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Albion Chambers FAMILY TEAM NEWSLETTER

Giving voice to the vulnerable

I have recently acted for a father with serious mental-health difficulties. He has made several attempts on his life. The man is accused in care proceedings of attempting to kill his baby daughter by deliberate obstruction of her airways. The father denied the allegations in police interviews and in written statements to the court. Following an initial forensic psychiatric assessment, the father was assessed to be a "protected party" within the FPR 2010 r 2.3. In other words, he was a party who lacked capacity within the meaning of the 2005 Mental Capacity Act to conduct proceedings.

The Official Solicitor consented to act as the father's Guardian ad Litem. However just before the commencement of the fixture, and following treatment, the father was re-assessed by the consultant psychiatrist and said to now have capacity to conduct the proceedings. How best to receive his evidence in the light of a serious concern that the court process, including giving evidence to the court and being subjected to cross-examination, was likely to adversely impact on his mental health?

We sought clarification from the expert who confirmed in writing, having assessed the father, that giving evidence to the court in the normal way (or indeed by video link) was likely to have a deleterious impact on the father's mental health and wellbeing given his history of suicide attempts. (See Art 3 of the ECHR).

Witness intermediaries have been successfully used in the family jurisdiction but sometimes even with an intermediary the parents may not be able to give a very good account of themselves within the traditional court setting.

We argued that the father's evidence could and should be received by a carefully pre-recorded interview conducted by his team, *with or without the assistance of a mental-health processional*, at a neutral venue and away from the formal court setting. The aim would be to explore the allegations and the vulnerable person's responses and accounts. We also had in mind the comments of Baker J in *Re JS (a minor)* [2012] EWHC 137 that parents *"must have the fullest opportunity to take part in a hearing and the Court is likely to place considerable weight on the evidence and the impression it forms of them"*.

The Supreme Court decision in *Re A (a child) [2012]* UKSC 60 provides very helpful guidance in cases involving vulnerable witnesses where evidence given in the usual way is likely to impact upon their mental health.

I consider that the following principles were established in the Supreme Court's ruling:

(a) It does not follow in family proceedings that the person has to give evidence in person.

(b) There are many ways in which the witness' evidence could be received "without recourse to the normal method of courtroom confrontation".

(c) Family proceedings have long been more flexible than other proceedings in this respect.

(d) The court has power to receive and to react upon hearsay evidence.

(e) For example, it is commonplace for children to give their account in videotape conversations with specifically trained police officers or social workers.

(f) Such arrangements might be extended to other *vulnerable witnesses* including adult witnesses with mental health vulnerabilities.

(g) If giving oral evidence carries a health risk to the adult, questions can be put in a different way, and "the court may have to do its best with (their) recorded allegations".

(h) Such questioning "could be arranged in ways which did not involve face-to-face confrontation."

(i) It is not a requirement that other parties be present if a witness is questioned in this way.

(j) The court's only concern in family proceedings is to get at the truth. The object of the procedure is to enable witnesses to give their evidence in a way which best enables the court to assess its reliability. It is certainly not to compound any abuse which may have been suffered.

The above principles are in my view supportive of bold and imaginative steps (with the court's permission) by those representing vulnerable clients to ensure that their evidence is received and considered by the court and that the vulnerable participate in the process. These "special measures" are by no means problem free but there is potential injustice and unfairness in any forensic exercise which seeks to exclude the evidence of the vulnerable on the basis that the delivery or receipt of the evidence is not within the traditional setting.

The judicial task which requires the tribunal to consider the (*vulnerable*) person's demeanour in answering questions and the general impression formed by the court is fraught with difficulties because all of those matters are surely influenced by the very fact of the person's mental illness or vulnerability.

The argument that the court can come to a conclusion by undertaking, effectively, a paper exercise is unfair, may lead to unsafe findings and injustice. The vulnerable are entitled to take part and we must champion measures that make it possible for their voices to be heard.

Nkumbe Ekaney QC

Whose Care Order should it be anyway?

