MENTAL CAPACITY REPORT: PRACTICE AND PROCEDURE

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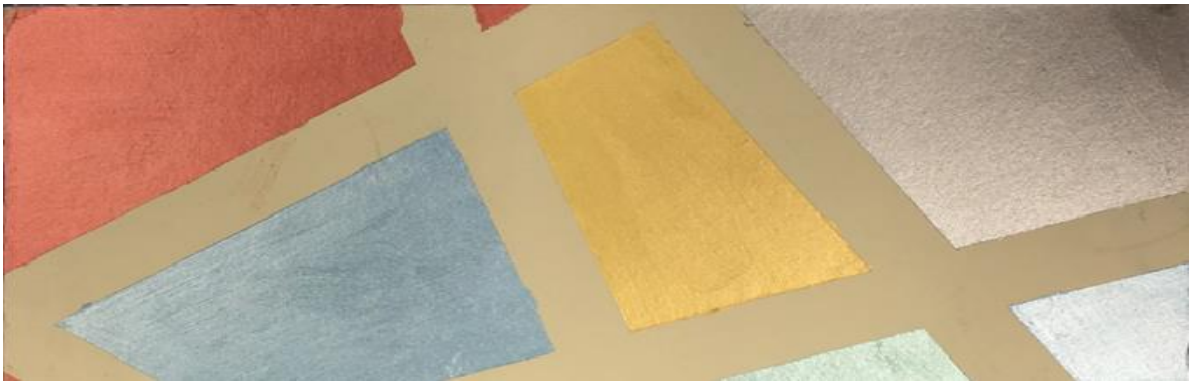

Welcome to the July 2019 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: when to appoint welfare deputies, termination and best interests, capacity in the context of sexual relations and birth arrangements, and the interaction between the MHA and the MCA in the community;

(2) In the Property and Affairs Report, fraud and vulnerability; news from the OPG, and deputyship and legal incapacitation;

(3) In the Practice and Procedure Report: Court of Protection fees changes; contingency planning, costs and s.21A applications; mediation in the Court of Protection;

(4) In the Wider Context Report: the Chair of the National Mental Capacity Act Forum reports, a new tool to assist those with mental health/capacity issues to know their rights, older people and the CPS/police; and books for the summer;

(5) In the Scotland Report: establishing undue influence and an update on the Scott review.

You can find all our past issues, our case summaries, and more on our dedicated sub-site here. If you want more information on the Convention on the Rights of Persons with Disabilities, which we frequently refer to in this Report, we suggest you go to the Small Places website run by Lucy Series of Cardiff University.

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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.

Contents

Court of Protection fees

With effect from 22 July, and via The Court Fees (Miscellaneous Amendments) Order 2019, Court of Protection fees are changing. Application fees are reduced to £365; appeal fees to £230 and hearing fees to £485. A new filing fee with the Supreme Court Costs Office of a short form of a full bill of costs is £85, replacing the previous £115 for short form, and £225 for a full bill.

Contingency planning and the Court of Protection

United Lincolnshire Hospital NHS Trust v CD [2019] EWCOP 24 (Francis J)

Mental capacity – best interests – birth arrangements – medical treatment

Summary[1]

Francis J has grappled with a subject that has been perennially difficult for practitioners: what to do where a person currently has capacity to make a relevant decision but it is likely that they may lack it in due course. Can the Court of Protection be involved, or is it prevented from doing so on the basis that the person, at present, does not fall within its jurisdiction? As Francis J noted, it is surprising that there has been no reported decision upon this to date (although in a judgment alluded dating back to 2009, the current President, Sir Andrew McFarlane had done so).

The case arose in the context of a woman with schizophrenia, detained under the MHA 1983. She was 35 weeks' pregnant, and question of the arrangements for her birth. As Francis J summarised it:

> *The difficult and, I am told, novel issue that arises in this case is that it is common ground among the treating clinicians that CD does not presently lack capacity to make decisions in respect of the birth and the treatment and necessary procedures in connection therewith. However, based on her history, her clinicians are agreed that there is a substantial risk that she may become incapacitous in relation to such decisions at a critical moment in her labour. CD also*

[1] Katie having been involved in the case, she has not contributed to this summary.

