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— Franks & Zalev - This Week in Family Law

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Contents

When an Adult Child Is not Child Enough for Child Support for an Adult Child

Edwards v. Edwards, 2021 CarswellOnt 2711 (S.C.J.) - Charney, J.

This case involved a mother's motion to end her child support obligations of $2,241 payable to the father pursuant to the interim Order of Justice MacPherson dated May 8, 2018 (the "MacPherson Order"). At the time, the "adult children" were Matthew (born in 2000) and Aaron (born in 2001).

The parties were married on July 29, 2000, and separated on June 6, 2017. The children had lived with the father since separation.

After separation, the father brought a motion for interim child and spousal support. At the time of the motion, both children were under 18 years old and were both in school. The motion resulted in the MacPherson Order, which was a temporary order meant to last until trial.

Matthew graduated from high school in June 2018, and turned 18 in October 2018. He did not attend school in the 2018/19 academic year. He attended college in the Fall 2019 term, but he did not return for the Spring 2020 term or enroll for the current 2020/21 academic year. Instead, Mathew worked full time from August 2018 to June 2019, with several months of unemployment throughout that period due to the seasonal nature of his work. He continued to work on a part-time basis throughout 2020.

Aaron graduated from high school in June 2019, and turned 18 in November 2019. He did not attend school in the 2019/20 academic year or the then current 2020/21 academic year. Aaron had worked part-time in bars and restaurants since his 18 th birthday.

Almost immediately after the mother served her motion to terminate child support, Aaron applied to attend a post-secondary program scheduled to start in September 2021. A week later, Matthew also applied to attend a post-secondary program to start in September 2021. What an incredible coincidence. In the meantime, both children had each been admitted to their respective programs.

The mother lost her job in May 2020 because of Covid-19. As a result, she fell into arrears of support, and had to bring a motion to try to vary the MacPherson Order pending trial.

While the mother was only one month behind in November 2020, she was about $16,500 behind by the time the motion was argued, presumably because the impact of her unemployment had set in.

The father responded by bringing a motion to stay the mother's motion because she was in arrears of her support obligation. Very nice. He relied on *Cosentino v. Cosentino* (2017), 98 R.F.L. (7th) 53 (Ont. C.A.) and *Abu-Saud v. Abu-Saud* (2020), 48 R.F.L. (8th) 330 (Ont. C.A.).

While the Court was somewhat concerned about the arrears, Justice Charney noted that the MacPherson Order was intended to last only until the trial, which had been significantly delayed. Given the delay, it was appropriate that the court revisit the MacPherson Order as it did. The mother had also raised a serious issue with respect to her existing child support obligations, and if she was right, her arrears could be setoff against her previous overpayments.

The mother argued that the MacPherson Order was premised on the children being enrolled in school after their respective 18th birthdays. But that did not happen. Neither child had been enrolled in a program of education. She argued that there had been a material change since the MacPherson Order, and that the adult children had each not been eligible for child support since their 18th birthday.

There was no dispute that Matthew had not attended any educational program since completing a term in December 2019 (if he even completed the term), and that Aaron had not attended any post-secondary program since graduating from grade 12 in June 2019. The mother also argued that the timing of the college applications - only two weeks after she served her Notice of Motion to terminate child support - was suspect, such that the court should not force her to pay child support until the children could show that they were actually attending the programs in September 2021.

The father argued that Matthew took a year off after high school "to figure out what he wanted to do", and then started his first year of college in September 2019. Then, at the end of the term, Matthew decided to "change a course", which required him to withdraw from the program and start again in September 2020. He decided not to enroll in the 2020/21 academic year because he did not want to participate in online classes.

The father made a similar argument regarding Aaron: he also took a year off after high school to figure out what he wanted to do. And, like Matthew, he decided not to enroll in the 2020/21 academic year because he did not want to attend online classes. However, now the children had been accepted to 2-year programs starting in September 2021.

Justice Charney reviewed section 17(1) of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), as amended, noting that the court could change a support order if, pursuant to s. 17(4), there has been "a change of circumstances". His Honour suggested this was not a high bar and that changes in the incomes of the parents, the academic circumstances of the children, the needs of the children, or their ability to contribute to their own support, would constitute a change in circumstances within the meaning of the *Act*: *Makdissi v. Masson* (2017), 2 R.F.L. (8th) 157 (Ont. S.C.J.), at para. 22.

