Court of Appeal New South Wales

Medium Neutral Citation Re Tracey[2011] NSWCA 43 Hearing Dates 1 February 2011 Decision Date 10/03/2011 Before Spigelman CJ at [1], Beazley JA at [50], Giles JA at [51]

Decision

(1) Order that the decision of the District Court of New South Wales made on 28 July 2010 be quashed and that the proceedings be remitted to the District Court to be heard and determined according to law.
(2) Make no order as to costs.

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

Catchwords CHILDREN AND YOUNG PERSONS - Children and Young Persons (Care and Protection Act) 1998 (NSW) - child under parental responsibility of Minister - application by mother for parental responsibility - existing care plan with two carers but one had died - application of principle of least intrusive intervention in s 9(2)(c) - confined to when necessary to take action to protect child from harm - does not apply where question is whether existing care arrangements are to be displaced - consideration of care plan required by s 80 - care plan that is considered must be relevant to the circumstances - need for revised care plan - (per Spigelman CJ and Beazley JA) treaty obligations under Convention on the Rights of the Child capable of being a relevant consideration to the exercise of discretion - held error of law (application of principle of least intrusive intervention) and jurisdictional error (failure to consider revised care plan and rejection of regard to Convention on the Rights of the Child).

Legislation Cited Child Welfare Act 1939;
Children and Young Persons (Care and Protection) Act 1998;
Convention Relating to the Status of Refugees (1951);
Family Law Act 1975 (C'th);
Family Law Reform Act 1995 (C'th);
Migration Act 1958 (C'th);
Supreme Court Act 1970;
United Nations Convention on the Rights of the Child (1989).

Cases Cited B and B; Family Law Reform Act 1995 (1997) 21 Fam LR 676;
Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission [2000] HCA 47; (2000) 203 CLR 194;
Commissioner of Corrective Services v Government and Related Employees Appeal Tribunal (No 2) [2004] NSWCA 337;
Craig v South Australia (1995) 184 CLR 163;
Director General Department of Community Services v D [2007] NSWSC 762; (2007) 37 Fam LR 595;
Director-General, Department of Community Services: Re Thomas [2009] NSWSC 217; (2009) 41 Fam LR 220;
Director of Public Prosecutions v Sami El Mawas [2006] NSWCA 154; (2006) 66 NSWLR 93;
Dwyer v Calco Timbers Pty Ltd [2008] HCA 13; (2008) 234 CLR 124;
George v Children's Court of New South Wales [2003] NSWCA 389; (2003) 59 NSWLR 232;
Gunaleela v Minister for Immigration and Ethnic Affairs ([1987] FCA 277; (1987) 15 FCR 543;

Heshmati v Minister for Immigration [1991] FCA 387; (1991) 31 FRC 123;
Le v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 875;
McKellar v Smith (1982) 2 NSWLR 950;
Minister for Foreign Affairs and Trade v Magno [1992] FCA 566; (1992) 37 FCR 298;
Perpetual Trustee v Khoshaba [2006] NSWCA 41;
Production Spray Painting & Panelbeating Pty Ltd v Newnham (1991) 27 NSWLR 644;
R v Togias [2001] NSWCCA 522; (2001) 127 A Crim R 23;
Re Louise and Belinda [2009] NSWSC 534.
Re Minister for Immigration Multicultural and Indigenous Affairs; Ex parte Lam [2003] HCA 6 ; (2003) 214 CLR 1;
Tomasevic v Travaglini [2007] 17 VSC 337; (2007) 17 VR 100.
Category Principal judgment Parties KL - Appellant
District Court of New South Wales - First Respondent
Department of Human Services - Second Respondent
CH - Third Respondent
Independent Legal Representative - Fourth Respondent
Representation Neisha Shepherd, Broadmeadow - Appellant
I V Knight, - First and Second Respondents
Kathryn Renshall - Third Respondent
Independent Legal Representative - Fourth Respondent

B W Walker SC & L Goodchild - Appellant
Submitting appearance - First Respondent
I Temby QC & M Anderson - Second Respondent
P Braine - Third Respondent
S Gardiner - Fourth Respondent
File Number(s) CA 2010/281392

APPEAL

010 Court File Number(s) 2009/00335531
e Children and Young Persons (Care and Protection) Act 1998 at s 105.

he judgment the title "Re Tracey" replaces the case title in the published judgment, and certain parties and nitials, in recognition of the restriction on publication.

