
CANADA / JUDGMENT

D.A.M. v. D.M.T.

2013 BCSC 357

COURT

Supreme Court of British Columbia

DECIDED

16 January 2013

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2013 BCSC 357 D.A.M. v. D.M.T.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

D.A.M. v. D.M.T.,

2013 BCSC 357

Date: 20130116

Docket: E113896

Registry: Vancouver

Between:

D.A.M.

Claimant

And

D.M.T.

Respondent

Before: The Honourable Madam Justice H. Holmes

(via telephone conference)

Oral Reasons for Judgment

Counsel for the Claimant:

Carey Linde

Counsel for the Respondent:

Jack Hittrich

Place and Date of Hearing:

Vancouver, B.C.

January 11, 2013

Place and Date of Judgment:

Vancouver, B.C.

January 16, 2013

THE APPLICATIONS

- [1] The parties have two children: a daughter R., who is nine years of age, and a son R., who is six years of age.
- [2] At the beginning of the hearing, the parties agreed to an interim order setting aside the order Master Tokarek made on January 3, 2013 at the father's request on a without notice basis. Under that order, the children were moved from the mother's care to live with a relative and the relative's husband until a further determination by the Court on notice to the mother. The order restrained the mother from any contact with the children.
- [3] The trial concerning the children's custody and other issues is scheduled for January 28, 2013 for two weeks. The parties' cross-applications relate to issues concerning the children between now and the trial.
- [4] The parties agreed that the hearing before me should focus on the following:
 - (1) The father's application for sole interim custody and guardianship of the children and their primary care, or, alternatively, that the children remain with the relative's family until the trial (because with the agreed setting aside of Master Tokarek's order, interim custody, guardianship, and care of the children reverts to the mother absent a different order); and
 - (2) The mother's application that either Dr. Herve or Dr. Aruda interview the children to conduct a forensic investigation about alleged sexual abuse by the father and alleged coaching by the mother.
- [5] At the end of the hearing last Friday, I reserved judgment until this morning. To provide for the children's care in the meantime, I ordered that the children remain with the relative on terms substantially the same as those in Master Tokarek's then-vacated order. I also ordered that neither party have access to or contact with the children until further order.

BACKGROUND

- [6] The parties married in 1998 in England, and the children were born there in 2003 and 2006. The family moved to Canada in 2008.

- [7] The parties separated in the spring of 2009. Things went reasonably well until the spring of 2011. Until then, the parties each had substantial time each week with the children, and no significant issues arose about the arrangement or the children's care.
- [8] The parties' respective positions concerning the events from May 2011 and onwards are set out in Exhibit 1 ("History of [the father]") and Exhibit 2 ("Outline of Basic Key Arguments of Respondent Mother"), which by agreement were filed to efficiently set out each party's position concerning the facts. The statements of facts in these documents are not to be taken as agreed between the parties. Nor do they of themselves provide evidence of the stated facts.
- [9] The parties' versions of the facts differ markedly as of May 2011 when, it is agreed, and I find, the children first made comments to the mother or in her presence which gave her extreme concern that the father had sexually abused them. Later comments gave the mother the additional concerns that the father threatened the children and inflicted emotional and physical abuse on them, as well as sexual abuse.
- [10] The father agrees that the children made the numerous comments reporting instances of inappropriate conduct on his part, including sexual and other abuse. Abundant evidence of third parties, including family friends, and psychological, counselling, and teaching professionals, indicates that the children made these comments from May 2011 and onwards, and there can be no doubt that they did, or that they acted with increasing or at least sustained hostility toward the father.
- [11] The disputed issue is whether the children made these comments because the inappropriate conduct or abuse actually took place as they reported it, or for some other reason.
- [12] The father took the position, and maintains it now, that the mother misinterpreted what the children said (in the May 2011 comments which initiated the mother's concerns) about his acknowledged use of manuka honey on their private parts as a recognized medicinal remedy for soreness or rash. He says that the mother has coached the children into distorting and amplifying their descriptions of his use of honey as a remedy, and into manufacturing additional allegations, and that she has seriously alienated the children from him as a result.
- [13] Throughout, the mother has vigorously maintained that the children's disclosures reveal conduct that puts them at high risk, and must be taken very seriously.
- [14] Applications in the Provincial Court based on the children's reports began in late May 2011 and continued. By an order of the Provincial Court made in late May or in June 2011, the mother has interim sole guardianship and interim sole custody of the children. By an order on July 12, 2011, the father's limited access to the children is to be supervised, as it has been ever since.