But that is, respectfully, not the correct test. Remember that the MacPherson Order was an interim order. There is nothing in the *Divorce Act* that expressly permits a court to vary an ***interim*** order - only a final order. Therefore, some courts still suggest it is not possible to vary an interim order: *Myatt v. Myatt*, 2018 CarswellNS 194 (S.C.). Other courts suggest that it is possible to vary an interim order by relying on the court's inherent jurisdiction, but that the test is quite onerous and that it should be quite difficult to vary an interim order, the idea being to encourage parties to "get on to trial": *Waxman v. Waxman*, 2016 CarswellOnt 7808 (S.C.J.); *West v. West* (2001), 18 R.F.L. (5th) 440 (Ont. S.C.J.). The test has been described variously as:

- Requiring "exceptional circumstances" that are "urgent and cannot wait until trial": *Chicoine v. Chicoine* (2007), 38 R.F.L. (6th) 150 (B.C. S.C.); *Mowat v. Mowat* (2012), 31 R.F.L. (7th) 247 (N.L. T.D.); *Whelan v. Whelan* (2005), 17 R.F.L. (6th) 458 (N.L. C.A.); *Janmohamed v. Janmohamed*, 2014 CarswellBC 170 (S.C.)

- Requiring a "substantial change in circumstances": *Stannard v. Stannard*, 34 R.F.L. (3d) 249 (Alta. Q.B.); *Brooks v. Brooks* (1998), 39 R.F.L. (4th) 187 (Ont. C.A.); *Damaschin-Zamfirescu v. Damaschin-Zamfirescu*, 2012 CarswellOnt 14841 (S.C.J.); *F. (H.) v. G. (D.)* (2006), 29 R.F.L. (6th) 47 (N.B. C.A.)

• Requiring a "compelling change in circumstances" and "cogent evidence": *Lussier v. Lussier*, 2012 CarswellMan 586 (Q.B.)

• Requiring compelling changes in circumstances where one party would be seriously prejudiced by waiting until trial: *Santelli v. Trinetti*, 2019 CarswellBC 2641 (C.A.); *G. (O.L.) v. G. (D.C.)*, 2015 CarswellBC 799 (S.C.); *Huculak v. Huculak*, 1998 CarswellBC 135 (C.A. [In Chambers])

• Requiring a "compelling reason": *Simmons v. Simmons*, 2011 CarswellOnt 8824 (S.C.J.); *Wotherspoon v. Wotherspoon*, 2016 CarswellOnt 12274 (S.C.J.); *Torres v. Marin*, 2007 CarswellYukon 27 (S.C.); *Sork v. Sork*, 2009 CarswellBC 1999 (S.C.)

• The continuation of the interim order would result in an absurdity: *Ciarlariello v. Iuele-Ciarlariello*, 2012 CarswellOnt 15145 (S.C.J.); *Tremblay v. Tremblay* (1997), 39 R.F.L. (4th) 324 (Ont. Gen. Div.); *Novikova v. Lyzo*, 2019 CarswellOnt 424 (S.C.J.), aff'd on other grounds (2019), 31 R.F.L. (8th) 140 (Ont. C.A.)

Only Saskatchewan seems to accept that a court has the power to make successive interim orders: *Prescesky v. Prescesky* (2015), 69 R.F.L. (7th) 27 (Sask. C.A.). And in *Mizrahi v. Mizrahi*, 2019 CarswellOnt 14963 (S.C.J.), the Court simply suggested that there is jurisdiction to change an interim order without the need to establish a material change where there has been a significant change in the evidence - but this does not speak to the actual test.

However, regardless of the test applied, it is likely that the mother would have been able to meet it. She had lost her job due to the pandemic and the MacPherson Order was clearly premised on the fact that both children were in school.

Entitlement to child support for a child who is over 18 years of age requires a finding that the child remains under the charge of a parent, and is "unable by reason of illness, disability or other cause" to withdraw from the parent's charge or to obtain the necessities of life: s. 2(1) of the *Divorce Act*.