> *suffers from polyhydramnios (excess of amniotic fluid in the amniotic sac). At that point, defined as once either CD's membranes have ruptured or CD's waters have broken, the clinicians agree that there would almost certainly be insufficient time to make a renewed application to the court, even though I have agreed to make myself available by telephone throughout the day and night for this case so far as consistent with other professional obligations.*

The Trust therefore asked for anticipatory and contingent declarations, allowing for interventions (including those amounting to a deprivation of liberty) to take place in the event that CD lacked the relevant decision-making capacity.

Francis J went through, in turn, each of the five possible ways in which the court could proceed, as identified by the Official Solicitor.

The first was to bring the proceedings to an end, on the basis that CD did not currently lack capacity to make decisions for herself. However,

> *The practical position, however, is that if (as those treating CD consider very likely) CD subsequently loses capacity to make decisions about her delivery, this is likely to be in an urgent situation where a renewed application would cause unacceptable delay with potentially catastrophic consequences as discussed above. In my judgement it would be dangerous and plainly wrong to do nothing. This court cannot and will not take what is regarded by all as an unacceptable risk. If, as has been summarised above, a medical emergency were to arise and if it were to be determined that CD has again lost capacity to make decisions about herself, the treating clinicians would find themselves in the invidious position of possibly carrying out invasive surgery and administering anaesthetic or other drugs without lawful authority.*

The second was to adjourn the proceedings, but Francis J considered that this was possibly, if not probably, have the effect of leaving things too late and insufficient time for an emergency order to be obtained.

The third was to make an interim order pursuant to s.4B, which authorises the deprivation of liberty "*while a decision as respect any relevant issue is sought from the court*." However, Francis J considered that it was not appropriate:

> *Whilst I agree with Mr Patel that all three conditions of subsection 4B could be said to be met in the circumstances of this case, the court is fully seized of the issues and I am in a position to make a decision now. I agree with the submission made by Mr Patel on behalf of the Official Solicitor that using section 4B to make an interim order would be a device to fit CD's circumstances within section 4A/B. It would involve adjourning the s16 order until after the birth, which is entirely artificial since it is in relation to treatment during labour that the issue arise.* (Emphasis in original).

The fourth was to make a final order. Francis J acknowledged that he was:

> *not currently empowered to make an order pursuant to section 16(2) because the principle enunciated in section 16(1), namely incapacity, is not yet made out. However, as I have already said, there is a substantial risk that if I fail to address the*

> *matter now I could put the welfare, and even the life, of CD at risk and would also put the life of her as yet undelivered baby at risk. As I have said, I am not prepared to take that risk. I am prepared to find that, in exceptional circumstances, the court has the power to make an anticipatory declaration of lawfulness, contingent on CD losing capacity, pursuant to section 15(1)(c).*

Francis J made clear – as was agreed before him – that he was doing so on the basis that:

> *For so long as CD retains capacity to make decisions about her obstetric care and the delivery of a baby, she will of course be allowed to do so, even if those decisions are considered to be unwise. If, however, her mental health deteriorates and she loses capacity I consider that it would be in the best interests to try for a normal vaginal delivery if possible and this is consistent with either CD's expressed wish or best interests. The care plan drawn up by the applicant records the expectation that CD will comply with what is proposed but also includes fall back options, including for appropriate minimal restraint, should this not be the case. Restraint would potentially be used to transfer her to the maternity suite, insert a cannula (although only if medically required) or provide general anaesthetic in order to proceed to a caesarean section. A caesarean section would be very much a last resort.*

