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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002157-MR
AND
NO. 2007-CA-002284-MR

CAROLYN L. RIGGLE

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JOSEPH W. O'REILLY, JUDGE
ACTION NO. 05-CI-504136

KEVIN RIGGLE

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING IN PART, AND
VACATING AND REMANDING IN PART

** ** * * * * *

BEFORE: MOORE, TAYLOR, AND VANMETER, JUDGES.

VANMETER, JUDGE: Carolyn Riggle and Kevin Riggle appeal and cross-appeal from a judgment entered by the Jefferson Circuit Court, Family Division, in a dissolution proceeding. For the reasons stated hereafter, we affirm in part, and vacate and remand in part.

The parties married in 1979, and separated in 2005. The trial court's 2007 findings, conclusions, order and decree of dissolution, as amended pursuant to both parties' motions to alter, amend or vacate, stated in pertinent part:

The parties have three adult sons. [Carolyn] moved out of the marital home in January 2006. [Carolyn] now resides in a two bedroom apartment. [Kevin] has remained in the marital home.

[Carolyn] is 50 years old. [Carolyn] is currently employed at Stein Mart. [Carolyn] works thirty (30) hours per week and makes \$8.50 per hour. [Carolyn] has been employed at Stein Mart since May 2007. Prior to Stein Mart, [Carolyn] worked at Nanz & Kraft florist from November 2006 to May 2007. [Carolyn] earned \$8.00 per hour at that position. Throughout the marriage [Carolyn] was primarily a homemaker. [Carolyn] has a high school education. [Carolyn] occasionally worked outside the home while the children were in school.

[Kevin] is currently employed in commercial lending with PBI Bank, where he has been employed since June 19, 2006. [Kevin] earns a salary of \$75,000.00 per year. [Kevin] can also earn a bonus of up to 11% per year, based on his performance. During the marriage, [Kevin] was a successful real estate agent with Semonin Realtors. [Kevin] left Semonin in October 2006, following the parties' separation.

[Kevin] is also a member of four LLCs^[1], Spalted Investments, LLC, First Group Investments, LLC, American Commercial Realty, LLC and Regal Investments, LLC. [Kevin] has a one-third interest in Spalted, First Group and American Commercial Realty. [Kevin] has a one-half interest in Regal Investments, LLC.

The LLCs are involved in a business using triple leases. The LLCs buy properties and then lease them to ResCare, a residential care provider. ResCare then leases

¹ Limited Liability Corporations.

the properties to groups with special health needs. With the exception of one, the leases with between [sic] ResCare and the LLCs are fifteen years in length. All the leases have less than nine years remaining. ResCare pays the taxes, maintenance and insurance on the properties. After expenses, the companies have an average total monthly cash flow of \$39,872.41.

In February 2006, the partners in the LLC began receiving payments of \$10,000.00 per month from the monthly cash flow of the LLCs. While the other partners were receiving payments directly, [Kevin's] payments have been going into a capital account. The balance of the capital account is \$113,313.90, as of April 1, 2007. Of that amount, \$104,750.00 is attributable to disbursements [Kevin] should have received but were instead deposited into the capital account. [Kevin's] capital account is not included on his income taxes. The disbursements are also not included as income.

The LLCs were also involved in litigation with SPV Green. That litigation has since been settled, with the LLCs agreeing to pay \$200,000.00 to settle the claim.

[Kevin's] other LLC, Regal Investments, LLC, owns one property. This property² is a house on Periwinkle Drive. The home has a federal lien on it. The home cannot be sold with a lien on it. Attorneys for Regal Investments have requested the lien be released, but it is unclear when it will be released. The home does not currently generate income, but does have expenses, such as insurance, utilities, maintenance and taxes.

The Periwinkle property was purchased using money from the parties' home equity line and from their real estate bank account. A note was used to secure the loan. The original balance on the note was \$268,000.00. The balance on the note is approximately \$228,800.00.

Prior to the separation [Kevin] was receiving a monthly interest payment on the note in amounts ranging from \$1,300.00 to \$1,600.00. After the separation,

² As amended by trial court's order entered October 11, 2007.