- [15] The mother pursued the allegations with the Ministry and with several RCMP detachments through 2011 and 2012. Police investigations were undertaken and closed without charges against the father. The Ministry concluded that there were no child protection concerns, and continues in that view now.
- [16] The mother's frustration grew, with what she perceived as a lack of response to the children's disclosures, and led her to press the police and the Ministry to the point that the latter questioned her mental or emotional stability (and has continuing concerns in that area). The police advised that for her to renew her complaints at further police detachments would amount to public mischief.
- [17] By the father's position, the history, which I have greatly abbreviated, shows the mother to be unreasonable and possibly unstable in her pursuit of the allegations.
- [18] By the mother's position, her situation is almost identical to that of the mother in *J.P. v. B.G.*, 2012 BCSC 938, who the Ministry and the police considered unstable for pursuing sexual abuse allegations against the father. After the trial, Walker J. concluded that it was the Ministry and the police who were mistaken, and that the father had indeed sexually abused the children.
- [19] On December 24, 2012, psychologist Dr. Krywaniuk delivered his extensive s. 15 report. In brief summary, he expressed his opinion that the allegations of sexual abuse by the father are without support, and that the children are alienated from their father. He described the children as in unhealthy situations and at risk for future difficulties. In the complex and challenging circumstances he identified, he recommended the admittedly drastic step of reversing the custody and guardianship of the children, and denying the mother access to the children for about six months. Some of the key portions of Dr. Krywaniuk's opinion and recommendations read as follows:

OPINION AND RECOMMENDATIONS

On the basis of the information I have, particularly the investigation by the RCMP and my initial interviews, as described elsewhere in my report, I am not able to support the allegations that the children have been sexually abused by the father. I think it likely that the initial statements the children made were misinterpreted and that, by means that are not entirely clear to me, the children began making statements that were interpreted as indicating sexual abuse. Some of the statements, for example that the father inserted a knife into [the daughter's] vagina causing it to bleed, are improbable and in that case was not supported by medical investigations. I would note that the children continued to make what seems like inconsistent and escalating descriptions of the abuse while in therapy and in the care of the mother. I would note that therapeutic situations are by nature supportive of the client and do not satisfy the requirements of a forensic evaluation. The children's attitude towards the father are entirely and unusually negative and apparently underwent a very rapid metamorphosis shortly after a prolonged visit to Whistler, in the presence of the father's sister, that apparently went very well. I noted that the children tend to

put a negative interpretation of even benign behaviors and seemed very closely aligned with their mother in this regard. [The daughter] tends to speak both for herself and [the son] and frequently uses the word "we" when describing attitudes towards her father. This indicates to me that she is taking on the role of an 'agent', which also is a mechanism within the alienating process.

Quite clearly, these children are alienated from their father and, in my experience; the pattern described above is an indication of an alienation process. It appears unlikely to me that the level of animosity and negativism demonstrated by the children at their age could exist without reinforcement and support. In my experience, this is unlikely to occur without the awareness of the caregiver or parent. There is perhaps a small probability that it results from a combination of misinterpretations coupled with inadvertent reinforcement. However, given the pattern described above, it is difficult to avoid the conclusion that the children's allegations come from outside their own experiences and that they have been implanted or magnified in some manner while in the mother's care. This may be something the court will ultimately need to determine. In any event, the children are quite clearly aligned with their mother in this regard although it appears likely to me that their anxiety, particular that of [the daughter], results from being in the middle of this uncomfortable situation which she has been made to feel is caused by her father who represents a danger to them. It may also be that the mother acts or responds in a fashion that makes them believe she is in danger as well, which would likely reinforce the sense of danger that the children have.

[20] Dr. Krywaniuk's report provided the basis for Master Tokarek's ex parte order on January 3, 2013, which removed the children to the relative's interim care.

DISCUSSION

[21] The parties agree that the best interests of the children must govern the determination of these applications.

[22] The parties also agree that, in the consideration of the children's best interests, courts rarely change the custodial status quo in the short period before a trial.