Justice Charney moved on to consider the expanded list of "Farden Factors" considered by Justice Chappel in *Menegaldo v. Menegaldo*, 2012 CarswellOnt 6030 (S.C.J.), and he found the very first factor - whether the child(ren) is (are) in fact enrolled in a course of studies - to be of central importance.

A court will often approve of a "gap year" or "grace period" or "transition period" before starting post-secondary studies [see, for example: *Boomhour v. Huskinson* (2008), 54 R.F.L. (6th) 297 (Ont. S.C.J.), at para. 46; *Erb v. Erb* (2003), 41 R.F.L. (5th) 49 (Ont. S.C.J.), at para. 54; *Leonard v. Leonard*, 2019 CarswellOnt 14504 (S.C.J.), at para. 55; *Musgrave v. Musgrave*, 2013 CarswellOnt 17025 (S.C.J.), at paras. 38-39; *Hartshorne v. Hartshorne* (2010), 82 R.F.L. (6th) 1 (B.C. C.A.); *P. (S.) v. P. (R.)* (2011), 1 R.F.L. (7th) 269 (Ont. C.A.) at para. 32.]

However, it is not enough that an adult child have a vague intention of completing his or her studies: *Tatiossian v. Tatiossian*, 2015 CarswellOnt 17312 (S.C.J.). In the absence of "illness or other disability", courts generally require actual attendance at school to remain a "child of the marriage." Nor, says Justice Charney, can adult children accumulate multiple gap years to forestall their independence. And, of course, he is right.

While Justice Charney was satisfied that both children should be allowed to avail of a "gap year" in order to "figure out" what they want to do:

> [45] An adult child cannot, however, indefinitely postpone the commencement of post-secondary education and expect to remain a dependant, entitled to parental financial support. In the absence of "illness or disability" or some other cause that makes him "unable" to attend school, he no longer qualifies as a "child of the marriage" within the meaning of s. 2(1) of the *Divorce Act*.

> [46] While virtual learning may not be ideal, Matthew's and Aaron's decision not to enroll in any educational program for the 2020-2021 academic year was their choice. **It was a choice that, as adults, they had every right to make, but it is not a choice that the [mother] should be required to pay for**. [emphasis added]

As a result, child support was terminated without prejudice to the father's right to apply for child support if the children actually returned to school.

In the meantime, the mother had very substantially overpaid child support - to the tune of about $23,000, which was to be set off against any arrears owing or refunded to the mother.

Don't Be Fresh About New Evidence

Barendregt v. Grebliunas (2021), 50 R.F.L. (8th) 1 (B.C. C.A.) - Newbury, DeWitt-Van Oosten, and Voith JJ.A.

Barendregt v. Grebliunas provides a comprehensive review of the important distinction between "fresh evidence" and "new evidence" in family law appeals.

The mother and father both grew up in the Bulkley Valley, which is in the northwest central interior of British Columbia. They met in the summer of 2011 when the father was 20 and working as a carpenter, and the mother was about to enter grade 12.

In early 2012, the father moved to Kelowna, which is about 1,100 km southeast of the Bulkley Valley. The mother followed him to Kelowna later that year, and they were married in March 2013. They bought a home in Kelowna, and both of their children were born there.

The parties separated on November 14, 2018, when the children were four and two years old respectively.

After the parties separated, the mother took the children to stay with her at her parents' home in the Bulkley Valley, while the father remained in the family home. Litigation ensued.

In December 2018, the court made an interim order that the children alternate between the parties' homes every three weeks. In March 2019, this order was varied to provide for the children to remain in Kelowna and reside primarily with the father, but for a 50/50 parenting schedule if/when the mother returned to Kelowna.

The children returned to Kelowna at the end of April 2019, but the mother chose to stay in the Bulkley Valley with her parents. With the exception of August 2019, the children lived solely with the father from the end of April 2019, until the trial started at the end of October 2019.

After a 9-day trial, the trial judge granted the mother's request to relocate the children to the Bulkley Valley. The trial judge explained that he had concerns about whether the parties could afford to live in Kelowna, and about the mother's ability to thrive there. The parties had no real savings or assets as there was little to no equity in their home and it required significant repairs, the father only earned about $65,000 a year, and the mother only earned about $33,000 a year.

