

HONG KONG / JUDGMENT

LYSC v. MSN**[2019] HKFC 299****COURT**

Family Court

DECIDED

21 November 2019

CASE / FILE NUMBER

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**[2019] HKFC 299 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION MATRIMONIAL CAUSES NUMBER 13330 OF 2017**

BETWEEN LYSC Petitioner and MSN Respondent

Coram : Her Honour Judge Sharon D. Melloy in Chambers (Not Open to Public) Dates of Trial: 13
15 August 2019 Date of closing written submissions: 30 August 2019 Date of Judgment: 21
November 2019

JUDGMENT

(Staying access and access generally)

Introduction

The current hearing arose initially out of the Respondent father's summons dated the 4 January 2018, when he sought an order for interim defined staying access. This application was made in light of the husband's original request as set out in his Form 4 dated the 26 October 2017, for an order for joint custody and shared care of the only child of the family, a little girl called B, who was born on the XX September 2010 and is now 9 years of age. In his Form J the father asked for shared care on a week on/week off basis. The mother for her part originally sought custody of B with reasonable access to the father. Notwithstanding this divergence of views, the parties were sensibly able to resolve most issues with respect to B's care. On the 8 January 2018 an interim order was made whereby the father had access to B, albeit not staying access, on each Monday,

Wednesday and Friday evening and on alternate weekends. On the 19 April 2018 the parties further agreed joint custody, with care and control to the Petitioner mother. In addition, the father continued to have regular weekly access, with staying access on alternate weekends from Saturday at 8:00 am until Sunday at 9:00 pm. Unfortunately, despite a Children's Dispute Resolution (CDR) hearing on the 4 September 2018, the parties have been unable to agree on staying access otherwise. In a nut shell the father wishes to have regular staying access including overseas holiday access. The father is Bulgarian and he wishes in particular to be able to take his daughter to visit her wider family in Bulgaria. The mother is however very resistant to any extensive staying access. She complains that the father has used corporal punishment on B in the past and she has concerns that this may happen again in the future. She is agreeable to very limited staying access and to splitting the school holidays, but only on the premise that the child returns to her each night to sleep. Consequently, this trial brings into sharp focus the apparent differences in parenting styles, from parents who come from two very different cultural backgrounds. It is the mother's clear view that all forms of corporal punishment are wrong and cannot be condoned at any level. Although the father has promised not to use corporal punishment on B, this is not a view that he necessarily accepts as a general premise. At the CDR hearing it became clear that the parties would not be able to resolve these apparent differences and the court ordered that the Mother's allegations concerning the father's behaviour with respect to B, should be transferred out of the CDR list. Thus this trial is concerned with both these alleged behaviours and the related issue of staying access going forward. The issue to be determined Thus the outstanding issues to be determined concern a) staying access, b) travelling abroad and c) other minor alterations to the general access schedule. In considering these issues, the court is also required to make a risk assessment. What is the risk to the child, if any, if the court makes an order for increased staying access including holiday access going forward? The father's proposal In his closing submission the father amended his initial proposal slightly, to take into account his new working hours. His amended proposal states as follows: School Term: day and staying access based on a two-week schedule, as per table below. Monday Tuesday Wednesday Thursday Friday Saturday Sunday Week 1 6:30 - 8:30 PM 6:30 - 8:30 PM 6:30 - 8:30 PM Week 2 6:30 - 8:30 PM 6:30 - 8:30 PM Friday 6:30PM - Sunday 6:30PM Long school holidays: equal share of staying access; freedom to travel abroad with the child Vacation Period Child with Respondent Christmas/NY* 20 Dec (Fri) 2019 1 Jan (Wed) 2020 6:30 PM, Friday 20 Dec 2019 6:30 PM, Sunday 29 Dec 2019 Lunar New Year* 22 Jan (Wed) 1 Feb (Sat) 2020 Easter* 8 April (Wed) 16 April (Thu) 2020 6:30 PM, Wednesday 8 April 6:30 PM, Sunday 12 April Summer break (7 weeks) 14 Jul (Tue) 1 Sep (Tue) 2020 6:30 PM, Friday 18 July 2019 6:30 PM, Sunday 2 Aug 2019 * Based on 2019/2020 School Calendar proposed by the Education Bureau of Hong Kong. Dates indicated as Child with Respondent ensure minimal disruption to the current defined weekend access of either parent. Short Public holidays: Adopt a flexible attitude towards the division of days and the time of access In particular, it should be noted that the father now works from 8:30 am 6:00 pm Monday Thursday and from 8:30 am 5:00 pm on Fridays and he is based at the X Park in Shatin. Realistically he is now only able to pick B up at 6:30 pm during the week as opposed to 6:00 pm as before and he is also able to pick her up at 6:00 pm on Fridays. It is also of note that he has 14 working days annual leave and he is not required to work on weekends. Previously he worked in