[23] The mother submits that the court should not gamble by departing from the status quo that applied for approximately two years under the order giving her interim custody and guardianship. The children's disclosures are acknowledged, and they are disturbing. The mother submits that she has no reason to coach the children into false allegations or to alienate the children from their father, and, indeed, actively promoted the children's relationship with their father until the May 2011 disclosures. She submits that there is no compelling evidence that the children's mental health will be at risk if they remain in her care.

[24] The main difficulty with the mother's position, as it relates to the children's situation over the relatively short-term period between now and the trial, is that the evidence does indicate that the children are suffering. The evidence makes abundantly clear that -- whether for the reasons the mother alleges or for other reasons -- the children are anxious and stressed, and

have been so for some time despite extensive counselling. That they are anxious and stressed is not surprising, given the escalating seriousness of the allegations they are making, and their apparently growing -- or at least enduring -- and demonstrated hostility toward their father.

- [25] Also, if Dr. Krywaniuk's assessment is correct and his recommendations sound, the children are at risk of longer-term harm to their welfare, as well as their general and psychological development:

... in situations where there is alienation at the level described, the issue of custody and access becomes extremely challenging. Children who are alienated to this extent, which include [the daughter and son], are generally deemed to be in unhealthy situations and are felt to be at risk for future difficulties. These situations are considered to be harmful to their welfare and general and psychological development. Quite apart from the fact that they have an extremely negative perception of their father, the alienation is likely to create a negative template for their own future relationships and parenting attitudes. These children have been in therapy for a considerable period of time but it seems that [their] issues have not resolved and that their behavior towards their father has not improved. In the current circumstances, it seems unlikely to do so.

- [26] In Dr. Krywaniuk's opinion, the most effective way of repairing the children's relationship with their father and attempting to avoid long-term harm to the children's own development, is to transfer custody away from the alienating parent, reducing the trauma in the transfer by an interim period with a familiar third party with whom the children feel safe. The January 3 order has in effect begun that transitional process, based on Dr. Krywaniuk's opinions and recommendations.

- [27] It is of course entirely possible that the trial judge will not accept Dr. Krywaniuk's opinions and recommendations, or will determine for another reason at some stage that the children should return to live with the mother. If that happens, the children will have needlessly spent several weeks away from their mother. In my view, the resulting harm -- and I recognize that there would be some -- would be very significantly less than the harm that would follow if Dr. Krywaniuk's opinions and recommendations are well-founded, but the children are now returned to the mother's care pending the trial.

- [28] The evidence on this application discloses no real basis for rejecting Dr. Krywaniuk's opinions and recommendations, and includes much to support them. In particular, I cannot agree with the mother that Dr. Krywaniuk in his report overlooks or pays no heed to serious disclosures the children made to several people, including counsellors Dr. Shred and Ms. Marcil. Dr. Krywaniuk writes that he spoke to each of those counsellors, and he mentions in several portions of his report many of the disclosures they each received and passed on to others.

- [29] The mother expresses concern about the suitability of the relative's home for the children's interim care. In her affidavit sworn on January 6, 2013, she says the following:
113. The Court needs to be aware that [the relative] and her home is not neutral. [The relative] and her family had only met the children and I on one occasion prior to the disclosures. Except for the one hour supervised visits, the children have no relationship or bond with her or her family.
114. [The relative] has clearly taken [the father's] side by telling the children that the abuse by their father did not occur. [The relative] and her husband [...] have told the children that they have to call their father "daddy" and they can not call him [by his given name].
115. [The children] must be traumatized by being ripped from the home that they have always known. The message to them is that they are being punished for speaking up about abuse.
116. [The relative] told my mother a few years ago, that her husband [...] was convicted in Alberta of physically abusing a child.
117. I fear for the emotional and physical safety of my children. They are being punished for speaking the truth. Are they now going to be scared into silence?
- [30] I have considered these concerns, and find most of them to be over-stated or unsupported by the evidence. The specific words or conduct to which the mother refers carry somewhat different connotations than those the mother implies when considered in light of other evidence in the application. Also, the evidence indicates that the children are reasonably comfortable staying with the relative's family, despite the fact that they did not have a long or a close relationship with them before January 3. Ladona Pinder, a child protection worker with the Ministry who has the current responsibility for this file, testified in the hearing that the relative's family advised that the children had trouble settling when they first arrived after the January 3 order, but that things have improved over the week, and the children are settling much better. The children continue to go to their normal school.
- [31] The children's situation is far from ideal. However, in my view, for the children to continue with the relative's family best protects them in the short period until the trial from the potentially significant short- and longer-term harm which could result if they were to be returned to the care of their mother in accordance with the order made approximately two years ago granting her interim custody.
- [32] With the trial issues as yet unresolved, it is not in my view in the children's interests to complete the transfer of custody Dr. Krywaniuk envisioned by placing the children in the father's interim care.
- [33] The children will therefore remain with the relative's family pending the trial, on terms analogous to those in Master Tokarek's order (now vacated) except that the parties will not be required to remain at least one kilometre away from the children's location. I understand that the mother lives within that distance.

