

HONG KONG / JUDGMENT

JPH v. PK

[2022] HKFC 144**COURT**

Family Court

DECIDED

19 July 2022

CASE / FILE NUMBER

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bjbj FCMC 13429/2012

[2022] HKFC 144 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION MATRIMONIAL CAUSES NO 13429 OF 2012 BETWEEN JPH Petitioner and PK Respondent Before: Deputy District Judge R Chow in Chambers (Not Open to Public) Dates of Hearing: 17, 18 and 25 August and 2 September 2021 Date of Judgment: 19 July 2022

JUDGMENT

(Variation of Maintenance)

Introduction

This is the hearing for the application by the Petitioner Husband () for variation of maintenance payable to the Respondent Wife () for her maintenance. This is the second time that H made such application. Maintenance to W had been varied once on 8 June 2017, H now seeks to completely discharge his duty to pay maintenance to W.

Background

H and W were married in 1991. They have one daughter born in 1991 and one son born in 1993. On 11 September 2012, H petitioned for divorce on the ground of 2-year separation. Decree nisi granted on 7 January 2013 was made absolute on 14 May 2013. At the time of the Petition, both children of the family were over 18 years old. Pursuant to a settlement agreement between H and W, it was ordered by consent on 15 April 2013 that:

- (1) W undertook to continue to pay the mortgage of her property in Canada;
- (2) H undertook to pay for the children's tuition fees for their tertiary education in Canada;
- (3) H should pay a lump sum of HK\$250,000;

- (4) H should pay W periodical payment of CAD\$5,000 per month during their joint lives, or until W's remarriage or further order of the court; and
- (5) H should pay the children's periodical payment of CAD\$500 each per month until they each complete their present full time tertiary education. H by summons filed on 22 February 2016 made an application for variation of the Order made on 15 April 2013 to the effect that the maintenance payable to W and the children to be varied by way of discharge and his undertaking to pay the children's tuition fees to be released. By the Judgment made on 8 June 2017 (the 2017 Judgment) by HHJ CK Chan, the Order made on 15 April 2013 was varied to the extent that (the 2017 Order):
- (1) All maintenance and undertakings in favour of the son were to be discharged or released as from the date of H's summons for variation, namely 19 February 2016.
- (2) H's application for the discharge or release of the maintenance or undertakings concerning the daughter was refused.
- (3) The maintenance order in favour of W was to be varied downward to a monthly sum of CAD\$2,500 starting from 1 July 2018. There is no dispute that since 1 May 2019, H had been in default of payment of maintenance to W. By summons filed on 7 August 2019, H now applies for variation of the 2017 Order that the periodical payments payable to W and the daughter be varied by way of discharge and that the outstanding arrears be remitted. W, on the other hand, has taken out a Judgment Summons on 4 June 2020 to enforce the 2017 Order. The Judgment Summons has been adjourned sine die pending determination of H's present application. There is no dispute that the daughter's periodical payments already ceased under the 2017 Order, W only opposes H's application for variation of her periodical payments. Grounds of H's Application H was born in 1954 and aged 66 at the time of the hearing. He was unemployed and unable to find a new job by reason of his age and health conditions. H's asset had been exhausted over the years particularly due to medical expenses related to his deteriorating health issues and became seriously indebted to the bank. He could no longer afford W's maintenance. Legal Principles The legal principles on variation were summarised by Cheung JA in paragraph 14 of AEM v VFM [2008] 3 HKLRD 36 as follows:- Principles on variation
14. 1. The power to vary a periodical payment order is expressly provided for by section 11(1) of the Matrimonial Proceedings and Property Ordinance (Cap. 192) (MPPO) :
- (1) Where the court has made an order to which this section applies, then, subject to the provisions of this section, the court shall have power to vary or discharge the order or to suspend any provision thereof temporarily and to revive the operation of any provision so suspended.
2. How this power is to be exercised is stated in section 11(7) :

