

FAMILY HOME RIGHTS IN DIVORCE
DERECHOS SOBRE LA VIVIENDA FAMILIAR EN EL DIVORCIO

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ABSTRACT: The essay offers a “map” of the conflicting interests in allotting the family home after separation or divorce and their governing rules. The critical review of the judicial doctrine, which considers the preservation of the domestic “habitat” as an exclusive criterion, leads the Author to redefine the axiological foundation of the current legislation, to put forward a different interpretation able to optimize the promotion of child’s best interest, without affecting competing interests in an unreasonable and disproportionate way.

KEY WORDS: Family home; interests; balance.

RESUMEN: *El ensayo ofrece un “mapa” de los intereses en conflicto en la asignación de la vivienda familiar después de la separación o el divorcio y sus reglas de gobierno. La revisión crítica de la doctrina judicial, que considera la preservación del “hábitat” doméstico como criterio exclusivo, lleva al autor a redefinir el fundamento axiológico de la legislación vigente, para proponer una interpretación diferente capaz de optimizar la promoción del interés superior del menor, sin afectar los intereses en competencia de una manera irracional y desproporcionada*

PALABRAS CLAVE: *Vivienda familiar; intereses; equilibrio.*

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I. INTRODUCTORY REMARKS.

The family home is a place of affection and the centre of interests and customs where family life is expressed and carried on. The fate of the family home after separation or divorce involves the interests of numerous stakeholders: parents, children and any third party owners¹.

The breakup of the couple requires all legal systems to address the issue of the family home². A comparative survey reveals that, on the one hand, conflict resolution rules designed exclusively for personal or property situations are inadequate and, on the other hand, flexible and differentiated forms of protection are needed in actual individual cases³.

The choice of the “right civil remedy”⁴ must be informed by the criteria of proportionality, in quantitative terms, and reasonableness, in qualitative terms⁵.

- 1 An accurate and in-depth analysis of the main issues raised by the allocation of the family home can be found in FREZZA, G.: *I luoghi della famiglia*, Torino, 2004; Id.: *Mantenimento diretto e affidamento condiviso*, Milano, 2008; most recently, Id.: *Il nuovo art. 337 sexies c.c.: appunti e spunti*, Arch. giur., 2014, p. 163 ff. In the doctrine following the adoption of art. 155 quater of the Italian Civil Code, see also QUADRI, E.: “Affidamento dei figli e assegnazione della casa familiare: la recente riforma”, *Famiglia*, 2006, p. 395 ff.; Id.: “La crisi familiare e le sue conseguenze”, *Rass. dir. civ.*, 2013, p. 154 ff.; CUBEDDU, M. G.: “L’assegnazione della casa familiare”, in AA.VV.: *Il nuovo diritto di famiglia*, I, *Matrimonio, separazione e divorzio*, directed by Ferrando, Bologna, 2007, p. 839 ff.; CUBEDDU, M. G.: “L’assegnazione della casa familiare”, in PATTI, S. and ROSSI CARLEO, L.: *L’affidamento condiviso*, 2006, p. 181 ff.; BIANCA, C. M.: *Diritto civile*, 2.1, *La famiglia*, Milano, 2014, p. 220 ff.; MANTOVANI, M.: “Casa familiare (assegnazione della)”, in *Enc. giur. Treccani*, VI, Roma, 2008, p. 1 ff.; IRTI, C.: *sub 155 quater*, in PATTI, S. and ROSSI CARLEO, L.: *Provvedimenti riguardo ai figli*, in *Comm. cod. civ. Scialoja and Branca*, continued by Galgano, Bologna-Roma, 2007, p. 260 ff.; GIACOBBE, G. and VIRGADAMO, P.: *Il matrimonio*, II, *Separazione personale e divorzio*, in *Tratt. dir. civ.*, directed by Sacco, Torino, 2011, p. 282 ff.; FERRANDO, G.: “L’assegnazione della casa familiare”, in Id. and LENTI, L.: *La separazione personale dei coniugi*, in *Trattato teorico-pratico di diritto privato*, directed by Alpa and Patti, Padova, 2011, p. 309 ff.; MARINI, R., *Il diritto all’abitazione nei rapporti familiari*, Napoli, 2012.
- 2 The expression is from JEMOLO, A. C.: “La famiglia e il diritto”, in *Ann. Sem. giur. Univ. Catania*, 1949, p. 47.
- 3 IRTI, N.: *Norma e luoghi. Problemi di geo-diritto*, Roma-Bari, 2006, p. 4 talks about the interweaving of a “material” profile and an “ideal” profile.
- 4 For this expression see PERLINGIERI, P.: “Il «giusto rimedio» nel diritto civile”, *Giusto proc. civ.*, 2011, p. 1 ff.
- 5 PERLINGIERI, P.: *o.l.u.c.*, notes the need for congruence between remedies and interests in the light of the criteria of reasonableness and proportionality. The Author also states that «the peculiarities of the

