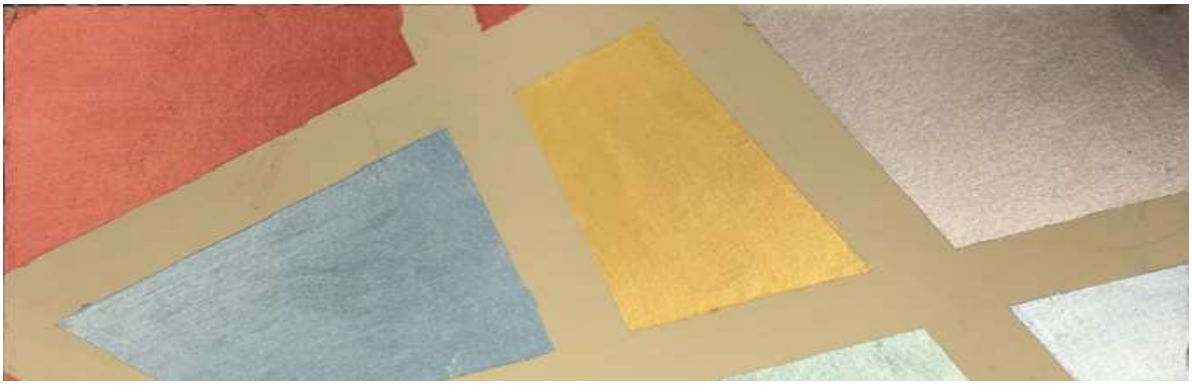
# GUIDANCE NOTE: USING THE INHERENT JURISDICTION IN RELATION TO ADULTS

November 2020



## A: Introduction

1. This purpose of this document is to provide for social workers and those working in front-line settings an overview of the inherent jurisdiction of the High Court as it applies to adults.[1] It sets out (a) when it is appropriate to seek to obtain orders from the High Court; and (b) key procedural matters relating to such applications.

2. This document cannot take the place of legal advice. In any case of doubt as to the principles or procedures to apply, it is always necessary to consult your legal department. This is important as the law in this area is evolving rapidly.

3. We give in this guide references to the key cases throughout, with hyperlinks to the case comments in the database maintained by the editors of the 39 Essex Chambers Mental Capacity Law Report. However, we give these references in footnotes for those who want to read further: the key information is contained in the body of the Guide, in language which is hopefully not as legalistic as that sometimes adopted by the courts.

## B: What is the inherent jurisdiction?

4. For the purposes of most of this note (except section F) the inherent jurisdiction is best understood as the ability of the High Court to make declarations and orders to protect adults

[1]The High Court also has an inherent jurisdiction in relation to children, which we do not consider here.

**Editors**
Alex Ruck Keene
Victoria Butler-Cole QC
Katie Scott
Peter Mant
Alexis Hearnden
Neil Allen

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The picture at the top, "*Colourful*," is by Geoffrey Files, a young man with autism. We are very grateful to him and his family for permission to use his artwork.

who have mental capacity to make relevant decisions, but are vulnerable and at risk from the actions (or sometimes inactions) of other people. It has been described as 'the great safety net,'[2] used by High Court judges to fill the gap left by the fact the Mental Capacity Act ('MCA 2005') only applies to those lacking mental capacity applying the test in ss.2-3 of that Act.

4. The courts have explained that "[T]*he inherent jurisdiction can be exercised in relation to a vulnerable adult who, even if not incapacitated by mental disorder or mental illness, is, or is reasonably believed to be, either (i) under constraint or (ii) subject to coercion or undue influence or (iii) for some other reason deprived of the capacity to make the relevant decision, or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent.*"[3]

## C: When it is appropriate to use the inherent jurisdiction?

*Does the person have or lack mental capacity?*

5. The first question that must be asked is whether, in fact, the person lacks mental capacity[4] to make the decision in question. Most often, the concern will arise in relation to a situation where a person is at risk in some way from the actions (or sometimes inactions) of another, often in the context of a safeguarding investigation under the Care Act 2014 or Social Services and Well-Being (Wales) Act 2014. For purposes of this Guidance Note, we will use the term 'A' for the person potentially at risk, and 'B' for the other person.