In terms of the form of the order, and picking up on a discussion in the *Court of Protection Practice 2019*, which had identified that it was not entirely clear whether indications as to when lack of capacity would arise should be in the declaration itself, or in the accompanying judgment (cross-referenced to in the recital to the order), Francis J considered that any anticipatory order should be made in the declaration itself, rather than in an accompanying order:

> *It is the declarations and orders of the court which authorise the applicant to take the particular course of action, not the wording of the Judgment. Moreover, these cases are by definition going to be urgent and a hospital trust, or other person with the benefit of such an order, will not want to be trawling through what could be a long Judgment. I am not in any doubt that, if making such a declaration, it needs to be on the face of the court order.*

Finally, Francis J considered the inherent jurisdiction. He considered it "*obvious*" that he should work within the MCA 2005 if it all possible. However, he observed:

> *were it necessary for me to say that the unusual circumstances of this case are not covered by that Act, I would have no hesitation in making an order pursuant to the inherent jurisdiction if faced with a situation where the choice is to make such an order or to risk life itself.*

Comment

Alex having been involved in the unreported case before McFarlane J in 2009 noted by Francis J, and others on the team having had unreported cases involving similar issues, we can confirm that it is immensely helpful that we now have a reported decision in which the court has considered and determined the question of what to do in the situation where the person currently has capacity, but it is sufficiently foreseeable that they may lack capacity in due course that

proper contingency planning should be undertaken.

Perhaps counter-intuitively, the difficulties that arose here do not exist outside the court arena, because the question is at any given time whether the relevant person carrying out the fact reasonably believes that the individual lacks capacity. It appeared, though, that the court might be (inadvertently) rendered unable by the wording of ss.15/16 MCA 2005 to play sensible part in 'high end' contingency planning of the nature in contemplation here. The flight-path through those jurisdictional hoops has now, helpfully, been made clear.

Turning to the perinatal setting more specifically, this case would appear to be a paradigm example of one in which advance care planning might have obviated the need to come to court at all. That might have required some careful consideration of (1) whether CD could consent to what would otherwise be a deprivation of her liberty if she did, indeed, need to be confined in her own interests during the course of her birth; and (2) the circumstances under which one could seek to refuse a Caesarean section by way of advance decision to refuse medical treatment (a question which may be as much ethically demanding as it is legally demanding).

Costs and s21A applications

BP v LB Harrow [2019] EWCOP 20 (District Judge Sarah Ellington)

COP jurisdiction and powers – costs

Summary[2]

This was a s.21A MCA 2005 application made on behalf of "P" who objected to being in a care home. He wanted to return to the family home, where his wife lived. His family were opposed to his return home but declined to become parties to the application or to make any formal statement to the Court.

On behalf of BP, the Official Solicitor eventually sought a trial period at home: this was on the basis that a standard authorisation had imposed a condition that such a trial be conducted but the condition had not been complied with and because BP wanted to return home.

The local authority consistently opposed a trial at home, until the morning of the first day of the 2-day final hearing. The local authority had maintained that opposition at a round table meeting in August 2018.

As a result of the local authority's offer of a trial period at home, the final hearing was adjourned, the trial at home took place, and it resulted in P being returned to the care home within a relatively short time. Final orders were agreed that it was in P's best interests to remain at the care home. On behalf of BP, the Official Solicitor sought an order that the local authority pay the costs of the final hearing claimed in the region of just over £10,000 excluding VAT.

The Judge held that there had been no new information and no change of position between the local authority's refusal to agree to a trial period at home during the round table meeting three weeks before the hearing, and their offer to

[2] This draws in part, and with thanks, upon the report prepared by Sian Davies for the 39 Essex Chambers.

facilitate a trial period at home on the morning of the first day of the trial.