- [34] I am not persuaded that the children should be subject to forensic interview by either Dr. Herve or Dr. Aruda, as the mother requests, in the short period until the trial. Dr. Krywaniuk conducted an extensive examination of the background and the allegations, and interviewed the children and others. His report was issued only very recently. As I have already indicated, I am not persuaded that he failed to consider serious allegations the children made to Dr. Shred, Ms. Marcil, and others.
- [35] The children have been interviewed or questioned about their allegations multiple times. On almost all the evidence, the children are stressed and anxious in relation to these allegations, despite sexual abuse counselling. It must be obvious to the children that their residence has changed (as of January 3) because of "the court case" about which the daughter is reported to often ask the relative's family. A further forensic interview about their allegations would run the risk of drawing the children still further into the parties' dispute.
- [36] For related reasons, I would continue the order I made at the end of the hearing on January 11, 2013, that neither party have access to the children until further order of the court. Addressing one of the alternatives for reducing the children's anxiety, at least on a temporary basis, by reducing or eliminating access by the father, Dr. Krywaniuk recognized a risk of sending "the wrong message" to the children, and reinforcing or justifying "the unwarranted and negative perception they have of him". Instead, he recommended that the children's relationship with their father be repaired and rejuvenated in the way I have briefly explained earlier. In my view, similar concerns about sending the wrong message to the children may apply if, during the interim period in which they are with the relative's family, one parent has access and the other does not. This concern arises in part because the outcome of the trial is unknown.
- [37] On the evidence, and given the children's current situation, their interests are best protected by preserving the situation which came into effect on January 3 under Master Tokarek's order, and by effectively insulating the children from the parties, each of whom, by the position of the other party, places the children at very great risk.

CONCLUSION

- [38] The children will remain in the care of the relative pending further order of the court.
- [39] The mother's application for an order for a forensic interview of the children by Dr. Herve or Dr. Aruda before the trial is denied.
- [40] Neither party will have access to or contact with the children until further order of the Court.

FURTHER CONSIDERATION

- [41] Now, on that last point -- and I recognize that is a drastic order, even over the interim -- I have in mind, and I would like counsel's submissions on this, asking Dr. Krywaniuk to make a recommendation about whether it would be in the children's best interest for one or both parents to have some form of access or contact over the interim period, and if it would be, how that access or contact might best be achieved. I am thinking about the period between now and the trial, but Dr. Krywaniuk might be asked to comment for a slightly longer period since the trial judge may not be in a position immediately, on embarking on the trial, to assess whether some revision to the order I have already made would be appropriate.
- [42] Do counsel have any submissions on my thoughts of asking Dr. Krywaniuk for such a recommendation?
- [43] MR. LINDE: Good idea.
- [44] THE COURT: I am having trouble hearing. You're a bit distant, whoever that was.
- [45] MR. LINDE: It's Carey Linde. I think it's a laudable idea.
- [46] MR. HITTRICH: I don't think we can take a position one way or the other at this point. I would have to reflect on it, but I mean there is certainly no harm in having more evidence.
- [47] THE COURT: [Indiscernible/overlapping speakers/teleconference] Mr. Hittrich, I do need to know, because obviously time is moving on. If I am to ask Dr. Krywaniuk I think I need to do it immediately.
- [48] MR. HITTRICH: We don't take an objection to it.
- [49] THE COURT: All right. Thank you. Then it will be part of my order that Dr. Krywaniuk be asked to supplement his report by giving his opinion about whether it is in the children's best interests for them to have some form of contact or access with one or both of their parents between now and either the start of the trial on January 14th or the approximate conclusion of the trial on January 28th - I'm sorry, I've got those dates totally wrong - the start of the trial January 28th or the approximate conclusion of the trial two weeks later. I would ask Dr. Krywaniuk to indicate, if he is of the opinion that some form of access or contact is appropriate, how that might best be achieved.
- [50] Anything further?
- [51] MR. LINDE: Yes. It's Carey Linde here. I have one point I want to raise.
- [52] THE COURT: Mr. Linde, I need to be able to hear you more clearly.
- [53] MR. LINDE: I'm not sure where I should be speaking. Just hold on a second. How is that now?
- [54] THE COURT: Much better, thank you.