Public law proceedings issued in order to protect children cost the state vast sums of money. The heart of such applications in public law is the welfare of the child who is the subject of any such application. The courts are asked frequently, however, to adjudicate in arguments that arise when differing local authorities are unable to resolve between themselves who should pay for a particular child or family. The consequence of such lack of agreement between themselves is that even more public money is spent on litigation arising out of the interpretation of two subsections of the Children Act; section 31(8) and section 105(6). The litigation has focused on what should be a simple test to be applied in each case; a test to determine which Local Authority is designated "to pick up the bill" in the words of Lord Justice Ward in the case that summarises the law most recently; of *D (Local Authority responsibility)* 2012 EWCA Civ 627:

"We are finding it anything but simple".

The law

A Care Order places a child in the care of a designated local authority defined under section 31(8) Children Act 1989 as:

"(a) The authority within whose area the child is ordinarily resident; or

(b) Where the child does not reside in the area of a local authority, the authority within whose area any circumstances arose in consequence of which the order is being made."

(and then for the explanation of "ordinary residence" there is what I shall refer to in this article as the "disregard provision").

Section 105(6) of the Children Act 1989 states:

(6) In determining the "ordinary residence" of a child for any purpose of this Act, there shall be disregarded any period in which he lives in any place:

(a) which is a school or other institution;

(b) in accordance with the requirements of a Supervision Order under this Act or an order under [section 63(1) of the Powers of the Powers of Criminal Courts (Sentencing) Act 2000] (8); or

c) while he is being provided with accommodation by or on behalf of a local authority.

The above two sections have been the subject of a number of court decisions on a variety of different aspects.

The issue of the relevant date to determine "ordinary residence" was decided by Bracewell J in *Re BC (a minor) (Care Order: Appropriate Local Authority)* [1995] 3FCR 598, and although not followed in a number of subsequent decisions was then ultimately approved in the helpful case of *Northamptonshire County Council v Islington London Borough Council* [2001] Fam 364 when Lord Justice Thorpe commended the simplicity of the Bracewell approach. In other words, we look at "ordinary residence" preceding the period of disregard and deem it to continue without interruption. The court does *not* have to look at other circumstances during the period of disregard. Thorpe LJ saw section 31(8) as intended as a "simple test" to enable the court to make a quick decision about which authority picks up the responsibility of implementing the Care Plan:

"In summary, my view of these two interacting subsections is that they should be given that construction that achieves the result for which I conclude they were designed: that is a simple mechanism to determine the question of administration. If that involves a degree of artificiality and the import of legal fiction any misgivings can be met by recognising the limited purpose and effect of the court's function. After all, it must be assumed that all local authorities are equally competent, professional and committed in the discharge of responsibilities cast upon them by the making of a care order."

The same judge then developed the point and clarified it in the case of: *Re H (Care Order: Appropriate Local Authority)* [2003] EWCA Civ 1629 and concluded that section 105(6) would not apply when a child is placed with any persons to whom section 23(6) applied, namely:

- a parent;
- a parent with parental responsibility;
- a former residence holder;
- a relative, friend or other persons connected with the child;

because the child would not be "being provided with accommodation by or on behalf of a local authority" (whether or not the placement is under a Care Order).

Adopting the correct approach

An example of how to extract the principles set out in the case law on designated authority is found in the 2003 decision in the Family Decision of David Hershman QC (sitting as a Deputy High Court Judge; [2003] EWHC 2967 Fam) when the two relevant local authorities were the London Borough of Redbridge and Newport City Council. The facts in the case were relatively straightforward, with the mother moving from Redbridge to Newport shortly after the children had been placed with the mother under interim care orders. Redbridge argued that the mother had now settled in Newport, whilst Newport's argument was that as the proceedings had arisen in Redbridge then Redbridge should keep it. Simple facts; the issue was how to reach a simple decision.

The judge extracted six basic principles:

- "Ordinary residence" of child has to be determined. The relevant date is the time of the *hearing* (cf *Northants v Islington* cited above).
- The court must disregard any time the child is accommodated by a local authority in determining ordinary residence, i.e. "stopping the clock".
- Section 105(6) sets out the exceptions to "stopping the clock".
- Another exception will be "exceptional circumstances" (the Northants case and *Re C (A child) v Plymouth City Council* [2000] 1 FLR 881.
- If the court decides the child is not resident in any local authority, it will apply section 31(8)(6).
- Section 31(8)(6) means the circumstances that take the case over the section 31 threshold. At this stage there is no consideration of any exceptional circumstances, or intervening events.