- (7) In exercising the powers conferred by this section the court shall have regard to all the circumstances of the case, including any change in any of the matters to which the court was required to have regard when making the order to which the application relates and, where the party against whom that order was made has died, the changed circumstances resulting from his or her death.
3. The traditional approach to variation was not to re-fix afresh the amount of maintenance but to consider the amount of change in the actual means of the parties so that the new order should merely be increased or decreased roughly in proportion to the change in the means : Foster v. Foster [1964] 3 All ER 541, Jackson s Matrimonial Finance and Taxation 7th Ed. Ch. 3. 131.
4. The modern approach, as required by section 11(7), is for the Court to consider all the circumstances of the cases. The Court is not required to proceed from the starting point of the original order but look at the matter afresh : Flavell v. Flavell [1997] 1 FLR 353 at 357B following Lewis v. Lewis [1977] 1 WLR 409 and Garner v. Garner [1992] 1 FLR 573.
5. Any change in any of the matters to which the Court was required to consider when making the original order was one of the circumstances to be considered.
6. Almost invariably, an application to vary an earlier periodical payment order will be brought on the basis that there has been some changes in the circumstances since the original order was made, for example, continuing inflation; the increased costs in supporting a growing child and that one party may be more adversely affected than another by the increase in the costs of living : Garner v. Garner.
7. An increase in the wealth of the husband was a relevant factor to be taken into account : Primavera v. Primavera [1991] 1 FLR 16 and Cornick v. Cornick (No. 2)[1995] 2 FLR 490.
8. At the same time the basis and intended effect of the original order are relevant factors to which the Court on variation should pay regard and there should not be a radical departure from the approach taken by the parties themselves when they had entered into an agreement embodied in a consent order : Boylan v. Boylan [1988] FLR 282. For how much weight is to be attached to the original order, Tang VP (as he then was) stated in HCTT v. TYYC [2008] 5 HKC 86 at paras 15-16:-
15. But as Garner v. Garner [1992] FLR 573 shows that does not mean that the earlier order, whether made by consent or not, carries no weight. How much weight should be given to the earlier order must depend on the circumstances. Cazalet J said in the English Court of Appeal: Almost invariably, an application to vary an earlier periodical payment order will be brought on the basis that there has been some change in the circumstances since the original order was made; otherwise, except in exceptional circumstances, the application will, in effect, be an appeal. If an order is not appealed against, or is made by consent, then the presumption must be that the order was correct when made. If it was correct when made, then there will usually be no justification for varying it unless there has been a

material change in the circumstances. However, because of the impact of continuing inflation, because children grow older and cost more to support and because, for example, the cost of living in its increase may hit one party harder than another, it will usually follow that, if time has passed, there will inevitably have been changes in the circumstances, of the parties concerned. Following *Lewis v. Lewis*, by which decision this court is bound, a court on the hearing of an application to vary is fully entitled to look at all the relevant matters set out in s.25 of the Matrimonial Causes Act 1973. On occasions, the court may be slow to accede to an application to vary a consent order; not least because the parties solicitors might otherwise be deterred from either seeking to negotiate such a provision or to achieve finality. Another factor which may influence a court will be the time that has passed since the original order was made. If an application consequent on an order is brought very soon after that order has been made, the court, in normal circumstances, is likely to attach more weight to the earlier order than if it had been made some years previously. Likewise, the court would expect to pay full regard to any special terms agreed between the parties at the time the original order was made- as, for example, when endorsements on briefs or contemporaneous correspondence show that an agreed order has, for some particular reason, been set at an artificially low figure. Shortly stated, the court must decide what weight it should attach to the original order and all the surrounding circumstances. However, once an application to vary is before it, the court is fully entitled to make an order considering all the circumstances afresh, paying such regard to the older order as may be appropriate.

16. Thus, although the jurisdiction to vary is untrammelled, normally the earlier order would not be varied unless there has been a material change in the circumstances.

Issues

In my view, the issues in this hearing are as follows:-

- (1) Was there a change of circumstances by reason of H's health conditions?
- (2) Should H be able to find new employment?
- (3) Financial Circumstances and Reasonable Needs of W
- (4) Financial Circumstances and Reasonable Needs of H Change of Circumstances? As one can see in the 2017 Judgment, HHJ CK Chan accepted that H had been suffering from very serious medical conditions including the following in the preceding 10 years supported by a letter of Dr Lam from Hong Kong Adventist Hospital dated 28 December 2015:
 - (1) Throat cancer had resection and radiotherapy
 - (2) Recurrent pneumonia
 - (3) Deep vein thrombosis