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Likewise as regards the fate of the family home in the wake of a marital crisis, it is necessary to seek “personalised solutions”⁶.

II. INTERPRETATION OF THE ALLOCATION RULES AND LEGAL MODELS ON CUSTODY OF THE OFFSPRING.

The law governing the allocation of the family home must be interpreted in unison with regulatory models on custody of the children.

The legislative preference for sole custody is consistent with granting a right of residence to the parent awarded custody. In this case, the marital crisis leads to a qualitative transformation of the parental relationship, with the automatic “placement” of the child with the parent to whom the home is allocated and the granting of so-called “visiting rights” to the other⁷.

If by contrast shared custody becomes the ordinary and preferred solution, in light of the child's right to maintain a balanced and continuous relationship with both parents⁸, what happens to the family home also needs to be reconsidered. All the more so because divorce courts, in almost all European systems, are obliged to take account of whatever agreement may have been reached between the parents and then proceed, in some systems like Italy, solely to check that any such agreement is consistent with the interests of the children⁹.

From this perspective, the position established by Italian caselaw needs to be reviewed. A stance that tends to favour the old schemes of custody awarded to a single parent and considers that the only way to achieve the child's interest is through habitual residence with one of the parents and the granting to the latter of the right to reside in what is already the family home¹⁰.

concrete case» guide the choice of the remedy also «beyond the boundaries predefined by the legislator». In this methodological perspective see, *inter alia*, PERLINGIERI, G.: *L'inesistenza della distinzione tra regole di comportamento e di validità nel diritto italo-europeo*, Napoli, 2013, p. 84 ff.; *Id.*: “Alla ricerca del «giusto rimedio» in tema di certificazione energetica. A margine di un libro di Karl Salomo Zachariae”, *Rass. dir. civ.*, 2011, p. 664 ff.; *Id.*: *La convalida delle nullità di protezione e la sanatoria dei negozi giuridici*, 2nd ed., Napoli, 2011, particularly p. 85 ff.; LEPORÉ, A.: *Prescrizione e decadenza. Contributo alla teoria del «giusto rimedio»*, Napoli, 2012, particularly p. 167 ff.; CARAPEZZA FIGLIA, G.: “Diritto all'immagine e «giusto rimedio» civile. Tre esperienze di *civil law* a confronto: Italia, Spagna e Francia”, *Rass. dir. civ.*, 2013, p. 859 ff.; *Id.*: “Tutela dell'onore e libertà di espressione. Alla ricerca di un «giusto equilibrio» nel dialogo tra Corte europea dei diritti dell'uomo e giurisprudenza nazionale”, *Dir. fam. pers.*, 2013, p. 1012 ff.

6 See CARAPEZZA FIGLIA, G. and DE VERDA Y BEAMONTE, J. R.: “Interessi rilevanti nell'assegnazione della casa familiare. Un confronto tra le esperienze spagnola e italiana”, *Dir. fam. pers.*, 2013, p. 267 ff.; *Id.*: “Problemi dell'assegnazione della casa familiare nella giurisprudenza italiana e spagnola”, *Foro nap.*, 2013, p. 19 ff.

7 See on this QUADRI, E.: “Affidamento dei figli e assegnazione della casa familiare”, *cit.*, p. 395 ff.

8 As already stated by PATTI, S.: “L'affidamento condiviso dei figli”, *Fam. pers. succ.*, 2006, 302 f.

9 The judge, to encourage an agreed solution, can also postpone the adoption of custody measures to allow the spouses to reach an agreement, possibly through family mediation (art. 338 *octies* of the Italian Civil Code).

