached in the circumstances. It is not sufficient for a judge sitting in an appellate capacity to simply reach a conclusion that they themselves would have taken a different course to that taken by the judge below.

Permission to Appeal Out of Time

10. I deal first in this case, in fact, with the issue of whether the mother's application to appeal is, or was, made out of time. I have borne in mind, in particular, the case of *Re P (a Child) (Care proceedings)* [2018] EWCA Civ 720.
11. I have considered the delays caused in the handing down of the approved judgment by the request for clarification made on behalf of the appellant mother. The request for clarification was not the most detailed, or the most clearly drafted, request this court has seen. However, the request for clarification related to matters of central importance to the judgment. The request detailed the precise paragraphs of the judgment which now go right to the heart of the live issues on which this application for permission to appeal is founded.
12. I am satisfied, having considered the rationale of McFarlane LJ, as he then was, within *Re P* that in the circumstances of this case the appellant mother was entitled to wait a reasonable amount of time for a response from the Court following the reasonably made request for clarification. I note that four weeks from the request for clarification is not “the law” but a general guide as expressed by McFarlane LJ, as he then was, as to the outside edge of an appropriate length of delay in most cases. In the circumstances of this particular case the delay in submitting the application for

permission to appeal was reasonable in light of the request for clarification and I therefore deem the application to be made in time.

The Application for Permission to Appeal

13. I recognise from the outset the pressures that judges sitting in the Family Court are under. In particular, the Deputy District Judge in this case was presented with a fact-finding hearing in which no limit had been placed on the number of pages to be contained within the fact-finding hearing bundle by virtue of the order made by another judge at the Pre-Trial Review. The order was not silent on the point, it specifically stated that there was no page limit in respect of the bundle. The bundle prepared extended to over 1200 pages. The Deputy District Judge, quite properly, made a number of case management decisions at the start of the fact-finding hearing. The Deputy District Judge decided that only 18 of the, approximately, 30 allegations that were in the initial schedule would be necessary for the Court to determine. The Deputy District Judge determined, therefore, that 18 of the allegations made were necessary to determine in the welfare interests of the children. The narrowing down of the number of allegations to be determined was a process which should have been undertaken prior to day one of the fact-finding hearing. That is not something over which the Deputy District Judge had any control. However, the narrowing down of the allegations it was necessary to determine to 18 was a specific case management decision taken by the Deputy District Judge and one which set the parameters for the hearing that followed.
14. I will deal with the issue of permission and the substantive appeal together for reasons that shall become clear. I shall begin with a consideration of Ground Two – relating the adequacy of the reasons provided within the judgment.

15. I have considered, in respect of inadequacy of reasons, *Re B (A child) (Adequacy of Reasons)* [2022] EWCA Civ 407 in a Court of Appeal consisting of the President of the Family Division, Peter Jackson LJ, and Nicola Davies LJ. In the judgment given by Peter Jackson LJ, the Court sets out at paragraph 59 a detailed and helpful summary of the aspects that will necessarily be present within a “good judgment”.

“59. Judgments reflect the thinking of the individual judge and there is no room for dogma, but in my view a good judgment will in its own way, at some point and as concisely as possible:

- (1) state the background facts
- (2) identify the issue(s) that must be decided
- (3) articulate the legal test(s) that must be applied
- (4) note the key features of the written and oral evidence, bearing in mind that a judgment is not a summing-up in which every possibly relevant piece of evidence must be mentioned
- (5) record each party’s core case on the issues
- (6) make findings of fact about any disputed matters that are significant for the decision
- (7) evaluate the evidence as a whole, making clear why more or less weight is to be given to key features relied on by the parties
- (8) give the court’s decision, explaining why one outcome has been selected in preference to other possible outcomes.”

16. As per Peter Jackson LJ within paragraph 60 of the same judgment, it is the last two processes, evaluation and explanation, which are the critical elements of any judgment.

17. Having considered the judgment of the Deputy District Judge as a whole, I am satisfied that it falls short of the minimum expected in a satisfactory judgment in the circumstances of this case. The judgment was described on behalf the respondent father as “short”. That is clearly an apt description in respect of the length of the judgment itself and, indeed, the extent of the analysis within it. Sadly, I am satisfied

that the judgment read as a whole demonstrates little evidence of the process of evaluation of evidence before the Court in a fair and balanced way. There is almost part of the judgment which demonstrates the Deputy District Judge's reasoning as to the conclusions that set out therein.