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- (4) Pulmonary embolism
- (5) Stroke
- (6) Right carotid artery stenosis H was then also diagnosed to have vocal cord nodules that caused serious hoarseness in his voice. Subsequent to the 2017 Order, at the end of 2017, the effect of 7 weeks radiation therapy H was subjected to after the 2 operations for the cancer in his neck resulted in the rotting of all his teeth. H, still hoping to return to private banking where appearances mattered, had to spend HK\$420,000 to have all his teeth rebuilt. In the beginning of 2018, H further became Type 2 diabetic and suffered 2 heart attacks while in coma in hospital. H underwent heart surgery to insert 2 stents on ruptured heart arteries. H produced his updated medical proof as follows: Letter dated 16 January 2020 from the same Dr Lam from Hong Kong Adventist Hospital of H s medical problems in the last 10 years:
- (1) Thyroid, throat and neck cancer-had complete resection and radiotherapy
- (2) Recurrent pneumonia
- (3) Deep vein thrombosis
- (4) Pulmonary embolism
- (5) Stroke-partial left eye blindness
- (6) Right carotid artery stenosis
- (7) Recurrent pancreatitis
- (8) Diabetes
- (9) Scalp basal cell carcinoma Letter dated 21 January 2020 from Dr. Yuen from Hong Kong Adventist Hospital of H s medical problems:
- (1) Nasopharyngeal carcinoma in 2011 with OT and RT
- (2) Thyroid cancer 2011 - with thyroidectomy on T4
- (3) Coronary artery disease with percutaneous coronary intervention and VVI pacemaker implanted 4/2018
- (4) Post-radiation Rt carotid stenosis with stroke ad Rt eye visual impairment in 2015
- (5) Type 2 diabetes diagnosed 11/2018
- (6) Deep vein thrombosis and pulmonary embolism in 2014, treated
- (7) Vocal cord nodule, removed in May 2017
- (8) Dupytren s contracture
- (9) Recurrent aspiration pneumonia
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- (10) Hyperuricemia
- (11) Insomnia
- (12) Scalp squamous cell carcinoma with excision and skin graft on 29/10/2019
- (13) Pituitary incidentaloma, already completed hormone workup and 5 years of treatment with no change. No further follow up needed Letter dated 23 January 2020 from Dr. Fung from Hong Kong Adventist Hospital suffering from the following medical problems:
- (1) Nasopharyngeal carcinoma in 2011 with OT and RT
- (2) Thyroid cancer 2011 -> with thyroidectomy on T4
- (3) Coronary artery disease with percutaneous coronary intervention and VVI pacemaker implanted 4/2018
- (4) Post-radiation Rt carotid stenosis with stroke ad Rt eye visual impairment in 2015
- (5) Type 2 diabetes diagnosed 11/2018
- (6) Deep vein thrombosis and pulmonary embolism in 2014, treated
- (7) Vocal cord nodule, removed in May 2017
- (8) Dupytren s contracture
- (9) Recurrent aspiration pneumonia
- (10) Hyperuricemia
- (11) Insomnia
- (12) Scalp squamous cell carcinoma with excision and skin graft on 29/10/2019
- (13) Pituitary incidentaloma, already completed hormone workup and 5 years of treatment with no change. No further follow up needed It is indisputable that H s health had considerably deteriorated since the 2017 Judgment. It was the evidence of H that substantial medical expenses had been incurred. It is true that H s health was already in a seriously poor state at the time of the 2017 Judgment. However, it is clear from the evidence that H s health conditions did not just deteriorate, H suffered from new health issues that were serious in nature. As a result, substantial additional medical expenses had been incurred by H s new health issues in addition to those that existed at the time of the 2017 Judgment. I accept that there had been a change of circumstances by reason of H s further deterioration of health conditions. New Employment? H was born in 1954 and already aged 66 at the time of the hearing. H used to be employed by LGT Bank in the positions of managing director and senior relationship Manager since November 2014, his employment terminated on 30 June 2015 due to his health issues. At the time of the 2017 Judgment, H was unemployed. In July 2018, through recommendation by 2 former colleagues, H had worked for a small asset management firm named [SIA] Management Limited () between 1 September 2018 and 5
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March 2019 at a salary of HK\$50,000 per month. H resigned of his own accord on 25 February 2019. H explained that he resigned because SIA was not what he was given to understand and had only limited trading licences or permissions. That was why costs and expenses for certain transactions became more costly and less competitive for H's clients. Further, H did not have enough physical strength to attend workplace due to his health conditions. H kept looking for new employment but was unable to find one. H was considered too old and his health issues made his job hunting even harder. There was one thing that might help was that H had a former client who was willing to let him manage a fund of HK\$180 million. Even with that former client in H's pocket did not make H's job seeking any easier. H had approached 9 to 10 financial institutions between September 2020 and June 2021 to seek employment with no success. For those that were sizable enough with all the trading tools and channels, they rejected H for his age and health conditions, even a potential client worth HK\$180 million was not a client large enough to change their minds. For those that were smaller in size that had limited trading licences and permissions, they were not suitable for H's former client like SIA. I could understand H's concern about the capability of his new employer because he would be under a duty to protect his client's best interest in managing his fund. Clients with substantial investment often have high standard for his fund manager. H's former client really had no duty to let H manage his investments when someone else could manage them better. H said he would be willing to work in other sectors other than private banking. H impressed me to be truthful in his evidence about his job hunting and accept that he had really tried his best to find a new job. Dr Lam advised clearly in his aforesaid letter dated 16 January 2020 that H was no longer able to cope with the stress and long hours that were required of him in private banking. I have serious reservation whether H would be physically fit to be working in private banking or otherwise because of his age and health issues. I therefore find that H should not be able to find new employment. W's Financial Circumstances and Reasonable Needs W filed only her Form E without any affidavit. W, aged 64 at the time of the hearing, was born in 1957. Before W became a full time housewife in 1996, she had worked as a chief purser at an airline. W had a degree in business administration from Thailand but she explained that her academic qualification from Thailand was considered not competitive. W also said she was already 64 and was too old to find a job and she had high blood pressure. W said it was unlikely that she could find employment. In her Form E, W's monthly needs were as follow: General Mortgage instalments HK\$10,157 Utilities HK\$1,104 Management fees HK\$1,481 Food HK\$1,500 Household expenses HK\$1,000 Car expenses HK\$1,560 HK\$16,802 Personal Meals out of home HK\$120 Clothing/shoes HK\$120 Personal grooming HK\$120 Entertainment/presents HK\$120 Medical/dental HK\$1,000 HK\$1,480 Total: HK\$18,282 W's monthly expenses were not much challenged at trial and I consider her expenses to be reasonable. W owns 2 properties under her personal name, one in Canada as her residence and one in Thailand unoccupied. The following figures were agreed by parties in a letter sent to the Court dated 28 July 2021. The total estimated value of the Canadian property was CAD\$700,000 with outstanding mortgage of CAD\$130,837.41 (as at July 2021). The estimated net value of the Canadian property was CAD\$569,162.59 (approx. HK\$3,490,674.16) As for the