academia and arguably had more flexibility as a result. I was told during the trial that the parties had been able to discuss pickups and that there was some flexibility depending on B's after school activities. As at the date of trial B had a drawing class from 5:35 6:50 pm on Mondays, and a second drawing class from 4:15 5:30 pm on Wednesdays and ballet from 7:15 8:00 pm on Fridays. The mother's proposal The mother for her part proposes as follows:

1. School day weekday access to Respondent every Mon, Wednesday. Pick up time at 6pm and as to Respondent's availability until 8:30pm regularly.
2. Alternate the school day weekends access with Friday and Saturday overnight, return on Sunday 8:30pm.
3. Equal share of summer holiday. The second half of the long holiday to Petitioner.
4. Equal share of Christmas Holiday. The second half of the school holiday to Petitioner.
5. Equal share of Chinese New Year holiday. The first half of the school holiday to Petitioner.
6. Equal share of Easter holiday. The second half of the school holiday to Petitioner.
7. In case of Respondent away Hong Kong or any reason in Respondents absence, Petitioner will takeover the access time.
8. Long Holiday Staying access to Respondent follows the regular weekend access, or one might staying access on a public holiday within Respondent's access time. During the trial I clarified the issue of the extended weekend and the mother confirmed that she is not agreeable to an extended weekend from Friday Sunday evening. The other real sticking point remains the whole concept of staying access generally and in particular overseas holiday access. The mother had no difficulty with alternating single public holidays during the school term or splitting the longer school holidays as long as B only had day access with her father. Background to the marriage The parties met in the United Kingdom and on the XX September 2009 they married in Glasgow, Scotland. The only child of the family, B was born in the United Kingdom a year or so later. The mother is Hong Kong Chinese and in 2012 the parties relocated to Hong Kong, which is where the mother is from originally. Although the mother is ethnically Chinese, she has studied and spent significant periods of time in the UK. She is now aged 42 years old and she is a freelance dance teacher. Generally, therefore, she works after school hours and over the weekends. Her parents provide child care support when required and they live close by. The father for his part is Bulgarian. He is now aged 45 years old and he is an Electrical Engineer. He has also spent significant periods of time in the UK. Sadly, unhappy differences developed between the couple and on or about the 26 August 2016 the wife moved out of the matrimonial home, leaving B in the primary care of the father, although it is her case that she continued to visit the child every other day. This situation continued until October 2017, when there was an incident which eventually led to the father moving out of the matrimonial home and the mother resuming full time care of B. Shortly thereafter, on the 13 October 2017, the mother issued a divorce petition based on one-year separation with consent. On the 4 January 2018 the decree nisi was granted and as

indicated above a further order was made on the 19 April 2018 for joint custody, with care and control to the mother and interim defined access to the father. On the 25 January 2019 a Clinical Psychologist's report was filed. Two Social Welfare Reports have also been filed, the first dated the 29 March 2018 and the second dated the 21 August 2018. The law in Hong Kong