10 See Cass., 10 December 2014, no. 26060, *Foro it.*, 2015, I, c. 1544 ff.; Cass., 26 July 2013, no. 18131, in *Dejure* online, according to which “the rule of shared custody (...) does not exclude that the minor is placed

III. REDEFINITION OF THE AXIOLOGICAL FOUNDATION OF THE ALLOCATION AND “CONCRETE” BALANCING OF COMPETING INTERESTS.

A key step is to identify the foundation of the *ratio* underlying the allocation of the family home.

A restrictive vision, rooted in the caselaw of some continental European legal systems, identifies the *ratio* for allocation of the family home as the need to safeguard the preservation of the domestic *habitat*¹¹. The consequence of this approach is to allocate the property to the parent with whom the children habitually live, even in cases of shared custody. The prevalent placement of the child makes it possible to identify the “residual family group”, which deserves greater protection in terms of housing¹².

However, the *ratio* for allocation can be identified in a broad sense not only in the preservation of the *habitat* but in the protection of the child’s housing interests¹³. Moreover, at a time of economic crisis such as the present, the child’s interest in staying in the family home may conflict with the financial but also personal interests of the non-resident parent or third parties. It should not be forgotten that having to leave the family home is often a source of serious prejudice from an economic, social and moral point of view, especially for the former spouse who, by chance or life choices, has fewer means and who deprived of the family home would not be able to easily meet their own housing needs.

with one of the parents and that a specific regime of visits with the other parent is established (...), since it is evident that it is not materially possible, nor does it seem appropriate, for the minor to conduct his or her daily life with both parents, who are no longer cohabiting”. The Italian Courts of merit consider that alternate custody deprives the offspring of a stable environment, resulting in a negative commuting between one parent and another, contrary to the best interests of the child. See, on this, Trib. Savona, 11th June 2014, no. 869, ined.; Trib. Messina, 27th November 2012, *Dir. Fam. pers.*, 2013, p. 165; Trib. Trani, 11th May 2010, no. 402, *Giur. mer.*, 2013, p. 1050; App. Milano, 30th March 2006, *Fam. Pers. Succ.*, 2006, p. 781. A supportive solution can be found in Trib. Ravenna, 21st January 2014, *Guida dir.*, 2015, 14, p. 55; Trib. min. Trieste, 28th February 2012, with comment by IRTI, C.: *Dopo la fine della convivenza: case divise e condivise*, *Fam., pers. e succ.*, 2012, p. 424 f.

- 11 Cass., 3rd June 2014, no. 12346, in *Dejure* online; Cass., 15th July 2014, no. 16171, *ivi*; Cass., 30th March 2012, no. 5174, *Giust. civ.*, 2012, I, p. 1435; Cass., 22nd March 2007, no. 6979, *ivi*, 2008, I, 466. In this regard, see FINOCCHIARO, M.: “Casa familiare (attribuzione della)”, in *Enc. dir.*, Agg. I, Milano, 1997, p. 271.
- 12 Cass., Sez. un., 26th July 2002, no. 11096, *Fam. e dir.*, 2002, p. 461, with note by CARBONE, V.: “Assegnazione della casa coniugale: la Cassazione compone il contrasto giurisprudenziale sull’opponibilità ai terzi”; Cass., 29th August 2003, no. 12705, *Dir. fam. pers.*, 2003, p. 943 identify the *ratio* of the allocation of the family home with the protection of the “interest of the residual family group”.
- 13 See, *ex multis*, Cass., 8th June 2012, no. 9371, in *Dejure* online; Cass., 4th July 2011, no. 14553, *Fam. pers. e succ.*, 2011, p. 657, with note by IRTI, C.: *La casa familiare come habitat domestico*; Cass., 5th June 1990, no. 5384, *Giust. civ.*, 1990, I, p. 2900.

It is thus essential to proceed on the basis not of abstract assessments but a balance capable of identifying the most suitable solution for the actual individual case¹⁴.

IV. WHAT CONCEPT OF “FAMILY HOME”?

The concept of the family home is the test of the inadequacy of any reconstruction that claims to have a solution for any possible conflict *a priori*.