DJ Ellington's approach to the costs application was to conclude that the conduct of the local authority did not to the necessary degree "*represent a blatant disregard of the processes of the Act and the Respondent's obligation to respect BP's rights under ECHR as in [Manchester City Council v. G, E and F [2010] EWHC 3385]*" (paragraph 40). She therefore made no order as to costs, although she noted that breach of a condition of a standard authorisation would be relevant pre-action conduct for the purposes of CoP Procedure Rules 19.5(2) in relation to costs:

> *…the standard authorisation granted in November 2017 was subject to a condition that the Managing Authority was to work with social services and BP's family to arrange trial periods at home. No trial period at home was arranged. This would be relevant pre-action conduct for the purposes of Rule 19.5 (2).*

Comment

The decision not to award costs against the local authority is somewhat surprising. The judge had pointed out during the judgment that the January 2019 hearing was the second two day hearing in this matter which had not been effective. Thus the court had allocated four days of court time to this case which had not been used. Given the pressure on the Court of Protection, there is a real need for parties to come to early decisions about cases that can be compromised so as to free the courts up for those cases that need judicial intervention. There will of course always be those cases which cannot be compromised until the last minute because new evidence/information is still emerging, but this was not such a case. The local authority appears to have simply changed its mind at the very last minute.

It seems to us that the Court could have come to the opposite conclusion on the facts of this case given the duty on the court to give effect to the overriding objective (see COP Rules 2017 rule 1.1 which includes dealing with cases justly and at proportionate costs which means saving expense and allotting to each case the appropriate share of the court's resources having regard to the need to allot resources to other cases).

Litigation friends and firm views

A considerable time after the substantive decision was published, an important procedural judgment in the case of *D* has now been published ([2016] EWCOP 67), in which the mother of a soldier with a serious brain injury was found not to be an appropriate litigation friend in proceedings to determine whether it was in his best interests to travel to Serbia to undertake stem cell therapy.

D's mother, who had brought the application on his behalf, had firm views as to the merits of the proposed treatment, but "*rightly refer*[red]" Baker J "*to authority* [presumably *Re AVS*] *that the fact that a proposed litigation friend has a view as to the outcome does not disqualify that person from acting as litigation friend.*" The Ministry of Defence contended that D's mother could not, because of her firm views, fairly and competently conduct proceedings on his behalf.

Baker J noted that:

> *15. In the course of argument, I was referred to the decision of Charles J in Re*

UF [2013] EWHC 4289 (COP). The facts of that case are somewhat different from those of the present case. In particular, it should be noted that that case concerned a dispute between family members as to the right course to be taken in respect of P. It does, however, in my view, provide important guidance, albeit only from the court of first instance, and I note in particular the observation of Charles J at para.21 onwards of the judgment, where he says:

> *"… it seems to me that Rule 140 must be read and applied in the context of the overriding objective and having regard to the circumstances of each case. The overriding objective is set out in Rule 3 as follows:*
> *'(1) These Rules have the overriding objective of enabling the court to deal with cases justly and having regard to the principles contained in the Act.*
> *(2) …*
> *(3) Dealing with a case justly includes, so far as is practicable –*
> *(a) ensuring that it is dealt with expeditiously and fairly;*
> *(b) ensuring that P's interests and position are properly considered;*
> *(c) dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues;*
> *(d) ensuring that the parties are on an equal footing;*
> *(e) saving expense; and*
> *(f) allotting to it an appropriate share of the court's resources, while taking account of the need to allot resources to other cases.'"*

16. As to the application of the principle on the facts of that case, Charles J continues, at para.23:

> *"I agree that members of a family, even if there is a family dispute concerning P's best interests could, albeit I think rarely, appropriately act as P's litigation friend in proceedings relating to that dispute. However, it seems to me that he or she would need to demonstrate that he or she can, as P's litigation friend, take a balanced and even-handed approach to the relevant issues. That is a difficult task for a member of the family who is emotionally involved in the issues that are disputed within the family and it seems to me an impossible task for AF to carry out in this case. One only has to look at her statements to see that she is clearly wedded to a particular answer. You do not see within her statements a balanced approach or anything approaching it, such as: 'This is the problem. These are the relevant factors for and against'. That is not a criticism. Rather it seems to me that it is a product of the result of there being long-standing family disputes and the existing clear divisions of opinion within the sibling group as to what will best promote UF's best interests."*