6. At that point, careful assessment of A's capacity to make the decision in question – for instance whether they should continue to live with B, or have contact with them – should be undertaken. We have provided detailed guidance as to mental capacity assessments here. The so-called causative nexus is of particular importance here. In other words, is the 'material'[5] (or 'real') reason that the person appears to be unable to take the decision to protect themselves because they have an impairment or disturbance in the functioning of their mind or brain, or is the real reason the influence of B over them? If the real reason is the former, then they are within the scope of the MCA 2005; if the real reason is the latter, it may be appropriate to seek to invoke the inherent jurisdiction.

7. Whilst the English courts have yet to address this issue specifically, we suggest that an important question to ask in such a situation is whether A can understand, retain, use and weigh the information that relates to whether there might be undue influence being applied, e.g. whether they

[2] See *Re DL* [2012] EWCA Civ 253. For a helpful summary, see *A Local Authority v BF* [2018] EWCA Civ 2962.
[3] A description given originally by Munby J in *Re SA (Vulnerable Adult with capacity: Marriage)* [2005] EWHC 2942 (Fam) at paragraph 77, then endorsed in *Re DL*.
[4] We use the term "capacity" in this section to refer to mental capacity under ss 2 and 3 of the MCA 2005. The term is sometimes used in the case law to refer to an inability to make decisions for other reasons.
[5] See *NCC v PB and TB* [2014] EWCOP 14 at paragraph 86: *"the true question is whether the impairment/disturbance of mind is an effective, material or operative cause. Does it cause the incapacity, even if other factors come into play? This is a purposive construction."*

can grasp that another person may have interests contrary to theirs, and if not, whether this inability is caused by mental impairment.[6] If this is the case, then it would be legitimate – we suggest – to conclude that they lack mental capacity to make the relevant decisions for purposes of the MCA 2005, although with the very strong corollary that steps taken in the name of their best interests should be taken to secure either the gaining or return of their decision-making capacity by ensuring that they are surrounded by the supports that they require.[7]

8. If, in reality, the person lacks capacity to make the relevant decision(s) for purposes of the MCA 2005, then it would be inappropriate to go to the High Court to ask for orders under the inherent jurisdiction to secure their protection against B. It is important to note that it is likely still to be necessary to go to a court – the Court of Protection – because the steps that are likely to be required (for instance limiting or stopping contact, or bringing about or stopping a move) will be so draconian that it would be inappropriate for health and social care professionals simply to rely upon the general defence in s.5 MCA 2005.[8]

*If the person has mental capacity*

9. If the person has mental capacity to make the relevant decisions (so that the MCA 2005 is not applicable), but the person appears to be vulnerable in the ways set out at the beginning, then it will in principle be appropriate to consider making an application. This will mean considering, in particular, what relief (what orders) the court will be being asked to make. The primary purpose of the inherent jurisdiction in the sort of situation envisaged here is to "*allow the individual to be able to regain their autonomy of decision making.*"[9] Orders directed against A – for instance requiring them to stay away from B, or to live in a different place to B – are unlikely to achieve this goal. Far more likely to achieve this goal are orders directed against B. There are a number of other hurdles – addressed below – which will need to be considered if it is envisaged seeking orders against A.

## D: Before making the application

10. In all cases, it is necessary to consider what, if any, other legislative mechanisms exist. It is only following proper consideration of whether statute law covers the position that it can be clear whether there is, in fact, a gap to be filled, and hence whether recourse to the inherent jurisdiction is necessary.

11. In the case of domestic abuse, for instance, consideration must be given to whether the behaviour that is giving cause for concern could be addressed by s.42 of the Family Law Act 1996 (non-

[6] This was the approach adopted by the Singapore Court of Appeal, applying English case-law, within the framework of a Mental Capacity Act identical in material terms to the MCA 2005: see *Re BKR* [2015] SGCA 26.
[7] See for more discussion of this issue, and the underpinning ethical considerations, Camillia Kong and Alex Ruck Keene, *Overcoming Challenges in the Mental Capacity Act 2005* (Jessica Kingsley Publishers, 2018).
[8] For more, see Alex Ruck Keene and Stephanie David, *Powers, defences and the 'need' for judicial sanction: an update*.
[9] *London Borough of Croydon v KR &* Anor [2019] EWHC 2498 (Fam) at paragraph 40.

molestation orders which victims, but not public authorities, can seek), the Serious Crime Act 2015 (s.76: which creates a criminal offence of controlling or coercive behaviour where A and B live together and "are members of the same family"), a Domestic Violence Protection Order, a Stalking Protection Order or other civil remedy such as the Protection from Harassment Act 1997.