The outcome of the case was that Redbridge was the designated authority for the interim care orders and the judge concluded that the designation could be varied at a later date. If the children had acquired "ordinary residence" in the new authority area (Newport) by the time of the Final Hearing, it was open to the court to designate Newport in the Final Orders.

In the case of *Re D* [2012] EWCA Civ 627 (cited above) the Court of Appeal wrestled again with simple facts. The mother herself was in the care of Surrey County Council at the time of the hearing but had lived in Kent for a number of years, and her child had *never* lived in Surrey. At first instance, in the Family Proceedings Court, the judge decided section 105(6) *did* apply to the mother but found that the exceptional circumstances meant that the responsibility lay with Kent. The County Court found on appeal that section 105(6) did not apply and Kent was the designated authority. When Kent County Council took the matter to the Court of Appeal, the appeal was dismissed by LJJs Ward and Elias for different reasons, with Stanley Burnton LJ dissenting. The judgments are worth reading for the contrasting approach taken by each of the judges to the construction of the two important subsections. "Anything but simple…"!

Louise Price

The Law Commission

'Matrimonial property, needs and agreements'

The Law Commission published its report on 'Matrimonial Property, Needs and Agreements' on 27 February 2014. The report dealt with three areas that currently cause many problems in financial remedies cases. These were, firstly, financial needs, secondly, marital property agreements and thirdly, how should the treatment of non-matrimonial and matrimonial property be differentiated. Interestingly, the Commission accepted that there were regional inconsistencies in the decisions of the courts – a fact that we have all known for some time.

In relation to financial needs, the Commission recommended that the Family Justice Council prepared guidance as to the meaning of financial needs, to encourage the courts to make orders that would enable the parties to make a transition to independence, to the extent that that was possible in the light of choices made within the marriage, the length of the marriage, the marital standard of living, the parties' expectation of a home, and their continuing shared responsibilities. A further recommendation was that the guidance be kept under review by the Family Justice Council and updated regularly. The Commission however did not believe that a wholesale reform of the law in relation to financial needs was essential.

Pre-nuptial or post-nuptial agreements or separation agreements were referred to in the Commission's report as 'marital property agreements'. The recommendations in relation to these agreements were the headline grabbing main feature of the report. The commission recommended that these agreements were able to become "Qualifying nuptial agreements" and potentially binding. This was a term used to refer to a marital property agreement, which was enforceable, providing certain conditions were met, without the need for the agreement to be scrutinised by the court in its discretionary jurisdiction. The Commission pointed out that such agreements were not available under the current law. The Commission however did recommend that it should not be possible to use a qualifying nuptial agreement to contract out of the provision for financial needs. The Commission further recommended that "financial needs" should rely on the meaning given in the existing law. The Commission recommended that qualifying nuptial agreements must be made by deed and that they must contain a statement signed by both parties stating that he or she understands that the agreement is a qualifying nuptial agreement and that the terms of the agreement remove the court's discretion to make financial provision orders, save in so far as the agreement leaves either party without provision for their financial needs. The Commission further recommended that qualifying nuptial agreements should be invalid if made less than 28 days in advance of the marriage or civil partnership. Certain conditions would have to be met for a marital property agreement to become a qualifying nuptial agreement including disclosure and independent legal advice being received by each of the parties. Interestingly, the Commission did not envisage that qualifying nuptial agreements would be commonplace.

Despite my personal involvement in the recommendations made by the FLBA to the Commission during the consultation period regarding the treatment of non-matrimonial property, the Commission stated that it was too difficult to obtain consensus on this subject from the consultees, for them to come to any firm conclusions. The recommendation of the Commission was therefore no recommendation and we are therefore no further forward regarding non-matrimonial property and ring-fencing arguments. I personally believe that this is a missed opportunity though accept it is a difficult area to reach consensus on.

In summary, it was always going to be difficult to identify financial needs and perhaps it is dangerous to become too formulaic (they themselves cite the Child Support calculation formula), but some further guidance would be helpful and well received. I am left feeling that the introduction of the qualifying nuptial agreements is not so very far removed from how the court exercises it's discretion regarding this sort of agreement at present. I therefore do not believe that it is a significant step forward; by and large we are there already. If there is a disappointment with the report, it is the Commission's sidestepping of the significant issue of non-matrimonial property, which is an argument that occurs in so, or perhaps too, many cases. For certainty for the client, and us as advisers, let us hope that the Commission revisit this area before too long.