ad the advantage of reading the judgment of Giles JA in draft. I adopt his Honour's outline of the facts and on Ground One of the appeal on the subject of "least intrusive intervention" and have nothing to add. I ree on the Care Plan issue and add some observations below. I have come to a different opinion with g the United Nations *Convention on the Rights of the Child* (1989) ("the CROC"). I adopt his Honour's agree with the orders his Honour proposes.

n is manifest in the legislative scheme to which Giles JA refers. The sequence of Care Plans in the present nce with the regime whenever a material alteration in circumstances arises.
legislative regime (*Children and Young Persons (Care and Protection) Act* 1998 ("the Act")) in this

e child" before granting leave to vary or rescind a care order. (s 90(2A)(d)) The Court must not make a final sibility unless it has considered a Care Plan. (ss 80 and 78(1)) The Care Plan must make provision for how l terms to permanency planning for the child". (s 78(2)(b)(i)) A Care Plan must be "made as far as possible

hild". (s 78(3)) If the Director-General assesses that there is a realistic possibility of restoration to the nency plan involving restoration". (s 83(2)) If the Director-General assesses there is not a realistic e a permanency plan for another suitable long term placement for the child". (s 83(3)) If the Court decides sment it may direct him or her to prepare a different permanency plan. (s 83(6))
at has arisen in this case as to the relevance of the observations by Balla DCJ about the absence of any unity Services ("the Department"), I note that there are detailed provisions in the legislative scheme for the epartment in case of a permanency plan involving restoration (see ss 84, 85 and 85A of the Act).

ourt was the application by the mother for rescission of a care order, pursuant to the power in s 90(7)(a) of s summons, but did in fact vary the care order by deleting a reference to LH, who had died. This was done 7)(a). It is the alteration of the existing care order by Balla DCJ on which this ground of appeal turns.
resent case commences with the fact that prior to the hearing in the Children's Court, the Department 09. That Plan proposed that parental responsibility be restored to the mother.
scheme concerning permanency planning, the Plan answered the statutory question:
hild or young person being restored to his or her parents?"

"Yes."

The report went on to outline the mechanisms for restoration.

8The Care Plan of 24 March 2009 was considered by Senior Children's Magistrate Mitchell, whose decision was the subject of the appeal to the District Court. In his reasons for judgment of 1 May 2009, his Honour Magistrate Mitchell assessed the conflicting evidence on the implications for a child of being adopted by, or placed in the care of, persons who are culturally and racially different from that of the child. The exceptional difficulties of formulating the judgment required by a court in such circumstances were dealt with at some length, including by reference to the detailed assessment of the issue by Brereton J in the adoption context. (See *Director-General, Department of Community Services v D* [2007] NSWSC 762; (2007) 37 Fam LR 595 at [58]-[84].)

9After his consideration of the evidence and its application to the present case, his Honour directed the Director-General to prepare and file a new Care Plan with respect to the child. In accordance with that direction the Department prepared a Care Plan dated 15 May 2009 which answered the statutory question:

"Is there a realistic possibility of the child or young person being restored to his or her parents?"

"No."

The Department also made consequential amendments to the sections of the Plan concerning "permanency planning".

10Accordingly, Balla DCJ had before her two Care Plans, one prepared on the basis that the child would be restored to the mother and the second, which had been prepared at the direction of the Children's Court to the effect that the relevant permanency planning would maintain the status quo.

11The Care Plan of 24 March 2009 stated about the child: "It is evident that she has developed a good attachment to Mrs LH". There was no such reference in that Plan to CH.

12The Care Plan of 15 May 2009 provided:

" **How does the proposed placement relate to permanency planning for the child or young person**

LH and CH have been assessed by the Department to be appropriate to care for [the child] until she attains the age of 18. At the time in which [the child] was placed with LH, it was done on the basis that LH was the registered carer with the Department. Since LH has offered to care for [the child] on a permanent

> basis, CH has been assessed to care for [the child] and thus provide continuity in the placement in the event that LH's age or illness in the future precludes her from caring for [the child] in the future."

13The respondents sought to rely on the last sentence as, in some way, indicating that consideration was given to LH no longer being able to perform the tasks envisaged for her. This submission should be rejected. The orders made involved a continuation of the placement for some 13 years, until the child turned 18. The reference to L's future capacity was included with respect to the long-term situation.

14Indeed, contrary to the submission of the respondents, the passage quoted indicated that it was L who had been the "registered carer" at the time of the original placement. Furthermore, it was L who "offered to care for [the child] on a permanent basis".

15These matters reinforce the conclusion, on the facts of this case, that the death of L was a material change. The requirements of the legislative scheme for a variation of the order, as analysed by Giles JA, were applicable. For the above additional reasons, I agree that her Honour's failure to require a further Care Plan constituted a jurisdictional error.