17. Although, as I have said, and is clear from the passage I have just recited, the decision in Re UF concerns a case where there was a dispute within the family, it seems to me that the approach and principles identified by Charles J are relevant to this case, and indeed all cases where the court is considering whether a

> *family member can act as a litigation friend.*

Baker J had no reason to doubt that D's mother was motivated solely by what she believes to be in the best interests of her son: "*I accept that she only wants what is best for him and that she would not take any action which she thought would cause him harm or expose him to unnecessary risk*." Baker J rejected the suggestion that she may have influenced her son:

> *19.* […] *to express views that he has expressed, positive views, about the prospect of the stem cell treatment. At the moment, I do not accept any suggestion that she has unduly influenced D to express such views. I acknowledge that she has supported the proposal that an independent expert be instructed to provide an opinion before the court makes its decision. On the other hand, it does seem to me that she is, to use the phrase adopted by Charles J in Re UF, "clearly wedded" to the view that this treatment is in D's best interests.*
>
> *20. My impression is that, although she is not unshakeable in that view, it would take a lot to lead her to change her mind. Now, I do not blame her for holding that position. I can well understand a parent in that position taking that approach but, having regard to the overriding objective which underpins procedures in the Court of Protection, in particular the need to ensure that a case is dealt with expeditiously and fairly, and that P's interests are properly considered, and that the case is dealt with in a way that is proportionate to the nature, importance and complexity of the issues, it does seem to me that it may be difficult for her to act as a litigation friend with the degree of competence and fairness required in this case, which seems to me to raise unusual, indeed seemingly novel, issues for this court.*

Baker J therefore invited the Official Solicitor to act as litigation friend in the proceedings. Presciently, he noted that nothing in his procedural judgment should be read as implying that he had formed any view of the ultimate outcome, and that "[t]*he court's obligation is to make a best interests decision on the basis of all the evidence, including D's own wishes and feelings and the views of members of his family*." As we know, Baker J ultimately, and in the face of submissions to the contrary from not just the Ministry of Defence but also the Official Solicitor on D's behalf, found that, in principle, it was in his best interests to go to Serbia to undertake the treatment, D's wishes and feelings being central to his determination.

Mediation in the Court of Protection

Charlotte May, whose work we have been following and supporting for some time, has published her research 'Court of Protection Mediation Research: Where are we in the UK?' which can be found here.

The research analysed 25 MCA cases that had been mediated. The majority of them were mediated prior to Court of Protection proceedings being issued. The issues covered in the mediation case studies included residence, care, contact, finance and property, statutory wills and medical treatment.

The research makes findings on a number of issues including the best time to mediate, the best way to facilitate P's participation in the mediation, what the key obstacles to parties

engaging in mediation are, the levels of awareness of mediation and whether the mediation made matters worse or better. Of considerable interest is the fact that there was an overall success rate of 77% over the 25 cases and in 59% the agreements were incorporated into a court order.

The key recommendations coming out of the research related to (i) improving awareness as to how to secure P's participation in the mediation; (ii) raising awareness about mediation among those engaged with mental capacity law; (iii) seeking clarity as to when funding for mediation is available, either through P's estate by way of judicial order or by the Legal Aid Agency providing guidance and clarification as to when legal aid is available; and (iv) making recommendations as to the skills required of mediators mediating such disputes.

Charlotte May is part of the working group (along with Katie) implementing a Court of Protection mediation scheme which will launch this Autumn.

Mediation and participation

Separately to the project outlined above, Dr Jaime Lindsey of the University of Essex is undertaking a research project on impact of mediation on participation in Court of Protection cases (this is separate from the evaluation of the CoP scheme that Katie Scott asked me to be involved in). She is after legal and mediation professionals who have experience of mediated mental capacity disputes to complete a short survey available here. In addition to the survey, she will be carrying out interviews with non-legal participants in mediations (including P, P's family and other professionals).