[Kevin] continued to receive monthly payments in the amount of \$1,364.00. The payments were made through the Spalted Investment Group. The monthly payments were discontinued in November 2006. [Kevin] and his partner claim Regal Investments no longer has the income to pay the interest payments or the note. Jim Brien testified the note cannot be paid off if the lien on the property is not released.

The value of the LLCs is in dispute. A limited business evaluation was done by a Court appointed evaluator, Mr. Jim Gravitt. The evaluator gave a range of values for the business, not an exact appraisal. This avenue was chosen by the parties because it was a less expensive alternative to a full appraisal.

Mr. Gravitt submitted a report which found [Kevin's] portion of the LLCs to be valued at between \$300,000.00 to \$550,000.00, as of October 1, 2006. At the time of the valuation, the litigation with SPV Green was still pending. This value does not include the impact of that litigation or the Periwinkle litigation. Taking into consideration all of the litigation involving the LLCs, Mr. Gravitt found the range of values to be between \$0 and \$325,000.00.

The marital home is currently on the market for \$575,000.00. The home is a former Homerama home in Lake Forrest. It has six bedrooms. There have been no offers on the home since it was listed for sale.

[Kevin] is also on the deed of the Lexington home of the parties' son, Tony Riggie, along with Tony. The home was purchased in 2003 for \$113,000.00 from the parties' home equity line. The current value on the home is unknown. There is no note or mortgage on the home and the current payoff is unknown. Tony previously paid a mortgage payment to the parties in the amount of \$828.00 per month. Following the separation, Tony made the payments to [Kevin], until such time as he unilaterally discontinued the payments. [Carolyn] has not received any of the money.

The parties kept a ledger on the children, recording how much money was borrowed and paid back by each child. According to the ledger, Tony owes a personal loan of \$26,394.00, in addition to the home loan. The parties' son Michael owes \$4,691.00.

Following the trial in this action, [Carolyn] and [Kevin] entered into an Agreed Order regarding personal property. The Order resolved all issues of personal property, with the exception of the non-marital claim [Carolyn] asserted in the 2003 Mercedes and the ladies' golf clubs. [Carolyn] claims these items were gifts from [Kevin].

[Carolyn] drives a 2003 Mercedes. The current value of the car is \$15,135.00. The car was purchased during the marriage, in December 2004.

[Kevin] drives a 2003 Lexus 430. The current value of the car is \$19,035.00. The car was purchased using \$43,000.00 from the parties' home equity line.

.....

At the time of the separation, [Carolyn] left the home with approximately \$34,000.00 in liquid assets, including cash and a certificate of deposit. In September 2006, [Carolyn] cashed in her entire IRA account and placed the money in her savings account. At the time [Carolyn] cashed in the account, the account had a value of \$22,756.99. [Carolyn] currently has approximately \$8,000.00 remaining.

.....

The parties have a home equity line on their house. The balance on the equity line, as of the date of the trial, was \$518,220.36. Historically, the home equity line was used for many things, including loans to family members, loans to the LLCs, real estate investments, contributions to retirement accounts, taxes, and to purchase automobiles. Since the separation, the home equity line

has only been used to pay Crowe Chizek for the business range of values.

[Kevin] was initially ordered to pay maintenance in the amount of \$4,000.00 per month, effective May 10, 2006. From June 2006 through January 2007, [Kevin] only paid maintenance in the amount of \$1,424.00 per month. Effective October 1, 2006, [Kevin's] maintenance obligation was reduced to \$2,000.00 per month. [Kevin] began paying the reduced amount in February 2007. As of the date of the trial, [Kevin] had paid maintenance totaling \$22,101.68.

Prior to the separation, the parties enjoyed a nice standard of living. They own a home in Lake Forest worth approximately \$600,000.00. They both drive luxury cars. They belong to Oxmoor Country Club and played golf weekly. They also dined out at nice restaurants on a regular basis. [Carolyn] also always had enough money to furnish the home and buy clothing for the children, as well as take the family out for meals. The parties also always had enough money to provide their children with school expenses and to help them purchase cars. The parties did not have any credit problems during the marriage.

[Carolyn] has reasonable monthly expenses of \$4,000.00 per month. [Kevin] has reasonable monthly expenses of \$7,500.00.