If the protected interest is solely that of continuity of the offspring's living arrangements, the “family home” is not just any property suitable in theory for the general needs of the children but the residence where the family's life occurred while the parents lived together¹⁵.

This concept of family home - based on the connotations of stability, habituality and continuity of the habitat - has a precise legal meaning¹⁶. The Italian courts have ruled out allocation if the house has not in fact constituted the place where family life occurs (for example, in cases where the children and the resident parent have long since moved elsewhere¹⁷, the child has left home for study or work reasons¹⁸ or the property is used only on an occasional or infrequent basis¹⁹) and

14 The compatibility between balance and hierarchy of values is supported by PERLINGIERI, P.: “Valori normativi e loro gerarchia. Una precisazione dovuta a Natalino Irti”, *Rass. dir. civ.*, 1999, p. 787 ff., now in *Id.: L'ordinamento vigente e i suoi valori. Problemi del diritto civile*, Napoli, 2006, p. 333.; *Id.*: “I valori e il sistema ordinamentale «aperto»”, *Rass. dir. civ.*, 2014, p. 1 ff.; *Id.* and FEMIA, P.: “Sistema, gerarchia, bilanciamento dei principi”, in PERLINGIERI, P.: *Manuale di diritto civile*, 7th ed., Napoli, 2014, p. 13 ff. An in-depth reading of the dialectic between values and norms in FEMIA, P.: “Segni di valore”, in RUGGERI, L. (edited by): *Giurisprudenza della Corte europea dei diritti dell'uomo e influenza sul diritto interno*, Napoli, 2012, p. 83 ff.

15 Cass., 4th July 2011, no. 14553, cit.; Cass., 20th January 2006, no. 1198, *Giur. it.*, 2006, p. 1595, which adds that “in order for the family home to be assigned to one of the separated or divorced spouses (...) it must be *the same home* in which the life of the family took place when it was united” (italics added); Cass., 16th July 1992, no. 8667, *Giust. civ.*, 1992, I, p. 3002. Among the Courts of merit see Trib. Matera, 24th November 2007, *Giur. mer.*, 2008, p. 1609, which has the aberrant consequence of considering the assignee's right to enjoy the family home inalienable.

16 In doctrine, an objective notion of family home is welcomed by TRABUCCHI, A.: note to Cass., 19th May 1978, no. 2462, *Giur. it.*, 1978, I, p. 2106 ff.; QUADRI, E.: *La nuova legge sul divorzio*, II, *Presupposti. Profili personali e processuali*, Napoli, 1988, p. 213 ff.; following the 2006 reform see FREZZA, G.: *Mantenimento diretto e affidamento condiviso*, cit., p. 144 f. With regard to the suitability of the housing interest to be objectified, see in this volume MIGLIACCIO, E.: “La destinazione a casa familiare”.

17 Cass., 8th June 2012, no. 9371, cit., considers to be legitimate the judgement of the Courts of merit which had denied the assignment of a house to a mother who, together with her daughter, had been away for about three years.

18 According to Cass., 22nd March 2012, no. 4555, *Foro it.*, 2012, I, c. 1384, in order to allocate the family home, the legally relevant notion of cohabitation coincides with the stable residence of the child at the home of one of the parents, so that the circumstance that the child – for study or work needs – has to go away from it for long periods, undermines the foundation of the institute.

19 In this perspective Cass., 4th July 2011, no. 14553, cit., with regard to a property purchased in a rustic state, object of completion works and used by the family, during the marriage, for the holidays. On the contrary, see QUADRI, E.: “L'attribuzione della casa familiare in sede di separazione e divorzio”, *Fam. e dir.*, 1995, p. 283; CUBEDDU, M. G.: “L'assegnazione della casa familiare”, cit., p. 34, who note that even the holiday home can represent a seasonal extension of the *habitat*.

will provide for revocation if the child's interest in continuity of *habitat* no longer exists (for example, a prolonged stay with the grandparents)²⁰.

However, the court's discretion should include power to nominate a different dwelling from that already in the family, when this - for example, due to the geographical location or state of repair²¹ - is the choice that best meets the needs of the child or is better able to strike a balance with the needs of the parent not awarded custody. This is the solution suggested by the most recent Spanish caselaw, which is open to the possibility of nominating a separate house provided it is able to adequately (or even more adequately) meet the child's interests²².