Furthermore, while the father's plan of care for the children was based on him being able to keep and repair the family home, the father had not led any concrete evidence to show that he could actually afford to do so. The father also provided no plan for how both parties would be able to afford to live in Kelowna, which the trial judge thought was problematic since the parties had already struggled to make ends meet when they were together.

The trial judge was also concerned about the conflict between the parties, and the effect that it might have on the children. Although the trial judge was satisfied that the father was an active, caring, and concerned parent, he also accepted the mother's evidence that the father had assaulted her when they separated, and he had serious concerns about whether the father would be able to cooperate with the mother if they lived near each other. He also found that the mother's desire to want to return to her hometown to have support from her parents and extended family was not based on any desire to exclude the father.

The trial judge, however, did not explain how or why moving 1,100 km away from their active and involved father and from the only place they had ever lived would be in the best interest of the very young children in this particular case. (You can probably see where this is going.)

The father appealed, and he asked the court to allow him to file additional evidence to address the trial judge's concerns about the parties' finances. The additional evidence showed that the father, with the assistance of his parents, had been able to raise the funds he needed to purchase and repair the family home, while also significantly reducing his monthly mortgage payments.

In most cases involving a request to introduce additional evidence on appeal, the appellate courts apply the test from *R. v. Palmer*, 1979 CarswellBC 533 (S.C.C.) at para. 22. Based on the *Palmer* test, additional evidence can only be admitted on appeal if it could not have been adduced at trial through the exercise of due diligence; it is reasonably credible; it bears on a potentially decisive issue; and if believed, it would affect the result at trial.

However, in several recent cases (see e.g. *Kane v. Proffitt* (2018), 6 R.F.L. (8th) 282 (B.C. C.A.) at paras. 49-50 and *Barrette v. Benson*, 2019 CarswellAlta 200 (C.A.) at paras. 19-20), appellate courts have recognized that, despite some confusion in the caselaw, the *Palmer* test only applies to "fresh evidence", which is evidence that *actually existed* at the time of the trial. Different considerations apply when deciding whether to allow a party to introduce "new evidence" that did not exist when the trial took place. As the Court explained in this case:

> [29] There is a material difference between new evidence and fresh evidence. **[New evidence] is evidence that was not in existence at the time of trial but has arisen as a result of events or matters that transpired subsequent to trial. [Fresh evidence] is evidence that existed at the time of the trial but was not adduced at that time**: *Hellberg v. Nethercliff*, 2017 BCCA 363 (B.C. C.A.) at para. 53 [*Hellberg No. 1*]; *Jens v. Jens*, 2008 BCCA 392 (B.C. C.A.) at para. 24; *Struck v. Struck*, 2003 BCCA 623 (B.C. C.A.) at para. 37; *Scott v. Scott*, 2006 BCCA 504 (B.C. C.A.) at para. 22.
>
> [30] The admissibility of fresh evidence is subject to the well-established test in *R. v. Palmer* (1979), [1980] 1 S.C.R. 759 (S.C.C.) at 775. **Notwithstanding some periodic imprecision in the use of language, this Court has on a number of occasions noted that new evidence is not subject to the *Palmer* test**: see *Fotsch* at paras. 19 - 20; *Korol, Re*, 2014 BCCA 380 (B.C. C.A.) at para. 36; *Jens* at para. 29. [emphasis added]

The Court of Appeal was satisfied that the father was actually looking to introduce *new* evidence about events that did not occur until after the trial. As a result, the *Palmer* test did not apply. The Court also recognized that new evidence is only admitted in "rare" or "exceptional circumstances" due to the importance of certainty and finality in trial judgments, but confirmed that it can be admitted, "if it establishes that a premise or underpinning or understanding of the trial judge that was significant or fundamental or pivotal has been undermined or altered." While *new* evidence is generally not admissible on appeal absent exceptional circumstances, where the best interests of a child are at issue, the court will, in rare circumstances, take a slightly more elastic approach: *Fotsch v. Begin* (2015), 66 R.F.L. (7th) 259 (B.C. C.A.); *Stav v. Stav* (2012), 18 R.F.L. (7th) 326 (B.C. C.A.); *Artichuk-Murphy v. Murphy* (2019), 34 R.F.L. (8th) 327 (Ont. C.A.).