18. Ground One is, in summary, that the Deputy District Judge gave insufficient weight to certain aspects of the evidence. This ground overlaps with Ground Two to some extent. It is evident from an analysis of the judgment in the context of the extensive fact-finding bundle before me that there are many significant and identifiable errors made within the judgment in respect of the evidence that was before the Deputy District Judge. For example, the Deputy District Judge concluded that it was relevant to the Court's finding against the appellant mother in respect of the particular allegation of domestic abuse, said to have taken place after a barbeque, that she had "failed to mention" either the barbeque or a wardrobe at any point before her oral evidence (both of which were key features of the account given by the mother from the witness box). However, a simple reading of the appellant mother's witness statements shows that to be incorrect as she mentioned both aspects within them. Of course, such an error in isolation would not be sufficient to demonstrate such fundamental flaws in the analysis of the Deputy District Judge to satisfy me that the decision made was "wrong". However, such an error is troubling when viewed in the context of other clear and obvious errors of a similar nature throughout the judgment.
19. By way of further example, there is no mention whatsoever of the WhatsApp messages sent by the appellant mother regarding the allegations that on a night in 2021 the respondent father inserted a sex toy into her vagina without her consent and despite her complaints to him of it hurting and her asking him to stop. The WhatsApp message sent at 8.30 AM the very next morning, which clearly relates to that precise alleged incident, was clearly directly relevant to the Court's determination of where the truth lay in respect of the allegation. Despite the appellant mother complaining

directly to the respondent father that she had not consented, that he had ignored her, and that she was telling him it was hurting just hours after the alleged incident – there is no mention of this whatsoever within the judgment of the Deputy District Judge. There is not even passing reference to any complaint made by the appellant mother, let alone to the specific messages contained within the bundle before the Court. In my judgment, it is inconceivable that a court dealing with such an allegation would not at the very least mention the clearly relevant WhatsApp messages during the course of the analysis of the relevant evidence. I need not comment on what the Court may or may not have made of the messages in the context of the other evidence. The fact that there was simply no mention at all of them, despite their clear and obvious relevance, ensures that it is not possible for me to know what the impact of those messages on the evidential analysis of the Deputy District Judge was.

20. Were the errors and omissions from the judgment to have extended only to those two examples, it would not necessarily be fundamentally fatal to the judgment as a whole. Sadly, however, that is not the end of the list of significant evidential matters which the Deputy District Judge failed to mention. There was no mention at any point within the Deputy District Judge's judgment of the impact letter written by the appellant mother to the respondent father when he was in a clinic. Again, it cannot reasonably be argued that both the writing of the letter, and the contents of it, were anything other than directly relevant to the decisions the Deputy District Judge had to make. However, once again the analysis by the Deputy District Judge is sadly lacking by virtue of there being no mention of another key aspect of the relevant evidence before the court.
21. In the context of the judicial analysis as a whole, it is sadly clear to me that there were many significant pieces of the evidence which have simply not been mentioned by the Deputy District Judge within the very short evidential analysis contained in the judgment. The result of this repeated failure to mention key pieces of relevant

evidence is that the impact of this evidence on the decisions taken by the Deputy District Judge remains entirely unexplained.

22. It is not incumbent upon a judge at first instance dealing with a fact-finding hearing to list all of the evidence they have considered, nor indeed to mention each piece of evidence nor resolve every factual dispute between the parties. However, failing to refer to such significant pieces of evidence on numerous occasions, considered in the context of the other failings in analysis that I shall go on to consider, is significant in the context of this case.
23. Ground Three is that the Deputy District Judge failed to give proper consideration to the appellant mother's status as a victim of the respondent father's domestic abuse. On his own admission, the respondent father had acted in domestically abusive ways towards the appellant mother. There are effectively two strands to this ground of appeal.
24. The first is that the participation directions in place by way of a screen were insufficient in order to ensure that the appellant mother was able to give evidence in a way which ensured her effective participation. It is right that the Deputy District Judge did not explicitly consider FPR r.3A or PD.3AA in relation to the participation of vulnerable persons. However, in my judgment, that is not a solid basis for determining that the decision taken by the Deputy District Judge that only a screen was necessary by way of participation directions was wrong or in any way flawed. The use of screen in court was a specific measure put in place by the Deputy District Judge with the aim of ensuring the appellant mother's effective participation both during the proceedings generally and when she gave evidence.
25. However, the second strand of the third ground of appeal is that the impact of the appellant mother being a victim of domestic abuse on the findings made by the Court -- and, in particular, the view taken of the appellant mother's evidence -- is