12. The general principles governing applications relating to children's issues are set out in s.3 of the Guardianship of Minors Ordinance, Cap. 13, which states that: GENERAL PRINCIPLES
 - (1) In relation to the custody or upbringing of a minor, and in relation to the administration of any property belonging to or held in trust for a minor or the application of the income of any such property-
 - (a) in any proceedings before any court (whether or not a court as defined in section 2) the court -
 - (i) shall regard the best interests of the minor as the first and paramount consideration and in having such regard shall give due consideration to - (A) the wishes of the minor if, having regard to the age and understanding of the minor and to the circumstances of the case, it is practicable to do so; and (B) any material information including any report of the Director of Social Welfare available to the court at the hearing; For the avoidance of doubt s. 48 C Matrimonial Causes Ordinance, Cap. 179 adds that section 3 of the Guardianship of Minors Ordinance (Cap
13. (which provides that the welfare of the minor shall be the first and paramount consideration) shall apply in relation to any order for the custody care or supervision of a child which may be made under this Ordinance or the Matrimonial Proceedings and Property Ordinance (Cap 192).
13. For the avoidance of doubt, in so far as access is concerned, this is generally said to be the right of the child, as opposed to the parent. In other words, the child has the right to see and to have a relationship with both of her parents. The court is primarily concerned with the best interests of B and not the relative rights of each of the adults with respect to her. List of factors
14. In addition, reference may be made to the list of factors referred to in the Children's Proceedings (Parental Responsibility) Bill. Although this list of factors has yet to find its way into our statute books, I have nevertheless reproduced the same below. I should say at the outset that it is not meant to be an exhaustive list, but is simply a useful guide when considering issues relating inter alia to access. The checklist states that the following should be taken into account:
 - (a) the ascertainable wishes and feelings of the child concerned considered in the light of his age and understanding); the child's physical, emotional and educational needs; the nature of the relationship of the child with each of the child's parents and with other persons; The likely effect on the child of any change in the child's circumstances; The child's age,

maturity sex, social and cultural background and any other characteristics which the court considers relevant; The attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents Any harm which the child has suffered or is at risk of suffering; Any family violence involving the child or a member of the child's family; How capable each of the child's parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs; (a broader formulation along the lines of) the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis; The range of powers available to the court under this Ordinance in the proceedings in question. Any other fact or circumstance that the court thinks is relevant.

15. It is acknowledged that it is not generally necessary to go through this list mechanically, but that it can be a useful aid memoire. In this case I have taken note in particular of those points that are in bold. Discussion Social Welfare report/s The first Social Welfare Report dated the 29 March 2018
16. It is trite but worth repeating that recommendations made to the court in social welfare reports, although not binding are generally considered to be persuasive. The court is not required to follow the recommendations made blindly, but should give reasons in the event that the recommendations are not adopted.
17. The first Social Welfare Report was concerned with all aspects of B's care and Miss T investigated the incidents complained of by the mother. In that regard she said as follows:
Incidents on the Child of the family
16. Ms L [the- mother] mentioned several incidents that Mr M [the father] was treating B rudely or even violently and Mr M told his version of these incidents. (1) Ms L told that when B was a few months old, Mr M threw her up to make her silent when she cried. According to Mr M, he did not throw up the girl at all. He and Ms L had dispute over breastfeeding and when he held the girl up, the girl screamed. He shook her for a very short moment. (2) Ms L told that during the girl's childhood, Mr M grasped the girl's ear or pulled her hair to coach/discipline her. According to Mr M, he denied grasping the girl's ear or pulling her hair as a way of physical punishment. He admitted in around 2013 or 2014, he once held the girl's ear when the girl did wrong. (3) Ms L reported to the hotline of Against Child Abuse (hereafter as ACA) on 23.9.2015 that she discovered the girl's buttocks spanked by Mr M days ago when the girl was unwilling to take a bath. According to Mr M, he spanked the girl's buttock as the girl played tantrum. (4) Ms L told that in September 2017, when the girl patted the father's head from her upper bunk bed, the father became angry and pulled the girl down from the bunk bed. According to Mr M, the mother and the girl were memorizing mathematics multiplication. He asked the girl to sleep and the girl bite his hand. He grasped the girl's legs and took her down from the bed to talk to her. (5) Ms L told that on 26.9.2017, Mr M slapped the girl thrice and asked why she laughed when the girl laughed he he while the parents quarreled. When Mr M found out that Ms L was video-taking the episode, Ms L and Mr M

had a physical struggle. Ms L reported the incident to the police. Upon police intervention, the girl was arranged to stay at the maternal grandparents home. According to Mr M, he had a quarrel with Ms L over the girl's refusal to bath on 26.9.2017. Ms L was video-taking his grasping of the girl to the bathroom and Ms L angered him by saying that she was waiting for a child abuse to happen. Ms L twisted his leg and put him down on the sofa. When the girl spoke impolitely to him, he tried to hold her in three attempts but could only catch her once and slapped her once.