The additional evidence the father wanted to introduce was new evidence because it dealt with financial transactions that took place after the trial. Furthermore, it established that the trial judge's assumption that the father would probably not be able to afford to keep the family home or live in Kelowna was incorrect.

The Court also rejected the mother's argument that the father could have put forward better evidence about his financial plans at trial with reasonable diligence, because while that is part of the test for admitting fresh evidence, that test does not "strictly govern the admission of new evidence." Respectfully, we are not sure that this is correct, as evidence that could have been adduced at trial with reasonable diligence is not *new* evidence (i.e. "evidence that was not in existence at the time of trial but has arisen as a result of events or matters that transpired subsequent to trial").

In any event, having concluded that one of the trial judge's primary concerns (or "underpinnings") about the father's plan was incorrect, the Court of Appeal was satisfied that appellate intervention was warranted, and it was open to it to either remit the

matter back to the trial court, or make its own assessment of the children's best interests. To avoid further uncertainty and delay, the Court chose to do the latter.

Even without the new evidence, however, we suspect that the Court of Appeal would have been inclined to intervene in this case. The trial judge's main reason for allowing the move was that the mother would be happier in the Bulkley Valley, and a happy parent means a happy child. However, that reasoning does not address how the move would actually be in the best interests of the children themselves. While a parent's happiness certainly can be a relevant consideration in mobility cases, the analysis must always remain child-centered as opposed to parent-centred (*Peterson v. Peterson* (2019), 30 R.F.L. (8th) 341 (Sask. C.A.) at para. 41), and grounded in the best interests of the child(ren).

After considering the record and the trial judge's findings, the Court of Appeal was satisfied that it would be in the children's best interests to remain in Kelowna. The parties had a combined income of almost $100,000; the trial judge had specifically found that the father was a good parent and that the children were strongly bonded to him; and there was no evidence to show that they had not been doing well in his care during the significant period of time that they had been in his care leading up to the trial. Furthermore, while it was understandable that the mother would want emotional support from her family that was not available to her in Kelowna, that alone did not justify the move.

Since the mother had indicated that she would move back to Kelowna if the appeal was granted, the Court of Appeal ordered that the parties would have a shared parenting regime as soon as the mother returned.

The mother applied for leave to appeal to the Supreme Court of Canada. Somewhat surprisingly given that the Court has declined to grant leave in more than 20 mobility cases in the almost 15 years that have passed since it decided *Gordon v. Goertz* (1996), 19 R.F.L. (4th) 177 (S.C.C.), last week it granted the mother's request for leave to appeal. According to the summary of the case from the Supreme Court's website (https://www.scc-csc.ca/case-dossier/info/sum-som-eng.aspx?cas=39533), the appeal will consider the following questions:

- Whether the conditions under which new evidence may be admitted are unclear, particularly in custody disputes?
- How should the *Palmer* test to admit fresh or new evidence be applied in the "slightly relaxed" conditions of custody cases?
- Whether a different test should be applied to applications involving "fresh" evidence as opposed to "new" evidence?

Presumably, the Supreme Court will also have to consider the test from *Gordon v. Goertz*, and decide whether it requires any modifications or clarifications. Even though this case does not specifically engage the recent amendments to the *Divorce Act*, hopefully the Court will take the opportunity to provide guidance about them as well.

It will take some time for the Supreme Court to hear and decide the case (it typically takes an average of about 8 months for an appeal to be heard once leave has been granted, and then about 6 months for the Court to release a decision), but we will let you know when they do.

More Fun with Pensions

Armbruster v. Barrett (2020), 49 R.F.L. (8th) 1 (Sask. C.A.) - Ryan-Froslie, Schwann, Leurer JJ.A.

The Saskatchewan Court of Appeal's decision in *Armbruster v. Barrett* provides yet another reminder that it is crucial to value a pension before determining how to divide it for family law purposes.

Mr. Barrett and Mr. Armbruster separated in 2010 after cohabiting for 13 years (including four years of marriage). After they separated, they consented to an order that Mr. Barrett's employment pension would be divided at source. Although the pension had not yet been valued, the consent order also provided that they would hold back $5,000 from the sale of their home to cover the costs associated with valuing and dividing the pension, and that, "[e]ither party is free to refer the matter back to [the pretrial judge] for further direction should there be any difficulty in implementing this Judgment."