[Carolyn] is seeking attorney fees. Counsel for [Carolyn] submitted an affidavit showing attorney fees in the amount of \$33,488.64 and costs of \$2,908.14.

CONCLUSIONS OF LAW

.....

[Kevin's] interest in the four LLCs is marital in nature. This Court finds [Kevin's] portion of the value of the LLCs to be \$233,396.67.³ This value represents the

³ As amended by trial court's order entered October 11, 2007.

average in Mr. Gravitt's range of values, less [Kevin's] portion of the SPV Green litigation settlement.

In its amended order, the court found that the effect of the SPV Green litigation settlement was \$89,333.33. Further, it found that the effect of the Periwinkle lawsuit was \$35,600, calculated by subtracting the Periwinkle note balance of \$228,800 from the \$300,000 estimated effect of the lawsuit, and halving the result. The court awarded Carolyn one-half of Kevin's \$233,396.67 interest in the LLCs, or \$116,698.34. The court then continued:

In addition, [Carolyn] is awarded \$55,000,^[4] one-half the increase in [Kevin's] capital account from October 1, 2006 through the date of entry of this Order. [Kevin's] capital account was considered in the range of values at the time of the evaluation. . . .

Each party is also awarded one-half of the value of the note on Periwinkle Drive. The current balance on the note is \$228,800.00, with one-half being \$114,400.00. This amount shall only be due if the note to [Carolyn] and [Kevin] is repaid. If monthly interest payments resume, each party is awarded one-half of the monthly interest payments.

The parties' marital home is to be sold. Since [Kevin] currently enjoys use of the home, [Kevin] shall be responsible for paying the mortgage on the property pending the sale. At the time of the sale, [Kevin] shall be credited any mortgage payments made by him following the entry of this decree.

. . . .

At such time as the [marital home] is sold, the proceeds shall be used to pay the home equity line debt, which is a martial [sic] debt. Any proceeds after the

⁴ As amended by trial court's order entered October 11, 2007.

payment of the debt shall be divided equally between the parties, taking into account credits to [Kevin] for home equity line payments and mortgage payments. If the proceeds are not adequate to pay off the debt, the parties shall divide the shortfall equally. . . .

. . . .

Both the Mercedes and the Lexus are marital property. [Carolyn] is awarded the Mercedes. [Kevin] is awarded the Lexus. Each party shall cooperate with the other in transferring each car into the parties' sole name. Further, [Carolyn] is awarded \$1,950.00 as an equalization payment for the difference in marital equity between the two cars.

. . . .

Since the separation, [Carolyn] has received \$56,756.99 in marital assets. [Kevin] is entitled to one-half of this sum, or \$28,378.50. \$11,378 shall be deducted from [Carolyn's] portion of the division accounts, and \$17,000.00 is deducted from the cash payment due from [Kevin] to [Carolyn].⁵

. . . .

[Carolyn] has an average gross monthly income of \$1,473.33, based on her current wages for a forty hour week. [Carolyn] has reasonable monthly expenses of \$4,000.00. Before taxes, [Carolyn's] expenses exceed her income by \$2,526.67 per month.

[Kevin] has an average gross income of \$16,937.50 per month, from his salary plus bonus at his employment and \$10,000.00 per month from his LLCs. [Kevin] has reasonable monthly expenses of \$7,500.00. Before taxes, [Kevin's] income exceeds his expenses by \$9,437.50.

⁵ As amended by trial court's order entered October 11, 2007.

Noting that Carolyn sought a permanent award of maintenance, the court listed the factors which must be considered pursuant to KRS⁶ 403.200. The court then concluded that Carolyn

is entitled to maintenance from [Kevin]. Therefore, effective as of the entry of this decree, [Kevin] shall pay [Carolyn] the sum of \$3,000.00 per month in maintenance for fifteen years.

[Carolyn] has requested attorney fees for bringing this action. [Carolyn's] attorney has submitted an affidavit showing attorney fees and costs of \$36,396.78. . . .

. . . .

This Court concludes there is a disparity in financial resources between the parties. As such, [Carolyn] is awarded attorney fees in the amount of \$15,000.00.

This appeal and cross-appeal followed.

First, Carolyn asserts that the trial court abused its discretion when valuing and dividing the parties' interests in the LLCs. We disagree.