17. Regarding the incident (3) of the report to ACA on 23.9.2015 mentioned in para 16 above, the social welfare officer contacted Mr T (hereafter as Mr T), a social worker of ACA who previously handled this family case. Mr T quoted from their record that the girl's mother called their service hotline on 23.9.2015 to report that she found the girl's buttock spanked by the father days ago, and the girl's mother told that the father adopted physical punishment for the girl's naughtiness by either slapping her, grasping her ear or spanking the buttock and she worried on the negative impact on the girl. The mother told that the relationship between the girl and both parents were good. ACA arranged a home visit to the family on 2.10.2015. The father admitted to ACA that he physically punished the girl for her naughtiness by spanking her buttock. The parents consented to receive counseling on child management and family relationship. Both parents showed genuine concern on the girl's development. Mr T rendered counselling service to them from October 2015 to May 2016. Individual and joint interviews with the girl's parents were arranged. The father stopped using physical punishment on the girl. Subsequently, the case was closed in mid-2016.
18. The social welfare officer interviewed B about her parents parenting style. B told that the mother adopted coaching and did not use physical punishment on her. She told that the father adopted coaching. When she was naughty, he used to adopt physical punishment but none. She recalled that the father slapped her twice but could not recall the incident in details. Regarding incident (4) mentioned in para 16 above, B could not recall it.
18. Ms T ultimately recommended inter alia that iii) the Respondent, Mr M, be granted with defined access as tabled below and an equal share of the four long school holidays, i.e. Christmas, Chinese New Year, Easter and summer holiday; with pick-ups same as those in the interim access order or as agreed by both parties.
19. Ms T confirmed in the witness box that her recommendation above included staying access. When asked specifically about overseas access, she said that B had disclosed to her that she had been to Bulgaria in the past and that she hadn't mentioned that anything had been wrong or that there had been any unhappiness. On that premise she had made her recommendations as set out above.

20. The mother cross examined Ms T at some length about her sources of information with respect to the allegations of child abuse. In the main Ms T stood by what she had said in her report. In addition, Ms T said that she had observed the interaction between B and the father and she had spoken to the school. She denied that she had simply believed the father when he had told her that he had stopped exercising corporal punishment.
21. The mother asked Ms T a number of questions designed to establish the possibility for ongoing risk. However, Ms T also stood firm. She said that when she asked B, B had said that her Daddy had used corporal punishment in the past when she was naughty but that he no longer did this. The second Social Welfare Report dated the 21 August 2018
22. The court requested a second short updated report on the issue of staying and holiday access only. In this second report, Ms C, who had replaced Ms T, also recommended that the school holidays be shared equally as follows: Recommendation
8. In sum, the parents had a good start to arrange alternate staying access arrangement as scheduled and it was smooth in general. However, they continued to have different views on the arrangement of extension of staying access as well as holiday access. The key concern was Ms L worried much on Mr M s emotional condition while Mr M affirmed no problem on his psychological well-being. Nonetheless, based on the information gathered during this investigation, the present arrangement of staying access, was satisfactory and the girl was observed enjoying and longing to staying with the father during access. In addition, the comment from the counselor of Four Dimensions on Mr M s emotion and parenting capacity was positive. In view of the above, the social welfare officer would like to recommend that the present defined staying access to be continued and an equal share of the four long school holidays further to be granted to the Respondent.
23. Ms C also stated that she agreed with Ms T, that this recommendation should include overnight staying access.
24. During the trial Ms C also confirmed that the father had had some counselling with a group called Four Dimensions and that he had told her that he no longer used corporal punishment. However, the mother remained sceptical, asking how that could be measured. Ms C confirmed however that she had spoken to the therapist at Four Dimensions and that he had confirmed that the father had received some therapeutic support from October 2017 to July 2018. Ms C confirmed that she still recommended that the father have overnight staying access and that she would have no objection to B travelling overseas with her father. The Clinical Psychologists report dated the 25 January 2019
25. The Clinical Psychologist, Ms W, reported on the parent s psychological state and said as follows: Parents Psychological State