land in Thailand, it was agreed that the estimated value was HK\$300,000. Therefore, the total estimated value of the Canadian Property and the Land in Thailand was HK\$3,790,674.16. According to W's Form E filed on 24 October 2019, W had several bank accounts in Hong Kong and Canada with the total value of HK\$636,221.67 and investment of HK\$60,990.85 and personal items worth HK\$9,100. Other than the bank mortgage on her Canadian property, W had no liabilities. Therefore, the total asset that the wife is currently holding would be roughly HK\$4,500,000. H's Financial Circumstances and Reasonable Needs H was re-married and has an infant daughter with his new wife. H's financial position went downhill rapidly due to the significant medical expenses incurred. As of November 2018, H had HK\$662,775 in his HSBC account but his net position became only HK\$121,559 by 30 November 2019. In May 2019, H wrote and explained his difficulties to W to ask for a suspension of the payment of maintenance for 3 months until he could find a new job. At that time, H was being considered for a position with an international bank. Unfortunately, the discussion for employment was put on hold due to the social events and was gone afterwards. To H's surprise, W even asked for a raise of the maintenance to her. Although W later seemed to be more understanding and gave H the impression she would be fine with the suspension of maintenance payments, H later received W's demand for immediate repayments. H had no choice but to take out the present application. After the termination of his employment in 2015, H had only income for 6 months from SIA amounting to HK\$300,000 which was not insufficient to solve his financial problems. H had to rely on bank loans. H had to make withdrawals from his revolving credit account and overdraft on visa card from HSBC. H's financial situation became so desperate that H had to make withdrawals from these accounts to cover the minimum monthly payments of the same accounts. It was a vicious circle and his account balance kept diminishing. During difficult times, some close friends of H had given him money every now and then to help his family to get by. H's friends gave him amounts from HK\$50,000 to HK\$200,000. According to H's recollection, [JM] and [DN] each gave him HK\$200,000 and [EK] gave him HK\$150,000 and [KA] gave him HK\$50,000 at different times. These payments were used solely for the purpose of maintaining his domestic life. There were no loan agreements for such financial advancements and there were no terms attached thereto relating to repayment. H had been in the private banking business for a very long time, it would be natural that he had built a strong bond with clients also as close friends who apparently would have the financial capabilities to make monetary aid to H. I accept that those payments to H were financial assistance that could be considered as gifts. Having said that, those friends have no obligation to keep financially assisting H indefinitely. I, therefore, would not find that H could depend on his friend making regular financial contributions to him. H could not even afford his medical insurance premia any more despite it being so vital to him that he had depended on the medical insurance to cover his medical expenses. At the year of 2019, H considered it better that he, his wife and their infant daughter to return to Canada for him to receive free medical care as a Canadian citizen. His plan was disrupted by the quarantine policies in place due to the pandemic. The infant daughter had to go to stay with H's eldest daughter in the US. H's new wife had to work a part-time job at a restaurant earning