completely lacking in the judgment of the Deputy District Judge. Within the judgment there is no mention of the impact of the appellant mother's status as a victim of domestic abuse on any aspect of her evidence. It is uncontroversial that, even on the basis of the respondent father's admissions, the appellant mother was a victim of domestic abuse at his hands. This is strikingly clear whether or not the Deputy District Judge specifically considered the Domestic Abuse Act 2021. Within the judgment there is no mention of, let alone consideration of, the fact that victims of domestic abuse may react in a multitude of different ways in different circumstances and that there is no "standard" reaction of a victim of domestic abuse in any given situation. Of course, the Family Court recognises that some victims may react to being asked about abuse, both accepted and alleged, with fear and reluctance. Some may freeze entirely whilst others may react in a combative or angry manner. None of those taken in isolation are reliable indicators of the truth or otherwise of allegations made. There is no standard way of reacting either to abuse at the time it occurred, nor to recounting, whether by way of examination-in-chief or cross-examination, the allegations that are made.

26. The Deputy District Judge did not direct herself in respect of the impact, or lack of impact, that myths and stereotypes relevant to the consideration of allegations of domestic abuse had on the Court's view of the evidence. When considered alongside the very short nature of the evidential analysis within the judgment, and the contents of that analysis, it leaves me far from assured that they have not been applied to some degree in the decision-making process. The analysis in relation to the view taken of the appellant mother's credibility by the Deputy District Judge is short. In and of itself, that is not enough to ensure the judgment can properly be regarded as fundamentally flawed. However, within the very short analysis of the appellant mother's evidence it is clear that the Deputy District Judge gave significant weight to her combativeness in giving evidence. It appears that the Deputy District Judge,

having failed to guard against applying myths and stereotype regarding how victims of domestic abuse should be expected to act, then went on to judge the credibility of the appellant mother against an unjustifiable assumption as to the sort of behaviour expected of a genuine victim of abuse.

27. Sadly, the Deputy District Judge fell into similar error in considering the allegation that the respondent father allegedly inserted a sex toy into the mother's vagina without her consent on two occasions. The Deputy District Judge's reasoning in respect of this particular allegation suggests that the appellant mother's previous consent to the respondent father using a sex toy "in the context of this couple's adventurous relationship" increased the likelihood of her consenting on these particular occasions. Against that viewpoint, the Deputy District Judge concluded that the allegation was, therefore, unlikely to have occurred as the appellant mother alleged. The Deputy District Judge failed to give herself a clear direction in respect of issues of consent. This failure would not necessarily be fatal to the safety of the conclusions reached in respect of this allegation were it to be clear from the analysis of the evidence that the District Judge had given the matter sufficient consideration, even were it not specifically addressed. However, the comments made by the Deputy District Judge within the judgment that "*I find M is an intelligent woman who always understood the issue of consent long before the police mentioned it to her*" and "*in the context of this couple's adventurous relationship, I do not find either of these very serious allegations proven*" give the clear impression that the Deputy District Judge concluded that the appellant mother's intelligence and previous consent to similar activity made it unlikely that she was assaulted as alleged on these two occasions. This implies a clear lack of appreciation of the obvious fact that a victim may consent to sexual activity on one occasion but then not consent on another and also that their consent on one occasion is not indicative that they will consent on any other occasion. Further, the reference to the appellant mother's intelligence in the context of it

meaning she was more likely to have “understood the issue of consent” is problematic as it equates the intelligence of a victim with the way in which they are expected to react when assaulted. In short, the standards by which the appellant mother’s actions were judged were higher as a result of the view taken by the Deputy District Judge of her general intelligence. This was plainly a misguided approach adopted by the Deputy District Judge in this regard.