12. It is also necessary to see whether the position is governed by a statute because, as Lieven J pointed out in *JK v A Local Health Board,*[10] "[t]*he inherent jurisdiction cannot be used to simply reverse the outcome under a statutory scheme, which deals with the very situation in issue, on the basis that the court disagrees with the statutory outcome.*" In other words, the inherent jurisdiction cannot be used contrary to the intention of Parliament as set down in a statute.

13. If it appears (a) that there is no other mechanism which can be used, and (b) that using the inherent jurisdiction would not amount to reversing the position which would apply if a statutory scheme did apply, it is then necessary to consider two key aspects arising from the operation of the European Convention on Human Rights:

*Will the person be deprived of their liberty?*

14. If the result of the orders sought are that the person will, or will be likely to, satisfy the 'acid test' set down in *Cheshire West* (i.e. subject to continuous supervision and control and not free to leave), and if that confinement is to take place without the consent of the person, then there will be a deprivation of liberty for purposes of Article 5(1) ECHR.[11] In deciding whether or not a person is confined, the courts have made clear that an order preventing a person going home can in principle constitute a confinement.[12]

15. The courts have expressed doubts as to whether it is lawful to use the inherent jurisdiction to deprive a person with the relevant decision-making capacity of their liberty.[13] This is because a deprivation of liberty must comply with Article 5 ECHR. The conditions for deprivation of liberty in this context include that that the person must reliably be shown to be of 'unsound mind' (or, in

[10] [2019] EWHC 67 (Fam), at paragraph 57.
[11] The third element required for there to be a deprivation of liberty, state imputability, will always be satisfied.
[12] See *Redcar & Cleveland Borough Council v PR & Ors* [2019] EWHC 2305 (Fam) at paragraph 40, although Hayden J in *Southend-on-Sea Borough Council v Meyers* [2019] EWHC 399 (Fam) considered that – in that case – such an order would not amount to a deprivation of liberty, but rather a (justified) interference with Mr Meyers' Article 8 rights.
[13] See *Wakefield Metropolitan District Council & Anor v DN & Anor* [2019] EWHC 2306 (Fam). In *Mazhar v Birmingham Community Healthcare Foundation NHS Trust & Ors* [2020] EWCA Civ 1377, the Court of Appeal declined to rule definitively on the subject, noting (at paragraph 52) that: "[t]*he preponderance of authority at first instance supports the existence of this jurisdiction, but there is some authority to the contrary. There is also uncertainty as to whether it is permissible in urgent situations to depart from the Winterwerp criteria, in particular the requirement for medical evidence. The qualification in Winterwerp itself ('except in emergency cases') suggests that some limited departure may be permissible, although more recent decisions of the European Court have not repeated that qualification.*"

English terms, to have a mental disorder).[14] Mental capacity[15] is logically distinct to mental disorder. If there is no evidence to suggest that the person has a mental disorder warranting confinement, then it is suggested that there can be no basis upon which to ask the court for an order which will have the effect of depriving them of their liberty. If there is reason to believe that the person may have a mental disorder, then if the position is an emergency, it is legitimate to ask for an order depriving them of their liberty even though there is not yet the 'objective medical evidence' required to satisfy deprivation of liberty for purposes of Article 5(1)(e) ECHR.[16] Any orders made in such a case should be made for as short a period as possible to enable the necessary investigations to be carried out and, if the deprivation of liberty is to continue, to secure the necessary medical evidence to comply with Article 5(1)(e) ECHR.

16. It is particularly important to seek specialist legal advice if the intention is to make any application which might give rise to a deprivation of liberty to ensure that the decision is taken in light of the current case-law.