The parties sent the consent order to the pension plan. The plan advised them that Mr. Armbruster's share of the pension was $135,667.65. It paid Mr. Armbruster his share of the pension in September 2014, and he apparently "accepted those funds without objection or reservation."

Shortly after the funds were transferred to Mr. Armbruster, his lawyer requested some additional information from the plan. The plan responded, and there was no evidence to suggest that either Mr. Armbruster or his lawyer followed up with any further questions, or that they took issue with the plan's calculations.

In December 2014, Mr. Armbruster received his share of the $5,000 that had been held back from the sale of the home to cover the costs of dividing the pension. Once again, he accepted his share of these funds "without objection or reservation."

Mr. Armbruster changed lawyers in September 2015, and his new lawyer requested some additional information from the pension plan. The plan responded and explained that it had calculated Mr. Armbruster's share of the pension using the *pro rata* method instead of the value added method based on its understanding of the Supreme Court of Canada's decision in *Best v. Best*, 1999 CarswellOnt 1995 (S.C.C.). The *pro rata* calculation, of course, favoured Mr. Barrett.

(As an aside, how is it possible that 22 years after *Best* was released, we are still seeing countless cases involving disputes over how to deal with pensions in family law cases? Surely there must be a better way of dealing with pensions than what various jurisdictions across Canada are doing now?)

In October 2016, Mr. Armbruster commenced a lawsuit against the plan and Mr. Barrett, and asked for an order requiring the plan to divide the pension at source based on the value added method. Although the reasons do not say what the value of Mr. Armbruster's share of Mr. Barrett's pension plan would have been based on the value added method, it was likely significantly greater than $135,667.65 (for illustrative purposes, the pension in *Best v. Best* had a value of $235,000 based on the value added method, but only $144,000 based on the *pro rata* method).

Mr. Armbruster eventually abandoned his claims against the plan, but continued to pursue Mr. Barrett for the additional funds he believed he was owed.

The Chambers judge dismissed Mr. Armbruster's claims on the basis that the court was *functus*:

> [11] The doctrine of *functus officio* originates from a 19th-century decision of the English Court of Appeal in *Re St. Nazatre* (1879), 12 Ch. D. 88. It has come to mean that, where a court formally issues a final judgment, with no ongoing obligations, that court has no jurisdiction to reopen or amend the judgment except in two instances. One instance is where there has been a slip or mistake in the drawing up of the judgment. In such an instance, the slip can be corrected by a corrigendum. The second instance is where there has been an error in expressing the manifest intention of the court. The Supreme Court of Canada essentially confirmed this meaning in subsequent decisions, such as *Reekie v Messervey*, [1990] 1 SCR 219 (SCC), at pp. 222-23 and *Doucet-Boudreau v Nova Scotia (Department of Education)*, 2003 SCC 62, [2003] 3 SCR 3 (SCC) [*Doucet-Boudreau*] at paras. 77-79.

Mr. Armbruster appealed, and argued that the Chambers judge had made two errors. First, he argued that he had been denied procedural fairness because neither party had raised the doctrine of *functus officio* in their materials or otherwise. Second, he argued that the Chambers judge had ignored the wording of the consent order that allowed them to return the matter to court if there had been any issues with implementing the terms of the order.

The Court of Appeal gave these arguments short shrift. Although neither party had used the term "*functus officio*" in their materials, Mr. Barrett had clearly taken the position before the Chambers judge that he did not have jurisdiction to vary the consent order. Accordingly, as Mr. Armbruster knew the arguments he had to meet in advance, he was not denied procedural fairness.

Furthermore, having accepted payment in 2014 without exception or reservation, and having waited until 2016 to commence his current application, there was no basis for Mr. Armbruster to claim that the consent order had not been fully implemented.

So, in the end, Mr. Armbruster's appeal was dismissed with costs.

All of this uncertainty and cost could have been avoided entirely had the parties simply had the pension valued *before* they settled the case and agreed on a division. That way, both parties would have known exactly how much money Mr. Armbruster was going to receive *before* they finalized a binding settlement, and the parties would have been able to draft the settlement instrument in a way that would have left Mr. Armbruster without any basis for trying to challenge it later on. That said, given *Best v. Best*, it is hard to see how the ultimate outcome would have been anything different.

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