28. Within the eleven sentences within the judgment which contain the entirety of the analysis of the evidence regarding the two allegations of a sexual nature, it is sadly apparent that not only did the Deputy District Judge fail to guard against the application of myths and stereotypes regarding allegations of sexual abuse and the behaviour of victims but, it appears to me, is likely to have positively applied them both in respect of the impact of previously consensual sexual activity and as a relevance of the appellant mother's intelligence to the issue of consent. Both failings, sadly, demonstrate a significant deficiency in the reasoning adopted by the Deputy District Judge in this regard.
29. Ground Four is that the Deputy District Judge failed to analyse the admissions of domestically abusive behaviour made by the respondent father and failed to consider the other allegations of abusive behaviour made against him into the context of those admissions. There is, in fact, no analysis at all of the impact of the respondent father's admissions of domestically abusive behaviour on the view taken by the Deputy District Judge of the other allegations he faced. I do not find that the learned Judge's use of the phrase "to his credit" is of any real significance in the approach taken by the Court below to the allegations made by the appellant mother. I do not read the use of the phrase “to his credit” as indicating that the respondent father's case somehow gained transaction or credibility as a result of those admissions of domestically abusive behaviour being made. The key point is that the Deputy District Judge clearly failed to consider the respondent father's admissions of such behaviour in the

context of all of the other allegations. Instead, the admissions were simply recorded before the Deputy District Judge moving on to consider the other allegations made with no further reference to, nor consideration of, them.

30. As per Peter Jackson LJ, in *Re A (A Child) (Finding of Facts)* [2022] EWCA Civ 1652 at paragraph 42:

The perpetration of domestic abuse is an expression of an aspect of a person's character within a relationship, and the fact that a person is capable of being seriously abusive in one way inevitably increases the likelihood of them having been abusive in other ways.

31. Sadly, there is no indication that the Deputy District Judge acknowledged this in the present case. I am entirely satisfied, having considered the judgment as a whole, that there was an abstract failure of the Deputy District Judge to step back and consider the impact of the respondent father's accepted domestic abuse on the other allegations of domestically abusive behaviour that he faced. In failing to do so, sadly, the Deputy District Judge wrongly compartmentalised the allegation which remained to be determined without considering whether the evidence as a whole established a pattern of controlling and coercive behaviour relevant to the welfare decisions which needed to be made for the children at the centre of this case. The failure of the Deputy District Judge to consider at all the impact of the respondent father's accepted domestic abuse, which included punching a hole in the wall of the house in which the children lived, is fundamental. The failure of the Deputy District Judge to take a step back and consider, in the context of the evidence as a whole, whether a pattern of domestically abusive behaviour was established undermines the conclusions reached within the judgment. The decision of the Deputy District Judge to focus on individual allegations in isolation without at any point taking a broader perspective and considering the wider canvass of evidence, in the context of the other flaws within the

judgment which I have identified, sadly ensure that the inadequacy of the analysis and reasoning within the judgment shine brightly.

32. For all of the reasons I have given in respect of Grounds One to Four, I am entirely satisfied that the fact-finding judgment of the Deputy District Judge was fundamentally flawed as a result of a lack of reasoning, failure to consider clearly relevant evidence, failure to consider the impact of the appellant mother being a victim of domestic abuse and the failure to step back and view the respondent father's admissions of abusive behaviour in the context of a consideration as to the existence of a wider pattern of controlling and coercive behaviour. As a result, it is with some regret that I am drawn to the firm conclusion that the judgment of the Deputy District Judge simply cannot stand. The inadequacies in approach and reasoning are far too significant to read the judgment of the Deputy District Judge in a way which it can safely or properly be implied that the Judge holistically considered the relevant evidence and drew safe and sustainable conclusions in respect of both the findings made and those not made.
33. There are many judgments, many cases and many situations in which it would be perfectly safe to conclude that a Judge, at first instance, had considered aspects of evidence and weighed matters before them properly despite them not specifically being mentioned within the judgment itself. However, the scale and nature of the deficiencies within this judgment ensure that it is simply not possible to do so in this case.
34. Ground Five relates to whether the Deputy District Judge was wrong to order unsupervised contact at the point that she did. The Deputy District Judge dealt with the issue of "interim contact" within the final paragraph of the written judgment. Within those eight lines, the Deputy District Judge said as follows:

“As the children were spending unsupervised and overnight time with their F following the separation, the recommendations of the Local Authority and positive supervised contact notes, I see no reason why there should not be a regular twice weekly, visiting only, spends time with arrangements pending the risk assessment of the F and the s7 report of the ISW, and this could move to overnight contact if the ISW recommends it pending the DRA. I will consider how this is to commence further with the parties, and it may be that the first 2 visits be supervised. I would expect F to give an undertaking that he will not drink before contact and agree to further Hair strand and blood testing for alcohol.”