Deborah Dinan-Hayward

Editorial

Welcome to the Spring edition of the Family Team's newsletter. We are all extremely pleased to welcome to chambers Stephen Roberts, Fiona Farquhar, Joanna Lucas and Alice Darian. The attributes they will bring to the family team needs no embellishment, they are all respected practitioners with considerable expertise. The addition of their exceptional talent further strengthens the family team which now stands at twenty-nine members including two silks, Nkumbe Ekaney QC and Claire Wills-Goldingham QC. Enjoy the newsletter! Ed.

Benjamin Jenkins

The Court of Protection

The principle of beneficence, transparency (and Christopher Booker)

I don't imagine that many readers of this Newsletter are avid followers of Christopher Booker, but it's possible that a few might have come across his thoughtful, considered, accurate and intellectually rigorous Daily Telegraph columns. He has educated his readers about forced adoption[1], secret family courts and now how the "mysterious and sinister" Court of Protection[2] was "used" by social workers who obtained a "questionable psychiatrist's report" in a way that prompted Mr Booker to write a column on 15 February this year under the headline

"Will this OAP be robbed of her house and money?"

In order to promote and consolidate the Zeitgeist (transparency, openness, sharing of important information about how justice works) the seekers after truth who consume Mr Booker's writings learnt that Ian Josephs (who's more than just an adoption and child welfare expert) had found that the said OAP was "capable of carrying on a sensible conversation" and had therefore arranged for her to be assessed by "an eminent psychologist, Dr Ludwig Lowenstein". Dr L, who is indeed eminent (albeit as an educational psychologist with no known expertise in the psychology of old age or of dementia), not only assessed the lady in question but prepared a report that found its way into a hearing before Mrs Justice Russell on 17 and 18 February.

Mr Booker's article reported that, after learning of Dr Lowenstein's offer to attend the hearing, "the council apparently withdrew its attempt to persuade the court that the old lady lacks 'capacity'." In fact, the hearing proceeded and Russell J had no difficulty in finding that the "old lady" lacked capacity. She preferred the evidence of Dr Andrew Barker, described by District Judge Eldergill in the case mentioned below as "a well-known and highly-respected expert in older-age psychiatry", but described by Mr Booker as "the council psychiatrist", to that of Dr Lowenstein. Of the latter, Russell J commented as follows: "The evidence of Dr Lowenstein was undermined by his having no instructions; he said in oral evidence that he deduced them from what was said to him by C. G (the "old lady") was brought to see him at his place of work by C. How this report came into being is a matter of concern; it appears to have been instigated by C, who paid for it; where she got the funds to pay for it is not known. C was given Dr Lowenstein's name by a third party active in family rights campaigns." Having dealt with the strange circumstance of C, a party to the proceedings, having been introduced to Dr L as being G's niece (she isn't; she had been G's lodger, rent-free, after meeting her "through a friend who had carried out some tasks to help G" some time in 2012) Russell J went on to comment on the fact that Dr L "has no experience in the elderly", dismissed the relevance of his assertion that in the tests he had administered G was "good for a person of 94" and pointed out that "When he was asked about capacity he seemed to confuse the capacity to express oneself, particularly as to likes and dislikes, with the capacity to make decisions." Still, good job he was there to counter the council psychiatrist.

Mr Booker, no doubt in the interests of transparency and so on, ended his article as follows: "It will be interesting to see whether the social workers persist in their campaign to evict her and her family from their home, and to assume full control over her finances. In due course, I hope to report on the outcome." I hope he does, too. Maybe the Telegraph should carry an accurate summary of the judgment and an apology for Mr Booker's article; the judgment is, after all, a public document: [2014] EWHC 485 (COP).

Maybe, just maybe, the overdue move to transparency will enable a light to be shone on what really happens in the Court of Protection and in the Family Court (as it will soon be) whilst at the same time putting an end to the peddling of half-truths by people who no doubt see themselves as campaigners for justice but whose vision is filtered through a distorting prism of prejudice and misinformation.