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Alex is recommended as a 'star junior' in Chambers & Partners for his Court of Protection work. He has been in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively, has numerous academic affiliations, including as Wellcome Research Fellow at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click here.

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Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. Together with Alex, she co-edits the Court of Protection Law Reports for Jordans. She is a contributing editor to Clayton and Tomlinson 'The Law of Human Rights', a contributor to 'Assessment of Mental Capacity' (Law Society/BMA), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell). To view full CV click here.

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Neil has particular interests in human rights, mental health and incapacity law and mainly practises in the Court of Protection. Also a lecturer at Manchester University, he teaches students in these fields, trains health, social care and legal professionals, and regularly publishes in academic books and journals. Neil is the Deputy Director of the University's Legal Advice Centre and a Trustee for a mental health charity. To view full CV click here.

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Annabel has experience in a wide range of issues before the Court of Protection, including medical treatment, deprivation of liberty, residence, care contact, welfare, property and financial affairs, and has particular expertise in complex cross-border jurisdiction matters. She is a contributing editor to 'Court of Protection Practice' and an editor of the Court of Protection Law Reports. To view full CV click here.

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Nicola appears regularly in the Court of Protection in health and welfare matters. She is frequently instructed by the Official Solicitor as well as by local authorities, CCGs and care homes. She is a contributor to the 5th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2019). To view full CV click here.

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Katie advises and represents clients in all things health related, from personal injury and clinical negligence, to community care, mental health and healthcare regulation. The main focus of her practice however is in the Court of Protection where she has a particular interest in the health and welfare of incapacitated adults. She is also a qualified mediator, mediating legal and community disputes. To view full CV click here.

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Katherine has a broad public law and human rights practice, with a particular interest in the fields of community care and health law, including mental capacity law. She appears regularly in the Court of Protection and has acted for the Official Solicitor, individuals, local authorities and NHS bodies. Her CV is available here: To view full CV click here.

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Simon has wide experience of private client work raising capacity issues, including *Day v Harris & Ors* [2013] 3 WLR 1560, centred on the question whether Sir Malcolm Arnold had given manuscripts of his compositions to his children when in a desperate state or later when he was a patient of the Court of Protection. He has also acted in many cases where deputies or attorneys have misused P's assets. To view full CV click here.

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Adrian is a recognised national and international expert in adult incapacity law. He has been continuously involved in law reform processes. His books include the current standard Scottish texts on the subject. His awards include an MBE for services to the mentally handicapped in Scotland; national awards for legal journalism, legal charitable work and legal scholarship; and the lifetime achievement award at the 2014 Scottish Legal Awards.

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Jill Stavert is Professor of Law, Director of the Centre for Mental Health and Capacity Law and Director of Research, The Business School, Edinburgh Napier University. Jill is also a member of the Law Society for Scotland's Mental Health and Disability Sub-Committee. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2015 updated guidance on Deprivation of Liberty). To view full CV click here.

Conferences

Conferences at which editors/contributors are speaking

Liberty Protection Safeguards: Implementation of the Mental Capacity (Amendment) Act 2019

Alex is chairing and speaking at a conference about the LPS on Monday 23 September in London, alongside speakers including Tim Spencer-Lane. The conference is also be held on 5 December in Manchester. For more information and to book, see here.

Clinically Assisted Nutrition and Hydration Supporting Decision Making: Ensuring Best Practice

Alex speaking at a conference about this, focusing on the application of the BMA/RCP guidance, in London on 14 October. For more information and to book, see here.

Advertising conferences and training events

If you would like your conference or training event to be included in this section in a subsequent issue, please contact one of the editors. Save for those conferences or training events that are run by non-profit bodies, we would invite a donation of £200 to be made to the dementia charity My Life Films in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

We are taking a break over summer, and our next edition will be out in September. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Report in the future please contact: marketing@39essex.com.

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