15. The General Health Questionnaire-60 (GHQ-60) was used to assess the general and emotional functioning of the parents. The results indicated both Ms L and Mr. M did not manifest significant emotional problem that warranted clinical attention. They both denied history of alcohol or drug abuse.
16. The Parenting Stress Index was used to assess the relative magnitude of stress of parents in the parent-child system. The results indicated that both parents scores were within the normal range. Together with the behavioral observations during the interviews, both Ms. L and Mr. M did not show apparent signs of significant psychological problem that warrant clinical attention or would affect their parenting capacity. With respect to their approach to parenting she added as follows:
19. Both parents were administered the Child Information Questionnaire. The information indicated that mother was more able to recall B s developmental history and milestones in her early childhood. As to B s current situation, they both demonstrated adequate knowledge about her current health condition, interests, learning abilities, strengths and weaknesses. They both showed genuine love and concern over B.
20. The Childcare Situation Questionnaire which taped parents care and management of typical childcare situations were also administered to both parents. The data showed that Ms L stressed on understanding children s underlying thoughts, feelings and needs in her parenting. She emphasized interactive ways of relating with children and the importance of discussion in finding ways to solve problems with children.
21. Likewise, Mr M indicated that he would try to understand the underlying causes of child s problem behavior in parenting. He emphasized coaching of proper values and finding ways to solve the problem rationally.
26. In so far as B s relationship with her parents is concerned, it is clear that she has a close and bonded relationship with each of them. B specifically commented that she was not afraid of the father and that she would like to go on holiday with him and visit her grandmother in Bulgaria. In conclusion Ms W added inter alia as follows:
47. Summing up, the present assessment indicated that Mr M and Ms L did not manifest significant psychological problems that warrant clinical attention or affect their parenting capacity. B s relationships with both parents were observed to be good. She currently enjoyed the living with mother while she also enjoyed the access with father. Father demonstrated his motivation and effort to strengthen the father-daughter bonding by reflecting on himself, receiving counselling and learning appropriate parenting skills. Also, B indicated her wish to spend more time with father and visited paternal grandmother in Bulgaria. Taking all the information into consideration, it is recommended that the present access arrangement be maintained. Long holiday access could be extended in a gradual interval while travelling aboard could also be considered. Lastly, it is important that both parents find ways to communicate with each other. It is believed this would help to preserve the child s emotional tie with both parents, which is for the best interest of the child.

27. Ms W confirmed in the witness box that she thought that it would be permissible for B to start with a two-week holiday with the father and for the length of the proposed holidays to be increased over time. She also stood firm under the cross examination from the mother.
28. As will be seen I largely agree with the recommendations made by all three experts, save that I would have some concerns starting off with a two-week holiday and would prefer to begin with a shorter period of time instead. It is of note that the father has not sought a longer holiday period in any event. What is the risk to the child, if any, if the court orders increased staying access?
29. The mother is convinced that the father poses a risk to B. Her belief will not be shaken. However, there is little to substantiate this belief. It is true that the father has lost his temper in the past and that on occasions he has exercised corporal punishment against B. But these incidences, are, with respect relatively minor. It is probably for this reason that the ACA did not open up a full enquiry after what might be regarded as one of the most serious offences took place i.e. the spanking of the buttocks in September 2015. The mother attached a chronology of allegations and information in her bundle of documents which reads as follows: Chronology of the allegation and information Date and Periods Incidents Birth to 6 months of the Child Child was thrown up and shake with force by the Respondent * Between 2010 and 2017 Respondent frequently released anger on objects in the presence of the Child Between 2013 and 2016 Respondent pulled Child s ear and often pound table during meal time * Between 2015 and 2016 (Kindergarten 3) Respondent snapped Child s pencil and squashed worksheet 2015 September 23 Child abuse reported to Against Child Abuse, 8 strokes of bruises found on buttocks, Child age 5 * (with Evidence and ACA social worker report) 2015 October to 2016 May ACA Counselling received by Respondent and Petitioner for 6 months; Counselling conducted by 2 organisations: ACA and Church service received by Respondent 2016 July Respondent twisted to break the Hair dryer with hands in anger 2016 August 26 Petitioner moved out of Matrimonial home 2016 September 18 and 20 Corporal punishment reused twice in 3 days. Child complaint to Petitioner about Respondent slapped her with a book ** 2017 Early September Respondent pulled Child down from her bunk bed. * 2017 September 26 Respondent slapped the child s face thrice in the bathroom.* Case reported to Police. Child Age 7 2017 October 3-11 Petitioner remove Child from matrimonial home, absent 5 school days. Respondent moved out. Petitioner and Child returned Matrimonial home and resumed school on 12 October. Between 2015 to 2017 Respondent harassment on Petitioner s parents
30. I have marked with an * the alleged incidents of physical violence against B. There are others which do not include any physical contact. The father has explained the circumstances surrounding each incident. It is of note that none of these incidences necessitated a Multi-Disciplinary Case Conference. Nor did the police press charges. It is also clear that on occasion these incidences have taken place during periods of high tension between the parties. Further there is no evidence that the father has a psychiatric or psychological disorder which may make him a potential risk to the child. None was detected