Meanwhile, in another part of the forest, a fine and wholly transparent example of what the Court of Protection actually does, why it does it and (crucially) for whom it does it. I had intended to try to summarise the judgment of District Judge Eldergill in *Westminster City Council v Manuela Sykes* COP 1238388T, but on reflection I think any attempt at a summary would fail to do justice to a judgment that is a model of its kind.

Anybody who is new to the workings of the Court of Protection, particularly in welfare (as opposed to finance) cases, will find in this judgment an organised and lucid exposition of the relevant legal framework, including Article 5(1) ECHR, the principles enshrined in the Mental Capacity Act 2005 and its associated Codes of Practice, the Deprivation of Liberty Safeguards (DOLS), how to go about determining what is in a person's best interests and, last but definitely not least, consideration of issues around press attendance and reporting[3].

In brief, some of the good things that emerge from this case are:

1. Westminster brought the proceedings under s21A Mental Capacity Act 2005, seeking a review of the standard authorisation. That route to court ensured that Ms Sykes was entitled to non-means tested public funding. (The more usual application for a best interests determination does not have that benefit).

2. The judge explicitly recognised that there is "no solution" when trying to choose between a reluctant and unhappy existence in a care home and a potentially unsafe life at home (Ms Sykes' short term memory was less than one minute).

3. The court operates "the principle of beneficence, which asserts an obligation to help others further their important and legitimate interests. In this important sense the judge, no less than the local authority, is her servant, not her master."

4. "The importance of individual liberty is of the same fundamental importance to incapacitated people who still have clear wishes and preferences about where and how they live as it is for those who remain able to make capacitous decisions."

5. For reasons set out at pages 29 to 31 of the judgment, a trial period at home was found to be in Ms Sykes' best interests – in spite of the advice of the local authority and of Dr Barker. As the judge put it: "If not now, when? Ms Sykes is 89 years old and her life is drawing to a close. It is her life. Several last months of freedom in one's own home at the end of one's life is worth having for many people with serious progressive illness, even if it comes at the cost of some distress."

6. The court was able to deduce from Ms Sykes' history that her wish would have been for this case, and her name, to be fully in the public domain.

Westminster v Sykes creates no legal precedent, but it illuminates a way of thinking about liberty and welfare that I, for one, hope will contribute towards a continuing move away from the remnants of rigid paternalism and towards a consistently applied recognition that P is a subject, not an object. Manuela Sykes, however, might turn out to have been a special case in more ways than one. She was herself a fighter, and some of her views and wishes were clear from her living will and her LPA. She was lucky in her litigation friend (and in her solicitor and counsel). Westminster made the right application and appear to have conducted the hearing in the right spirit. And of course the Court of Protection was somewhat less mysterious and sinister than Mr Booker might have anticipated.

But in the end, sadly, it might all come down to money – the judge explicitly recognised "this court cannot direct the local authority (or the NHS) to provide services which they have assessed that Ms S does not require or which they have decided at their reasonable discretion not to provide." We really are "all in it together," or at least we (but not "them") will be one day.

1. A favourite topic of his friend, Ian Josephs – have a look at www.forced-adoption.com to learn about how "Every year thousands of parents who have committed no crimes are ruthlessly punished when they have their children removed for long term fostering or forced adoption by strangers."

2. Mr Booker tells us that the "workings" of the

Court of Protection are "even more secretive than those involving the forced removal of children."

3. It is important to note the District Judge's praise for the press: "The press's involvement has been thoughtful and sensitive. Their balanced advice (to the court) about the advantages and disadvantages of different ways of reporting the relevant issues and facts has been appreciated." It can be done.

4. Those of us who do care cases will be thrilled to see a reference to conducting a balance sheet exercise.

Stuart Fuller

Vince v Wyatt

Abuse of Process

Those with a background in civil litigation will know that under the Civil Procedure Rules, there are provisions for striking out a statement of case. *Vince v Wyatt* [2013] EWCA Civ 495, concerned an application to strike out a statement of case in a financial remedies application. The facts of the case were unusual and interesting. The parties got married when H was 20 and W was 22. That was in 1981. They both "chose the New-Age Traveller Creed". At this point the court chose to recite that they had been polytechnic students. I'm not sure if the court thought that this made the choice of creed more likely. When they married the parties had nothing. They had a child called Dane in 1981. They separated in 1984. W moved to Lowestoft and lived on state benefits. H lived in Bath in an old ambulance. There had clearly been some divorce proceedings, however, all that survived was the decree absolute from 1992. The court described H as "an improbable candidate for affluence." However, he started a business in 1995. He made a wind turbine to generate electricity for his caravan (having presumably abandoned the ambulance). He became successful in the "wind industry". His company was called Ecotricity. He was by the time of the hearing worth millions of pounds. The case was issued in Gloucester but was then transferred to the Principal Registry and then elevated to the High Court. There was a final hearing listed, but a few days before, H issued an application to strike out W's application. The application for strike out was brought under FPR rule 4.4.