*Is the interference with the person's rights necessary and proportionate?*

17. This issue will arise both in respect of a potential deprivation of liberty and also in relation to the interference with the person's rights under Article 8 to private and family life – including their autonomy – which will inevitably take place, at least in the short term, as a result of orders being made under the inherent jurisdiction. For both, this will require consideration of whether any other steps short of that being considered could achieve the goal. The more draconian the steps, the greater will be the scrutiny undertaken by the court of the steps taken by the public body in question.[17] This means that it is necessary to consider (and provide evidence to show consideration of):

- What, precisely, is the goal being sought? Is it securing the person's right to life?[18] Or their health (a 'legitimate aim' for purposes of Article 8(2) ECHR, encompassing both psychological as well as physical health)? Or to free them from inhuman or degrading treatment in Article 3 terms?;
- What less intrusive measures could have been taken to secure that goal, and why would they not achieve it?

*Will any orders be directed against the person?*

18. It suggested that it is only in "truly exceptional" cases that the court can properly be asked to make

[14] A useful summary of the European Court of Human Rights' case-law on Article 5(1)(e) ECHR can be found in *Rooman v Belgium* [2019] ECHR 105, at paragraphs 190-193.
[15] And also the wider concept of 'vulnerability.'
[16] See *A Local Authority v BF* [2018] EWCA Civ 2962 at paragraph 23.
[17] *London Borough of Croydon v KR &* Anor [2019] EWHC 2498 (Fam) at paragraph 51.
[18] As in *Southend-on-Sea Borough Council v Meyers* [2019] EWHC 399 (Fam).

an order directed against the person themselves.[19]

19. The courts have made clear that, if a public body makes an application under the court's inherent jurisdiction which is designed to regulate the conduct of the subject by way of injunction, particularly where mental illness or vulnerability is an issue, the public body should be able to demonstrate (and support with evidence) that it has appropriately considered whether the person:

    - is likely to understand the purpose of the injunction;
    - will receive knowledge of the injunction; and
    - will appreciate the effect of breach of that injunction.[20]

20. If the answer to any of these is 'no,' then the injunction should not be applied for or granted against the subject because no consequences can truly flow from the breach.

21. This is particularly important in a case where it is said that injunctions are required to stop A seeing B because A is said to be under the malign influence of B. There is a logical difficulty in:

    - making an application on the basis that (in effect) A is not acting of their own free will; whilst at the same time
    - saying that A is sufficiently capable of exercising free will to hold them to the consequence of breaching an order made against them if they do then seek to see B.

22. This logical difficulty does not arise if the orders sought are against B, rather than A.

## E: Procedural matters

23. This note does not address procedural matters in detail, because this is a matter for the relevant legal department/solicitors for the public body making the application. However, four key matters should be emphasised:

    - Only judges in the Family Division of the High Court (including those holding so-called s.9 tickets[21]) can exercise the inherent jurisdiction. This means that if there are doubts as to whether the case is an inherent jurisdiction case or a Court of Protection case, it is important that the judge who hears it is able to sit also as a judge of the High Court if required;
    - Applications under the inherent jurisdiction are governed by the Civil Procedure Rules 1998

[19] See *London Borough of Croydon v KR &* Anor [2019] EWHC 2498 (Fam) at paragraph 63. Lieven J's formulation of the position was endorsed by Sir James Munby (obiter) in *FS v RS and JS* [2020] EWFC 63 at paragraphs 121-22 in which Sir James also expressed doubts as to the correctness of the decision in *Meyers*.
[20] *Redcar & Cleveland Borough Council v PR & Ors* [2019] EWHC 2305 (Fam) at paragraph 46.
[21] I.e. authorised under s.9(1) Senior Courts Act 1981.

(including the costs provisions of those Rules);

- If the application is to be made without notice to either the person the subject of concern or anyone else, it is particularly important that the court is given complete information, and referred to relevant matters within that information, including (for instance) case notes which might point against, as well as towards, the grant of the order being sought. More detail on without notice applications can be found here;

- Anyone served with or notified of an order made without notice should be given the opportunity to apply to the court *at any time* to vary or discharge the order (or so much of it as affects that person).[22]

24. In *Mazhar v Birmingham Community Healthcare Foundation NHS Trust & Ors* [2020] EWCA Civ 1377, Baker LJ emphasised the following lessons learned from a case where things had gone badly wrong on an emergency inherent jurisdiction application to the out of hours judge:

> *(1) Save in exceptional circumstances and for clear reasons, orders under the inherent jurisdiction in respect of vulnerable adults should not be made without notice to the individual.*
>
> *(2) A party who applies for an order under the inherent jurisdiction in respect of vulnerable adults without notice to another party must provide the court with their reasons for taking that course.*
>
> *(3) Where an order under the inherent jurisdiction in respect of vulnerable adults is made without notice, that fact should be recorded in the order, together with a recital summarising the reasons.*
>
> *(4) A party who seeks to invoke the inherent jurisdiction with regard to vulnerable adults must provide the court with their reasons for taking that course and identify the circumstances which it is contended empower the court to make the order.*
>
> *(5) Where the court is being asked to exercise the inherent jurisdiction with regard to vulnerable adults, that fact should be recorded in the order along with a recital of the reasons for invoking jurisdiction.*
>
> *(6) An order made under the inherent jurisdiction in respect of vulnerable adults should include a recital of the basis on which the court has found, or has reason to believe, the circumstances are such as to empower the court to make the order*

[22] *Redcar & Cleveland Borough Council v PR & Ors* [2019] EWHC 2305 (Fam) at paragraph 26, Cobb J commenting upon a (frequently seen) order to the effect that "[l]*iberty is granted to* [the subject of the proceedings] *to apply to vary or discharge the order herein on 48 hours notice to the solicitors for the Applicant*."

(7) *Finally,* [*… if an order is made out of hours in this way, it is essential that the matter should return to court at the earliest opportunity.*

## F: Other uses of the inherent jurisdiction

25. Entirely separately to the situations set out above, there are times when the inherent jurisdiction may be considered where the person is not at risk from anyone else, but there is another reason why the MCA 2005 cannot be used in some way to seek to control the actions of the person.

26. The case-law is not consistent as to whether it is possible to use the inherent jurisdiction to address a situation where the person themselves is at risk because of their own actions.[23] However, we recall that the Court of Appeal made clear in *Re DL* that it considered that the inherent jurisdiction should be used in a "*facilitative, rather than dictatorial*" way, intended to "*re-establish… the individual's autonomy of decision making in a manner which enhances, rather than breaches, their ECHR Article 8 rights.*"[24] Making declarations or decisions which require someone to do something are not easily characterised as facilitative, rather than dictatorial. In many cases, further, using the inherent jurisdiction to require someone who has mental capacity to make the relevant decision to do something that they do not wish to do comes very close to, if not actually becomes, impermissibly using the inherent jurisdiction to seek to reverse the outcome under a statutory scheme dealing with the very situation in issue. This is particularly so if there is no third party involved, so there can be no suggestion that the individual in question is under duress or coercion.[25] If it is "truly exceptional"[26] to use the inherent jurisdiction to make orders against the person themselves in the presence of a risk from a third party, it must be even more exceptional – if it is legitimate at all – to make an order against the person where the sole risk is from the actions (or inactions) of the person themselves.

27. The case-law is also not entirely consistent as to whether the inherent jurisdiction can be used if the risk in question is posed by the person to others.[27]

28. In both of these cases, we suggest that it is necessary to consider with particular care both the

[23] Usually the jurisdiction is used to obtain a declaration of lawfulness rather than orders directed against the person. In other words, the courts are normally being asked to say that a particular situation of deprivation of liberty is lawful, as opposed to make an order directed against the person.
[24] See *Re DL* at paragraph 67.
[25] See *JK v A Local Health Board* [2019] EWHC 67 (Fam), at paragraph 57. See also *LBL v RYJ & Anor* [2010] EWCOP 2665 at paragraph 62, where Macur J "*reject*[ed] *what appears to have been the initial contention of this local authority that the inherent jurisdiction of the court may be used in the case of a capacitous adult to impose a decision upon him/her whether as to welfare or finance. I adopt the arguments made on behalf of RYJ and VJ that the relevant case law establishes the ability of the court, via its inherent jurisdiction, to facilitate the process of unencumbered decision-making by those who they have determined have capacity free of external pressure or physical restraint in making those decisions.*" This approach was expressly commended by the Court of Appeal in *Re DL* at paragraph 67.
[26] See paragraph 18 above.
[27] Contrast *AB (Inherent Jurisdiction Deprivation of Liberty)* [2018] EWHC 3103 (Fam) and *Wakefield Metropolitan District Council & Anor v DN & Anor* [2019] EWHC 2306 (Fam).

person's mental capacity[28] and whether there are other mechanisms that can be used to reach the same goal. The point made at paragraphs 14 and 15 above about compliance with the provisions of Article 5(1)(e) ECHR are going to be particularly important if there is any question of the orders being sought giving rise to a deprivation of their liberty.