HK\$5,000 per month. H and his wife had to further cut down on expenses. H gave updated figures on expenses in the hearing as follows: General Rent HK\$12,000 Food (including alcohol) HK\$6,500 Household expenses HK\$400 HSBC debt monthly repayment HK\$40,000 Personal Meals out of home (including alcohol) HK\$2,000 Transport HK\$250 Clothing/Shoes HK\$200 Personal grooming HK\$400 Entertainment /presents HK\$1,500 Medical/Dental HK\$2,000 Total: HK\$65,250 Apart from the HK\$40,000 that was for bank loan repayment, H's expenses were HK\$25,250 that had been a significant drop from before. I accept such as H's reasonable expenses. H has about HK\$50,000 in the account of Bank of East Asia but loans owed to HSBC about HK\$1.5 million. H clearly has no net asset. Having gleaned H's financial records, I find that they are consistent with H's evidence and accept that H was telling the truth about his financial circumstances and difficulties. H did not mention his Bank of East Asia account and Vancouver account in his Form E and Answer to Questionnaire. H did volunteer the information in the hearing that they were opened to put in cheques. H also could not recall some of the deposits made to his HSBC accounts. H claimed that he had been subjected to more than 30 surgical procedures under general anaesthetic since 2011, his memory had been affected. Having considered H's explanation and his financial records, I accept H's explanation and do not consider that there was material non-disclosure. I accept that H was genuinely forgetful and inadvertent and was not trying to hide any asset or information. I therefore would not draw any adverse inference against him.

Analysis

Comparing the finances of H and W, I find W's financial circumstances to be in a much better position than H. As said by HHJ CK Chan, W needs to be realistic about her own future financial arrangement. I accept H's submission that he was barely surviving and only through the help of some old friends who were good enough to help him in times of difficulty. While I accept W would have difficulties seeking employment, she could consider using one of her 2 properties to generate income. She could even consider selling one of the 2 properties to maintain her living. One way or the other, I consider W to be in a better financial position than H. H had paid W maintenance from April 2013 to May 2019. Given the age and health issues of H, it is my view that it should be time for the parties to go separate ways and have a clean break. By reason of the foregoing, I allow H's application for variation of maintenance and order that H be discharged from all liabilities to pay W and the daughter's maintenance. The Court has discretion to backdate the variation, in my view, it justice requires that the variation take place from May 2019. Given the result of H's successful application for variation of maintenance, I consider that the fair order should be no order as to costs.