Before the judge at first instance H relied primarily on 4.4(1)(b),which related to abuse of process. His argument was rejected. On appeal H's new counsel relied on the other part 4.4(1)(a), which relates to W's statement of case disclosing no reasonable ground for bringing or defending the action. Thorpe LJ noted that rule 4.4 was intended to ensure that the court's power to strike out in financial remedies proceedings "mirrored" the power in civil proceedings. The judge in the court below had approached his task too narrowly. Instead he should have had regard to:

"...all relevant considerations within the history and exercise his case management powers not just to protect against [prejudice] but also to husband the resources of the court."

Thorpe LJ cited the well-known case of *Crossley v Crossley* (the case which was the origin of the phrase "magnetic importance") where Bennett J refused to allow a Wife's claim to go to trial in the face of a clear prenuptial agreement.

So the message to litigators appears to be that if your argument based on fairness to your client can be buttressed by an argument based on the fairness to other litigants and the scarce resources of the court then you are more likely to gain traction. Of course it may be more attractive to plead your self-interested argument, cite the authorities about other interests and leave the judge to rely on them as a secondary point for ruling in your favour. In a case involving significant assets it may be a bridge too far for an advocate to convincingly feign concern about the needs of other litigants.

Returning to *Vince v Wyatt*, Thorpe LJ concluded by ruling that H was not W's insurer against life's eventualities. His Lordship did not however, flesh out why the Husband's appeal was to be successful, that was left to Jackson LJ. His Lordship provided some extra insight in relation to the comparison with the Civil Procedure Rules. He noted that under the Civil Procedure Rules there is provision in rule 24.2 for summary judgment, whereas there is no equivalent provision within the FPR. His Lordship opined that that was perhaps unfortunate. (We might speculate that the draftsman thought it inappropriate to include such a power where the court was dealing with parties' housing and income needs as opposed to e.g. a personal injury claim).

His Lordship said that the solution in the case lay in FPR 4.4(1)(b), the abuse of process section. He noted that unlike in civil claims there was no limitation period for actions. His Lordship held:

"...the court should not allow either party to a former marriage to be harassed by claims for financial relief which are (a) issued many years after the divorce and (b) have no real prospect of success. It must be an abuse of the court's process to bring such proceedings."

His Lordship noted that the case at hand was a classic example of such abuse. Even if W was successful on all disputed issues there was no reasonable prospect that she would succeed on her claim.

It was also underlined that an application to strike out under 4.4(1)(b) will only succeed in "rare and exceptional cases":

"Under no circumstances should parties start making applications to strike out, merely on the grounds that the other side's case is weak or unlikely to succeed. The court will take a very dim view of any such conduct and may well order the applicant to pay the costs of the application on an indemnity basis."

The effect of this would appear to be that if a judge confronts an applicant with a threat to strike out their case, the advocate's first response could be: "but judge even if you take the view that my case is weak or unlikely to succeed, you shouldn't strike it out."

So whilst the court was anxious to make the point about the need to husband scarce resources, it also stated that this provision can only be used to husband those resources in rare and exceptional cases. In effect the court has declined to import the power to award summary judgment into financial remedy proceedings.

As a further example of strike out, in the case of *T v M* [2013] EWHC 1585, Coleridge J, affirmed a District Judge's decision to strike out an application to vary a maintenance order which was made only a short time after the original order was made.

Leave has now been granted for W to appeal to the Supreme Court. The appeal will be heard in December.

Conclusions

- There is in theory a power to strike out an application for financial remedies;
- The power will only be exercised in rare and exceptional circumstances;
- Delay along with other factors might found an application;
- The theme within the case law for husbanding the court's scarce resources continue;
- If such an application is brought and lost, the loser is at risk on costs.

David Chidgey

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