29. Finally, we note that the inherent jurisdiction may be used, sometimes, when the person lacks capacity applying the MCA 2005, but there is a reason why the provisions of the Act cannot be applied. Three examples are:

- *Dr A*'s case,[29] in which Baker J had to use the inherent jurisdiction to authorise the additional deprivation of liberty to which a patient detained under the Mental Health Act 1983 was to be subject in order to force-feed him. Baker J could not (because of the wording of s.16A MCA 2005) do so as a Court of Protection judge, so, applying the same substantive tests of capacity and best interests, did so as a judge of the High Court exercising the inherent jurisdiction;

- *XCC v AA & Anor*,[30] in which, having decided (applying the MCA 2005) that the person in question did not have capacity to marry, Parker J wanted also to make a declaration of 'non-recognition' in relation to a marriage that had purportedly been entered to abroad; she could not do so as a Court of Protection judge, but could do so as a High Court judge exercising the inherent jurisdiction;

- *GSTT & SLAM v R*,[31] in which Hayden J addressed the position where a person currently has capacity, but is likely in a defined situation (there, during labour) to lose capacity. Hayden J confirmed that only the inherent jurisdiction could be used in such a situation to authorise any deprivation of liberty to which they would be subject, alongside a declaration under s.15(1)(c) MCA 2005 as to the lawfulness of other steps to be taken in relation to the person at the point when they did not have capacity.

## G: Useful resources

30. Useful free websites include:

- www.39essex.com/resources-and-training/mental-capacity-law – database of guidance notes (including as to capacity assessment) case summaries and case comments from the monthly 39 Essex Chambers Mental Capacity Law Report, to which a free subscription can be obtained

[28] In the case of the person who is at risk, but from their own actions, it may be important to consider whether they have an adjustment disorder reflecting the impact of their situation upon them: see by analogy *University Hospitals Bristol NHS Foundation Trust v RR* [2019] EWCOP 46.
[29] *An NHS Trust v Dr A* [2013] EWHC 2442 (COP). When the Liberty Protection Safeguards come into force, s.16A MCA 2005 will be repealed, so this situation could be authorised by the Court of Protection.
[30] [2012] EWHC 2183 (COP).
[31] [2020] EWCOP 4.

by emailing marketing@39essex.com.

- www.mclap.org.uk – website set up by Alex with forums, papers and other resources with a view to enabling professionals of all hues to 'do' the MCA 2005 better.
- www.lpslaw.co.uk – website set up by Neil with resources relating to the Liberty Protection Safeguards and many other aspects of the MCA 2005.
- www.mentalhealthlawonline.co.uk – extensive site containing legislation, case transcripts and other useful material relating to both the Mental Capacity Act 2005 and Mental Health Act 1983. It has transcripts for more Court of Protection cases than any other site (including subscription-only sites), as well as an extremely useful discussion list.
- www.scie.org.uk/mca-directory/ - the Social Care Institute of Excellence database of materials relating to the MCA.

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Sheraton Doyle
Senior Practice Manager
sheraton.doyle@39essex.com

Peter Campbell
Senior Practice Manager
peter.campbell@39essex.com



clerks@39essex.com • DX: London/Chancery Lane 298 • 39essex.com

**LONDON**
81 Chancery Lane,
London WC2A 1DD
Tel: +44 (0)20 7832 1111
Fax: +44 (0)20 7353 3978

**MANCHESTER**
82 King Street,
Manchester M2 4WQ
Tel: +44 (0)16 1870 0333
Fax: +44 (0)20 7353 3978

**SINGAPORE**
Maxwell Chambers,
#02-16 32, Maxwell Road
Singapore 069115
Tel: +(65) 6634 1336

**KUALA LUMPUR**
#02-9, Bangunan Sulaiman,
Jalan Sultan Hishamuddin
50000 Kuala Lumpur,
Malaysia: +(60)32 271 1085

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