- [55] MR. LINDE: Okay. My client is getting reports back the children are being approached by children in their class, saying that their mom is wishing them well, various messages from mom. I don't know how -- where they are coming through, how that is happening, but I would ask that there be some comment here that that is inappropriate. It looks as if the parents of some of the classmates are having their children speak to the children here.
- [56] THE COURT: Thank you. Mr. Hittrich?
- [57] MR. HITTRICH: I think it is a situation where you have got young children who are simply talking, that there is really no reason to believe that communication with other school children is going to have a significant impact one way or the other for the children. So I don't see how that can be a significant issue. The mother has, to the best of my knowledge, not communicated indirectly with the children in any way. She has had reports from a mother who has a child, and that is disclosed in the affidavit materials, but she has not sent any messages back. So we don't see this as an issue and there is no reason to believe that this is having an impact one way or the other on the children.
- [58] THE COURT: Well, the question of whether it is having an impact on the children is not for your client to assess. The issue is whether she is sending messages, albeit of goodwill, to the children through others. If she is, she must stop. That is as much as I will say.
- [59] MR. HITTRICH: Certainly. My client is in the courtroom and she will certainly follow any recommendation or order or direction from the court.
- [60] THE COURT: Thank you. Anything further?
- [61] MR. LINDE: Could I ask that costs be in the cause?
- [62] THE COURT: Any objection, Mr. Hittrich?
- [63] MR. HITTRICH: Well, I don't think it is really necessary to deal with that at this point. The trial is going to be a lengthy trial, complex, and I don't think it's necessary to deal with that today.
- [64] THE COURT: Well, what would the other alternative be?
- [65] MR. HITTRICH: I mean it's usually costs in the cause, but I think the trial judge is maybe in a better position to assess all that. I mean it may be that the trial judge has a different view then and may decide to award costs vis-à-vis this application in a different format, notwithstanding the final outcome. So although I guess the trial judge can always vary the -- I think the trial judge has that discretion, I'm not 100 percent sure. I just think this is a very, very complex case with many different factors and nuances and it's just really better for the trial judge to deal with issues of costs.
- [66] THE COURT: All right. Anything further on that, Mr. Linde?
- [67] MR. LINDE: No.

- [68] THE COURT: I agree with Mr. Hittrich and I will make no order regarding costs. That will be for the trial judge to determine on a fuller body of evidence. Anything else?
- [69] MR. HITTRICH: No, that's it. Thank you.
- [70] THE COURT: Now, I have asked Dr. Krywaniuk to make a recommendation. I think it would be useful to him to have the reasons I have just given, so Madam Registrar, could you order those on the most rush basis, please.
- [71] THE CLERK: Yes, My Lady.
- [72] THE COURT: Thank you. And how will my recommendation be conveyed to Dr. Krywaniuk?
- [73] MR. HITTRICH: My Lady, I intend to talk to Dr. Krywaniuk shortly, because there is a scheduling problem. We have subpoenaed Dr. Krywaniuk for the beginning of the trial. He has indicated that he is going to be leaving on holidays to Thailand on Monday evening, the 28th of January. So there is that issue, that he is actually not going to be here for the duration of the trial, and Your Ladyship should be aware of that.
- [74] MR. LINDE: It's Carey Linde here. I would write him a letter and a copy to my client -- I mean to my friend here, just explaining what you have asked for.
- [75] THE COURT: And you will do that immediately? If he is leaving on Monday, the 20th --
- [76] MR. HITTRICH: The 28th.
- [77] MR. LINDE: I'll do it today.
- [78] THE COURT: Monday isn't -- sorry, what did you say?
- [79] MR. HITTRICH: My Lady, Dr. Krywaniuk has indicated to me that he is leaving on the first day of the trial.
- [80] THE COURT: Monday, the 28th.
- [81] MR. HITTRICH: That's correct, in the evening. He is going to Thailand apparently and he won't be back until after the conclusion of the trial. Now, we are obviously --
- [82] THE COURT: You have a trial management conference coming up.
- [83] MR. HITTRICH: We do, actually it is today --
- [84] MR. LINDE: In an hour.
- [85] MR. HITTRICH: -- in an hour.
- [86] THE COURT: All right. So that is obviously something you can address there. I don't need to --
- [87] MR. HITTRICH: No.
- [88] THE COURT: -- try to help with that.