in the Clinical Psychologist report or in a subsequent note filed by Dr H on behalf of the father dated the 11 October 2017.

31. Further the mother complains about a number of incidences which pre date her leaving B with the father in August 2016. If the mother had been truly concerned that the father was a significant risk to the child, then it is unthinkable that she would do this. The mother's explanation that she had hoped that the father would change and that the incident on the 26 September 2017 was the last straw, is a little difficult to accept in the circumstances. Again it is of note that this incident took place in the middle of a major row between the parties. Tempers were clearly running very high at the time on both sides. The father lost his temper and in the heat of the moment he lashed out and slapped B. This was the last major incident and it occurred over two year ago.
32. When the mother asked the father why he had not complied fully with his undertaking to the ACA not to use corporal punishment, the father replied that he had given an undertaking and that he had restrained himself, but that there had been a couple of occasions when he had not been able to withhold his reaction. I accept what he says in this respect. Further it is clear that he has taken this issue seriously and sought to educate himself on effective parenting methods and has attended various forms of counselling. He also says, and I would accept what he says in this respect, that it is not possible to change one's behaviour overnight.
33. It is also of note that the father has taken B away on holiday, without the mother on frequent occasions in the past.

Conclusion

34. Given all of the above it seems to me that the father does not pose a significant risk to the child and that he should have regular overnight staying access with her including holiday access. The order
35. Consequently an order will be made as follows: Term time access The father shall have access to B on each Monday and Wednesday during term time from 6:30 pm 8:30 pm. The father shall have overnight staying access on alternate weekends from Friday at 6:00 pm until Sunday at 6:30 pm. The parties shall alternate single public holidays during term time. School holidays Christmas school holiday The Christmas school holiday shall be split 50:50 in that the father shall have staying access to B for the first half of the school holiday from the 20 December at 6:30 pm to the 26 December at 6:30 pm and the mother shall have the second half of the school holiday to include New Years day. The father shall have the first half of the Christmas school holiday in all odd years going forward and the mother shall have the first half in 2020 and in all even years thereafter. Chinese New Year The child shall be in the care of the mother over the Chinese New Year school holiday both for this year and in all years going forward. Easter The father shall have access to the child for half of the Easter school holiday in 2020. The father shall have the first half of the holiday from 6:30 pm

on the 8 April 6:30 pm on Sunday 12 April 2020. The mother shall have the second half of the holiday. Going forward the child shall be in the care of the father over the Easter school holiday, unless by agreement with the mother otherwise. The school summer holiday In theory the school summer holiday shall be split 50:50, but given the father s work commitments it is further ordered that the father shall have approximately two week s holiday access over the school summer holiday period in 2020. The father suggests from 6:30 pm on the 18 July 2020 until 6:30 pm on Sunday 2 August. I agree that these dates seem sensible and an order shall be made in those terms. Going forward the father may elect to take up to half of the summer school holiday to include approximately two weeks overseas holiday access. There shall be an updated Social investigation report on the issue of access only to be filed in May 2021. There shall be liberty to apply. Given that this is a child related matter and that the parties are acting in person, I shall exercise my discretion and make an order nisi to be made absolute in 14 days time that there shall be no order as to costs

(Sharon D MELLOY) District Judge The Petitioner and Respondent both appeared in person

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