Moreover, the legal notion of a family home must be influenced the weight afforded to any agreement between parents by the most recent European rules on family crisis.

In all separation or divorce proceedings, the will of the parties is called upon to play a central role in the division between parents of the tasks of child support and care²³, including the identification of the residence at the outcome of the crisis²⁴. Worth mentioning in this regard is Article 268 of the French Civil Code, as per its new wording, "In the context of consensual divorce, the fate of the dwelling shall be a matter for agreement. In other divorce proceedings, in the event of an agreement regarding the dwelling, the spouses may submit that agreement for the approval of the court". It should not be forgotten, among other things, that the free choice of family residence is considered one of the aspects of the right to respect for one's home enshrined in Article 8 of the European Convention on Human Rights.

Accordingly, it is necessary to reject an objective notion of a family home and embrace a subjective notion resulting from the agreement reached between the partners, possibly subject to a determination by a court that it meets the interests

20 Cass., 16th May 2013, no. 11981, *Guida dir.*, 2013, 33, p. 50.

21 Among the judgements of the Courts of merit see Trib. Modena, 24th November 2004, in *Dejure* online, which assigns the spouse who is the custodian of the offspring not the marital home, but a different apartment, owned by the husband, closer to the school attended by the younger daughter; as well as App. Perugia, 24th-30th June 1989 (reformed by Cass., 16th July 1992, no. 8667, *Giust. civ.*, 1992, I, p. 3002), which attributes the property where the foster spouse went to live after the crisis.

22 Reference is made to the case law carefully analysed in this volume by DE VERDA Y BEAMONTE, J. R.: "La atribución del uso de la vivienda familiar en casos de divorcio en España: la superación del Derecho positivo por la práctica jurisprudencial".

23 On the subject, see DI GRAVIO, V.: "Gli accordi tra genitori in sede di separazione" and BELLISARIO, E.: "Autonomia dei genitori tra profili personali e patrimoniali", in PATTI, S. and ROSSI CARLEO, L. (edited by): *L'affidamento condiviso*, Milano, 2006, respectively pp. 55 ff. and 83 ff.

24 In these terms see Corte cost., 21st October 2005, no. 394, *Foro it.*, 2007, I, c. 1083 ff. See also Corte cost., 13th May 1998, no. 166, *Dir. fam. pers.*, 1998, p. 1349 ff., according to which the content of the parental obligation to maintain the offspring includes first of all "the predisposition and conservation of the domestic environment, considered as a centre of affection, interests and habits of life". See, early, Corte cost., 27th July 1989, no. 454, *Foro it.*, 1989, I, c. 3336, which clarify that the family home "cannot be confined to the building, deprived of the normal supply of furniture and furnishings for the daily use of the family".

of the offspring²⁵. If the parents can make an agreement (approved by the court) that envisages nominating a dwelling other than the original one, there is no reason why the court could not adopt that solution even at the behest of only one of the parents, when it is a decision that strikes the best balance between all the interests at stake in the dispute.

In other words, courts should be permitted to nominate a house that, although not the *habitat* of the family while all the members lived together, appears in the circumstances of the case to be a place conducive to the harmonious development of the children's personality²⁶.

V. JUDICIAL HARMONIZATION OF CONFLICTING INTERESTS: PARTIAL ALLOCATION AND PREVALENCE OF THE NON-CUSTODIAL PARENT EXISTENTIAL NEEDS.

The need to strike the best balance between all the interests at stake in the actual case - including those of the parent (owner or co-owner of the property but) not living with the children - throws up some interesting solutions developed by the courts.

First of all, partial allocation comes to mind. In cases where property can be split or easily subdivided, the court may limit allocation to the part that is strictly necessary to satisfy the living needs of the children, taking into account the living needs of the other spouse and the possibility of separate and independent enjoyment of the property²⁷. Partial allocation seems appropriate especially in the case of absence of conflict between the parents, given the material proximity of the living quarters. In these cases it is a solution that fosters the principles underlying shared custody because it enables children to maintain equal and meaningful relationships with both parents²⁸.

25 According to GIACOBBE, G. and VIRGADAMO, P.: *Il matrimonio*, II, *Separazione personale e divorzio*, cit., p. 282 f., the discipline introduced by l. no. 54 of 2006 and today merged into art. 337 *ter* of the Italian Civil Code offers the starting point for a subjective view of the family home "resulting from the parents' agreement, implemented during the separation".