Carolyn's argument turns on her claim that the LLCs should be valued by deducting the current mortgage balances from the purchase prices of the properties held by three of the four LLCs, and then dividing the results by the parties' one-third ownership interest in each of those LLCs. More specifically, she asserts that the court should base its valuation on spreadsheets introduced through Kevin's partner, showing that the properties held by three of the four LLCs had a net equity of \$3,103,065.67. She contends that she is entitled to

⁶ Kentucky Revised Statutes.

receive one-half of the parties' one-third interest in those LLCs or \$517,177.65.

Carolyn's calculations on appeal do not address the value of the Periwinkle property held by the fourth LLC, or the significant impact of pending litigation or other liabilities on the proposed valuations.

The court rejected Carolyn's claim, instead relying upon the testimony of a court-appointed evaluator who, as stated by the court, was chosen to analyze the value of the parties' interests in the LLCs, and to provide an estimated range of business values. The parties selected this valuation method in lieu of paying for the more-expensive alternative of a full appraisal. The evaluator valued the parties' share of the monetary interests in the four LLCs at \$300,000 to \$550,000 if excluding the economic impact of pending litigation, or \$0 to \$325,000 if including such economic impact. Given the range of the evidence, the trial court did not err by valuing the parties' share of the LLCs at \$358,330 excluding pending litigation, as that finding of fact falls within the evidence presented by the evaluator. CR⁷ 52.01. *See Largent v. Largent*, 643 S.W.2d 261 (Ky. 1982).

Moreover, we are not persuaded by Carolyn's claim that the trial court should have awarded her a one-half interest in the monthly cash flow from the LLC properties. Although Carolyn argues that she should have been permitted to retain an ongoing interest in the LLCs pursuant to *McGinnis v. McGinnis*, 920 S.W.2d 68 (Ky.App. 1995), *McGinnis* turned on a trial court's decision to delay the division of the parties' respective interests in certain closely-held corporate

⁷ Kentucky Rules of Civil Procedure,

stock for several years, based on allegations that the stock's true value "would not be realized" until the stock went public. *Id.* at 69. On appeal, this court affirmed the trial court's exercise of its discretion. Here, by contrast, Carolyn made no showing of the kinds of unusual circumstances present in *McGinnis*, and the trial court did not abuse its discretion by electing not to impose a delay in the division of the parties' interests in the LLC property. Moreover, once Carolyn received the value of her LLC interests, she lost any right to receive a share of future LLC disbursements since she no longer possessed an interest in the LLCs and their proceeds.

Further, we agree with Kevin's claim on cross-appeal that in its amended order, the trial court miscalculated the effect of the Periwinkle lawsuit on the value of the parties' share of the LLCs. Gravitt estimated and the court found that the effect of the Periwinkle lawsuit was \$300,000. Because the parties owned a one-half interest in the LLC which owned the Periwinkle property, the Periwinkle lawsuit caused the value of the parties' share of the LLCs to be reduced by \$150,000.

Kevin admits that the trial court properly deducted \$89,333.33, representing the effect of the SPV Green litigation, from the \$358,330 which represents the parties' share of the four LLCs. As a result, the parties' share of the LLCs had a value of \$268,996.67, excluding the effect of the Periwinkle lawsuit. However, rather than subtracting the parties' \$150,000 share of the Periwinkle

lawsuit from their \$268,996.67 share of the LLCs, the court found in its amended order that

the effect of the lawsuit related to the Periwinkle property on [Kevin's] one-half interest is \$35,600.00. This number represents the estimated effect of the lawsuit, \$300,000.00, less the note balance of \$228,800.00, divided in half.

This finding failed to acknowledge not only that a federal lien existed against the Periwinkle property for the property's full value, but also that the entire note balance of \$228,800 was an unsecured debt which, although owed to the parties, might never be collected. Thus, the trial court clearly erred by subtracting the note balance of \$228,800 from the \$300,000 estimated effect of the lawsuit. Instead, on remand the parties' one-half share of the Periwinkle lawsuit effect should be subtracted from the parties' \$268,996.67 share of the LLC's, and the balance should be divided between the parties as marital property. Any amount which may eventually be repaid on the Periwinkle note will be allocated pursuant to the original order's provision equally dividing any such proceeds between the parties.