- [89] Now, if Dr. Krywaniuk is able to produce a recommendation quickly you will need to appear back before me or you may wish to. How might that be achieved?
- [90] MR. LINDE: I guess we can do it by telephone depending on Your Ladyship's availability. I guess what I'm sort of thinking here is that I wouldn't be surprised if Dr. Krywaniuk's view will be that Dad should have some access, although -- okay, let me just recalibrate that because of course Dr. Krywaniuk has not yet read Your Ladyship's reasons, so. I suspect that Dr. Krywaniuk is -- no, I'm not going to say. The bottom line is we can always appear. I suspect if Dr. Krywaniuk's recommendation is that there should be some access to father and not to mother, my friend is going to contact the registry and bring on an application. If the recommendation is that there should be no access to either parent, then obviously we are not going to be bothering Your Ladyship. If the recommendation is that both parties have supervised access, we might even have a consent on that, I don't know, but in any event I think we can contact Your Ladyship through the registry. I don't know if Your Ladyship is --
- [91] THE COURT: All right. Let me state a couple of things. One is that the registry will tell you I am not available between now and the 28th, but would you indicate to them that I have said I will make myself available, as best I can, and I will have some time when I could hear an application, if there is to be one.
- [92] MR. LINDE: Yes.
- [93] MR. HITTRICH: Thank you.
- [94] THE COURT: Second, I would like Dr. Krywaniuk's recommendations to reach me, whether or not it is going to form the basis of an application, please.
- [95] MR. HITTRICH: All right. We can certainly undertake to provide the recommendations through the --
- [96] THE COURT: Third, I indicated that Dr. Krywaniuk would likely want my reasons before making a recommendation, but it occurs to me that if he is to be a witness in the trial and cross-examined, counsel might have concerns about him reading reasons in which I have made comments about his report. If you have any such concerns, then obviously I will consider not having him read my reasons.
- [97] MR. HITTRICH: Perhaps an alternative would be to maybe delete any reference to Your Ladyship's comments on his report, so that he is unbiased vis-à-vis that.
- [98] THE COURT: I am not going to --
- [99] MR. HITTRICH: That may be overcomplicated.
- [100] THE COURT: That simply isn't really manageable to start deleting --

[101] MR. LINDE: Why don't we just tell him what the nuts and bolts of the order, what will end up being an order drafted and drawn, and just tell him what your decisions were, not why, and include it as a separate -- not in the order -- well, I guess it will be in the order. Do you want this in the order, that he is to do this update? I guess so.

[102] THE COURT: I would like that in the order and I think --

[103] MR. LINDE: Yes. That should be sufficient.

[104] THE COURT: -- it is the best approach.

[105] MR. HITTRICH: All right.

[106] THE COURT: So I am withdrawing my request that Dr. Krywaniuk have a copy of my reasons. Do counsel want the reasons? I mean I have put in the request --

[107] MR. HITTRICH: Yes.

[108] THE COURT: I have asked Madam Registrar to order them.

[109] MR. LINDE: Oh, yes.

[110] THE COURT: All right. Then I will leave that in place, Madam Registrar, please.

[111] THE CLERK: Yes, My Lady.

[112] THE COURT: But they are not to be sent to Dr. Krywaniuk, unless some particular reason arises that indicates he should have them.

"H. Holmes, J."

The Honourable Madam Justice H. Holmes

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