26 See, on this, RUSCELLO, F.: "Il rapporto genitori-figli nella crisi coniugale", *Nuova giur. civ. comm.*, 2011, II, p. 405.

27 In this way, Cass., 17th December 2009, no. 26586, *Dir. fam. pers.*, 2010, 674. See also Cass., 11th November 2011, no. 23631, *Arch. loc.*, 2012, 165, according to which partial allocation is admissible not only if the property is independent and distinct from that intended for the family's home, but also whether the latter "exceeds the needs of the family by extension and is easily divisible"; Cass., 11th November 1986, no. 6570, *Nuova giur. civ. comm.*, 1987, I, 361, which emphasizes the judicial discretion in limiting the allocation of the family home to the part necessary for the needs of the family, in order to "take into account the life needs of the other spouse".

28 Among the Courts of merit, Trib. Bari, 17th November 2010, in *Dejure* online and Trib. Napoli, 21th November 2006, *Foro it.*, 2007, I, c. 237 attribute to the partial allocation the purpose of facilitating the meeting of children with both parents

Rotational allocation is another model, further to which the child is the assignee of the house where the parents alternate according to shifts determined by a veritable schedule. While shared parenting, i.e. the division of the offspring between parental residences, has proved to be contrary to the harmonious growth of the children, rotational allocation ensures that children have a stable *habitat*, with the ensuing preservation of relationships and the usual environment²⁹.

But, more generally, important questions are raised by cases in which the parent not awarded custody has a personal interest in living in the family home that outweighs those of the children³⁰. For example, the situation of a seriously ill spouse or one suffering from a disability, who would suffer a disproportionate loss as a result of being uprooted compared to the advantage that the children would gain by remaining in the home³¹. In these instances, not only the parent's interest as an owner (normally subordinate) but also that parent's existential needs (arguably paramount) must be balanced with the children's interest.

In conclusion, the "mapping" of the interests involved in what becomes of the family home in the wake of a marital crisis discloses a very varied picture, which requires interpreters to avoid any automatism in order to accommodate flexible solutions capable of optimising the promotion of the children's personality without unreasonably and disproportionately sacrificing the competing interests in play.

29 See DELL'ANNA MISURALE, F.: "La casa nella disgregazione della famiglia (adeguatezza e proporzionalità delle tutele)", in DELL'ANNA MISURALE, F. and VITERBO, F. G. (edited by): *Quaderni di «Diritto delle successioni e della famiglia»*, Napoli, 2018, 263 ff.

30 See, on this, AULETTA, T.: *sub art.* 155 *quater*, in BALESTRA, L. (edited by): *Della famiglia*, I, Artt. 74-176, in *Comm. cod. civ.*, directed by Gabrielli, Milano, 2010, cit., p. 728 s., which recalls cases of handicap or serious infirmity.

31 See Cass., 24th August 1990, no. 8705, *Nuova giur. civ. comm.*, 1991, I, p. 92 ss., which verbatim excludes the allocation of the family home "when the advantage of such stay (of the children), in light of the peculiarities of the case, is not *proportionate* to the burden of the solution for the non-assignee parent" (italics added); Cass., 30th August 1995, no. 9163, *Giur. it.*, 1996, I, p. 4, with note by FREZZA, G., according to which the assignment to the foster parent is a preferential and not automatic criterion, intended to yield in front of the particular interest of the spouse who owns the property to stay there, due to the particular conditions of age and health. Particularly interesting App. Venezia, 6th March 2013, no. 25, *Fam. dir.*, 2013, p. 1009 ff., which does not attribute the enjoyment of the home to the parent cohabiting with the offspring, in consideration of the fact that the other "is blind and uses a dog for accompaniment. Therefore, a change of the house where the non-foster parent lives from when he was born and where he lived first with his parents and then with his sister and then with his wife and daughter, would have created considerable problems in the organization of his life which were absolutely unsustainable". According to the Venetian decision "in the face of an interest of the minor to remain in the marital home and other precise, concrete, appreciable and worthy interests to protect a disable parent (...), the Court believes that the latter has to prevail".

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