Next, Carolyn asserts that the trial court abused its discretion by failing to award her one-half of the capital account into which LLC payments were deposited each month. In its amended order, the court determined that \$110,000 was paid to the account over an eleven-month period, and it awarded \$55,000 to Carolyn for her one-half interest in the account. Although Carolyn contends that additional marital funds were deposited into the capital account, evidence was produced to show that some of the funds were used for marital debts such as those

relating to the marital residence, and that the value of such contributions potentially will be recaptured and divided between the parties when the marital residence is sold. Moreover, we are not persuaded by Carolyn's argument that other funds, which are paid to the LLCs each month but not distributed to the members, constitute marital property subject to division, as no evidence was produced to show that the parties possess any ownership interests in such funds. Finally, a different result is not compelled by Kevin's assertion that the capital account contained \$104,750 when the hearing was conducted in May 2007, as the trial court's finding was based on the account's balance when the dissolution was entered several months later. *See* KRS 403.190(2).

Next, both parties contend that the trial court erred when awarding maintenance. Carolyn claims that the amount and duration of maintenance are insufficient, as her needs exceed the award and no grounds exist for the termination of maintenance after fifteen years. Kevin, by contrast, claims that the amount and the duration of maintenance are excessive, and that the court erred by calculating maintenance based on his gross rather than net income. For the reasons stated hereafter, the issue of maintenance is remanded to the trial court for additional proceedings.

When examining the issue of maintenance, the trial court quoted the provisions set out in KRS 403.200, including the threshold requirement that the spouse seeking maintenance must be found to (1) lack sufficient property to

provide for his or her reasonable needs, and (2) be unable to support him or herself through appropriate employment. KRS 403.200(1).

The court found that Carolyn grossed \$1,473.33 per month from her employment, but it rejected her claim that her monthly expenses totaled \$6,402.59, including \$2,000 for attorney's fees. The court instead found that Carolyn's reasonable monthly expenses totaled \$4,000, and that Kevin's gross income exceeded his reasonable expenses by \$9,437.50 per month. The court directed Kevin to pay Carolyn maintenance of \$3,000 per month for fifteen years.

We agree with Kevin's assertion that the trial court erred by relying on the parties' gross rather than net incomes when calculating his maintenance obligation. Although KRS 403.200 does not address whether gross or net income should be used when calculating maintenance, the Kentucky Supreme Court has held that "common sense dictates that a court consider the parties' net income when determining whether or not the spouse seeking maintenance will be able to meet his or her needs, as well as the payor spouse's ability to continue meeting his or her own needs." *Powell v. Powell*, 107 S.W.3d 222, 226 (Ky. 2003). *See also Broida v. Broida*, 388 S.W.2d 617 (Ky.1965).

As to the amount of maintenance, it is clear that Carolyn's employment income was insufficient to allow her to support herself. KRS 403.200(1)(b). However, the trial court failed to address whether she "lacks sufficient property, including marital property apportioned to [her], to provide for [her] reasonable needs[.]" KRS 403.200(1)(a). Moreover, the court failed to

justify its findings as to the amount and duration of maintenance. We presume without deciding that since the court made a separate award of attorney's fees, it reduced Carolyn's monthly maintenance claim by the amount requested for attorney's fees, as well as by additional amounts which it may have found were duplicative. Nevertheless, in the absence of specific findings we are unable to determine whether the trial court abused its discretion when awarding maintenance of \$3,000 per month.

Further, the court failed to make findings to justify its award of maintenance for a period of fifteen years. More specifically, the court neither found that Carolyn's need for maintenance will terminate in fifteen years because of an increased ability to meet her needs through property or employment income, nor found that Kevin will retain his ability to pay maintenance of \$3,000 per month after the LLC property leases expire in less than nine years. On remand, therefore, the trial court shall make additional findings pertaining to each party's gross income, as well as to the amount and duration of maintenance. It then shall enter an amended order consistent with those findings and with the dictates of KRS 403.200.