Conclusion

By reason of the foregoing, I grant H his application for variation of maintenance and make the following orders:

- (1) H be discharged from all liabilities to pay W maintenance for her and the daughter under the Orders made on 15 April 2013 and 8 June 2017 taking effect from 1 May 2019;
- (2) There be no order as to costs of H s Summons filed on 7 August 2019. (R Chow) Deputy District Judge Petitioner (H) acting in person Respondent (W) acting in person PAGE - PAGE A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V hc(> hc(> hc(> h:d3 huR0 hc(> h:d3 ~zvrnjnf hc(> hc(> hD~] hc(> hc(> hc(> h:d3 gdlU` gdLL gdhe | xtpItptc hc(> hc(> hc(> hc(> hc(> hD~] hc(> tatQ hlU` hlU` h!@n gd/c> |o\_R\_ hD~] hD~] hD~] hlU` gdMM gdMM hD~] hD~] hD~] gd/c> h/c> hD~] hD~] hD~] hD~] hD~] hD~] hD~] hD~] gd*2 gd*2 gd*2 gd/c> gd*2 gd*2 h/c> hD~] hD~] hD~] gd/c> gd*2 ~n~a hD~] hD~] hD~] hD~] hD~] hD~] hD~] hD~] hD~] gdn/ gdn/ h/c> hD~] hD~] hD~] gd/c> ~n^ n ^ n ^ n ^ n hD~] hD~] hD~] hD~] hD~] hBmz hD~] hBmz hD~] hD~] hBmz gd@I h|Sc h|Sc hBmz hD~] hD~] hD~] hD~] hD~] h/c> h|Sc gd3< gd@I gd@I hD~] hD~] hD~] hD~] hD~] hD~] hD~] hD~] hD~] hD~] N<^N hD~] hD~] hD~] hD~] hD~] h, M hD~] hD~] h/c> hD~] hD~] h[(X hD~] gd&) gd`r3 gd`r3 h`r3 hD~] h`r3 h/c> h/c> h`r3 hD~] h`r3 h`r3 hD~] gd`r3 gd`r3 hc(> h4al &`\$# {nana{ananaQA hwpw hN/" hwpw hc(> hc(> hsJP :p`r3 [Content\_Types].xml \_rels/.rels theme/theme/themeManager.xml K Y, sQ}# theme/theme/theme1.xml \$O}) Xp90 +PHI| PP yu 9xu5 fs+W VF7H q=. 8jd- qyI@ j!Q\_- jyV` |PZ+ T ""p < 4V O&x\$ A8>v ;EUC n 8r *~P(5 .}x E /,EE\} theme/theme/_rels/themeManager.xml.rels 5 6?SQ K(M&\$R(.1 [Content_Types].xmlPK _rels/.relsPK theme/theme/themeManager.xmlPK theme/theme/theme1.xmlPK theme/theme/_rels/themeManager.xml.relsPK <?xml version="1.0" encoding="UTF-8" standalone="yes"?> <a:clrMap xmlns:a="http://schemas.openxmlformats.org/drawingml/2006/main" bg1="lt1" tx1="dk1" bg2="lt2" tx2="dk2" accent1="accent1" accent2="accent2" accent3="accent3" accent4="accent4" accent5="accent5" accent6="accent6" hlink="hlink" folHlink="folHlink"/> (Hy;x |L< PLb\$ 2n#gJ (Hy; 2n#g Ip |L< Windows User Normal.dotm Windows User Microsoft Office Word Judiciary Hong Kong SAR Title <?xml version="1.0" encoding="UTF-8" standalone="no"?> <b:Sources xmlns:b="http://schemas.openxmlformats.org/officeDocument/2006/bibliography" xmlns="http://schemas.openxmlformats.org/officeDocument/2006/bibliography" SelectedStyle="\APASixthEditionOfficeOnline.xsl" StyleName="APA" Version="6"></b:Sources> <?xml version="1.0" encoding="UTF-8" standalone="no"?> <ds:datastoreItem ds:itemID="{DB772222-1A57-4713-8098-848AE50A4658}" xmlns:ds="http://schemas.openxmlformats.org/officeDocument/2006/customXml"><ds:schemaRefs><ds:schemaRef ds:uri="http://schemas.openxmlformats.org/officeDocument/2006/bibliography"/></ds:schemaRefs></ds:datastoreItem> Microsoft Word 97-2003 Document MSWordDoc Word.Document.8

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