35. That is the extent of the welfare analysis undertaken by the Deputy District Judge in terms of what interim child arrangements were in the welfare best interests of the children. That analysis has been described, perhaps optimistically, by Ms McKenna KC as “short”. In my judgment, sadly it is better described as inadequate. Within that assessment, there was no mention of Practice Direction 12J, in particular paragraphs 35 to 37, which are clearly highly pertinent in respect of the Court making arrangements following admissions of domestic abuse as there were in this case. As well as PD 12J not being mentioned at all, there is nothing within the reasoning of the Deputy District Judge capable of being interpreted to say that any consideration had been given to it. Further, there is no analysis of the options for the court within the context of the welfare checklist. I agree with the submission of Mr Hephher that the words used within the judgment by the Deputy District Judge indicate that the Court failed to apply the correct legal framework to the decision taken regarding interim child arrangements.
36. In the context of the significant failings in the judgment I have identified already, this inadequate welfare analysis simply cannot stand and must be set aside. For the reasons I have given, the appeal must succeed on all five grounds. The conclusions reached by the Deputy District Judge were wrong. I therefore grant permission to appeal in respect of each of the five grounds and the appeal is successful on each.

The Way Forward

37. It is necessary for me to consider what is the way forward for these children. It is a significant shame for these children that I have been driven to reach the conclusions I have. However, I am entirely satisfied that the course that I must take having considered PD 12J extremely carefully, and in particular paragraphs 35 to 37, is to order that contact reverts to the position as it was prior to the fact-finding hearing – that being professionally supervised contact each Saturday between 10AM and 5PM. The same conditions as applied previously are also reinstated – including that the costs are to be met by the respondent father, he must not drink alcohol 24 hours before the start of a period of spending time with the children, or of course during it, and he must not drive a motor vehicle during the time he spends with the children. The matter will be listed for directions before a Circuit Judge on the next available date at this court with a time estimate of two hours.
38. I am not ordering a retrial of the fact-finding hearing at this stage. In my judgment, the correct course is for the matter to be listed before a Circuit Judge for directions for consideration, inter alia, of whether a fact-finding hearing is necessary by undertaking a proper analysis compliant with the guidance in *K v K* [2022] EWCA Civ 468 and Practice Direction 12J, the parameters of such a hearing, if necessary, and the appropriate interim child arrangements with reference to PD 12J.
39. I am alive to the fact, through the submissions of Mr Hepher, that there may be a way forward in this case which means that there need not be a complete rehearing of the fact-finding. That will be a matter for the Judge who hears this matter on the next occasion. I am satisfied that one of the clear issues that has arisen, not just in this case but in others, is the lack of judicial continuity ensuring that the key decisions made in the run up to a fact-finding hearing were made by different judges to the one who ultimately determines where the truth lies and what, subsequently, is best for the child

or children at the heart of the case. Indeed, one of the many significant sympathies I have for Deputy District Judge Kumar is that the matter came before her for fact-finding hearing having been previously case managed in such a way that led to directions such as there being no page limit to the bundle and there being over thirty live allegations at the start of the hearing. I do not in any way underestimate the significance of the difficulties faced by any judge embarking upon a fact-finding hearing in those circumstances. There must be robust and thorough case management decisions made in respect of both the necessity of, and the parameters of, fact-finding hearings in line with the clearest of authorities. Judicial continuity is extremely important in ensuring that fact-finding hearings are both case managed, and conducted, in the most efficient way. The next hearing must be listed as soon as possible, and the judge before whom it is listed must be able to list a fact-finding hearing, if one is deemed necessary, before themselves so that there is judicial continuity moving forwards. Sadly, the matter cannot be listed before me as I shall be transferring courts and will not be able to provide the judicial continuity which cases of this sort so clearly require.