Next, Carolyn raises several miscellaneous contentions, including that the trial court erred by directing that the parties' home equity credit debt should be paid from the proceeds of the sale of the marital residence. More specifically, she asserts that she has not been compensated for the fact that the equity line of credit was used to pay a variety of personal and LLC debts, including for real estate

investments, for the benefit of relatives, and for the purchase of the vehicle awarded to Kevin. Even if Carolyn's spending assertions are true, the record indicates that the debts were incurred during the marriage as marital debts, and that the values of the purchases and proceeds were divided equally between the parties as marital property. Similarly, Carolyn is not entitled to relief on the ground that the trial court abused its discretion by crediting her for the value of certain marital assets which she already had received or utilized during the parties' separation. Having reviewed each of Carolyn's arguments, we find no merit in the multiple claims of error raised in Issue IV of her direct appeal.

Next, Carolyn contends that the trial court erred by failing to assign the Mercedes vehicle to her as nonmarital property. However, although Carolyn asserted that Kevin purchased the car for her as a Christmas gift in 2004, other evidence indicated that the car was purchased as a replacement for another family vehicle. As the trial court's factual finding that the vehicle was marital property rather than a nonmarital gift was not clearly erroneous, it may not be set aside on appeal. CR 52.01.

Finally, Carolyn contends that the trial court abused its discretion by failing to order Kevin to pay all of her attorney's fees, while Kevin urges this court to find that the trial court abused its discretion by awarding an excessive amount as attorney's fees. We disagree with both contentions.

KRS 403.220 permits a trial court, "after considering the financial resources of both parties" to a dissolution proceeding, to order one party to pay "a

reasonable amount” toward the other’s costs and attorney’s fees. The allocation of such costs falls entirely within the trial court’s discretion. *Wilhoit v. Wilhoit*, 521 S.W.2d 512 (Ky. 1975). As noted in *Gentry v. Gentry*, 798 S.W.2d 928 (Ky. 1990), the trial court must be given wide latitude to sanction or discourage any conduct and tactics which waste the time of the court and the attorneys.

Here, the court awarded Carolyn \$15,000 toward her total attorney’s fees and costs of \$36,396.78. Kevin asserts, and Carolyn does not dispute, that he previously had been ordered to pay an additional \$5,000 toward her attorney’s fees, for a total contribution of \$20,000.⁸ Having reviewed the voluminous record of the proceedings below, including the evidence as to the parties’ respective financial resources, we cannot say that the trial court abused its discretion when awarding attorney’s fees.

The court’s judgment is affirmed in part, and vacated and remanded in part for further proceedings consistent with the views expressed herein.

MOORE, JUDGE, CONCURS.

TAYLOR, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

TAYLOR, JUDGE, DISSENTING: Respectfully, I dissent. I cannot agree with the majority that the findings of fact made by the family court regarding the division of marital property are clearly erroneous.

⁸ Although Kevin claims that an additional \$7,500 in marital funds was used to pay Carolyn’s attorney’s fees, the court’s judgment directed Carolyn to reimburse Kevin for one-half of the marital funds, or \$28,378.50, which Carolyn took at or around the time she left the marital residence.

Similarly, the award of maintenance appears to comply with KRS 403.200 as the family court considered all of the statutory factors in reaching the maintenance award. The award of maintenance is open-ended, although for a period of 15 years, which means it is subject to modification under KRS 403.250.

The amount and duration of a maintenance award is within the sound discretion of the family court. *Gentry v. Gentry*, 798 S.W. 2d 928 (Ky. 1990). An award will not be disturbed on appeal absent an abuse of that discretion. *Perrine v. Christine*, 833 S.W. 2d 825 (Ky. 1992).

The family court made findings as to amount and duration of maintenance in light of the statutory factors as required. There is no authority in Kentucky that requires the family court to “justify” its findings as stated by the majority. Rather, the findings must be sufficient to support the award, based upon the evidence considered, and otherwise not clearly erroneous. CR 52.01. I believe the findings were sufficient, especially given that the wife did not receive any of the future income from the LLCs although this income stream was not apparently considered in valuing the LLCs for division.

Accordingly, I do not believe the family court abused its discretion in awarding maintenance in the amount and duration as ordered, especially since the award can be modified upon a showing of changed circumstances that make the original award unconscionable.

I would affirm the family court’s ruling in its entirety.

BRIEFS FOR APPELLANT/CROSS-
APPELLEE:

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