The Convention Issue

16It was common ground that the appellant would be deported. As a consequence, Mr B Walker SC, who appeared for the appellant, submitted that the child would be "permanently and utterly divorced" from both her parents and the community and culture in which she was born. This fissure in the relationship between the appellant and her child was, Mr Walker SC submitted, entitled to weight in the decision under review. Similarly, the fissure between the child and her cultural origins was also entitled to weight.

17Questions of weight are for the primary decision-maker. The jurisdictional error alleged in this respect is the failure to take into account a relevant consideration, namely Australia's treaty obligations under the CROC.

18In written submissions, the appellant sought to reverse the use to which Balla DCJ put the "least intrusive intervention" element in s 9(2)(c), discussed by Giles JA, by submitting that there had to be "a compelling reason to remove a child from its natural parents". It was with reference to that proposition, which encompassed the parents' cultural origins, that the appellant's written submissions on the CROC ground of appeal concluded:

> "[33] Had the decision at first instance been approached by the court having regard to international obligations ratified by Australia, closer attention may have been given to a factually based assessment of what action would amount to the least intrusive intervention in the life of this child and what decisions could be made that best takes account of the child and parent's culture, language or religion."

19For the reasons given by Giles JA, on its proper interpretation, s 9(2)(c) does not give rise to these matters in this case. However, Mr Walker SC, in oral submissions, sought to rely on the CROC as a relevant consideration in two other respects.

20At a number of points in his oral submissions Mr Walker SC emphasised two matters: the significance of maintaining the parental relationship and the importance of the cultural identity of the child. Both these matters were relied upon with respect to the ground of appeal challenging her Honour's refusal to have regard to the CROC.

21With respect to the second of these matters, Mr Walker SC referred to her Honour's analysis of the requirement in s 90(6)(e) that the Court consider "the capacity of the birth parents to provide an adequate standard of care for the child or young person". Mr Walker SC submitted that the provisions of the CROC could be of significance by

informing the process of assessment of 'adequacy'. Further, Mr Walker SC emphasised, on several occasions, that it was impermissible to have regard to the standard of living that a child would have in Australia, compared with Cambodia. Such a comparison should play no part, he submitted, in the assessment of what was in the best interests of the child. This is a shorthand way of referring to the exercise of the discretion to make an order under the Act.

22Mr Walker SC acknowledged that Balla DCJ did not make any express reference to a proposition that it was in the best interests of the child to grow up in a wealthy country like Australia, rather than a poorer country like Cambodia. However, he submitted that this may have played a role in the reasoning process. This inference, or rather suspicion, was one of the matters relied on for the *Wednesbury* unreasonableness ground of appeal. I agree with Giles JA that that ground cannot succeed, not least because the proposition that this matter was taken into account never rises from the level of suspicion to inference and it was not submitted that it can do so.

The Reliance on Treaty Obligations

23This ground of appeal rests upon the principle that it is permissible to have regard to Australia's international treaty obligations for purposes of exercising a discretion, whether or not the relevant treaty has been enacted as a part of Australian municipal law. The judiciary and the executive are both arms of government. Where the latter has formally undertaken an obligation, binding as a matter of international law, even if not formally adopted as municipal law by the third arm, the legislature, the judiciary should recognise that the national interest is best served if any such international obligation is taken into account in its own decisions, when permissible and appropriate to do so.

24The appellant's written submissions advanced the proposition that various provisions of the Act should be understood as reflecting obligations under the CROC. No material presented to the Court suggested that that was the case. It is true that the Act deals with the same range of issues as are considered in the Convention and some specific sections may have been influenced by it or by its predecessor, the United Nations *Declaration of the Rights of the Child* (1959) . However, no basis was lain for relying upon the Convention for purposes of interpreting any provision that arises in the present case.

25The appellant's written submissions did not develop this theme by reference to extrinsic materials. Unlike the position with the *Family Law Reform Act* 1995 (Cth), the 1997 amendments to the NSW Act relevant in this case were not, it appears, significantly influenced by the CROC, although it was relevant background. (See Review of the *Children (Care and Protection) Act* 1987: Recommendations for Law Reform (Sydney, 1997) at 6.)

26However, the exercise of statutory discretions can be informed by treaty obligations and, in the present case, that may be relevant to two issues. First, the exercise of the discretion to vary or rescind an order for the care and protection of a child, if the Court "is satisfied ... that it is appropriate" to make such an order (s 90(7)). Secondly, in the consideration of an application for such an order the Court is required to consider whether the birth parents can "provide an adequate standard of care for the child" (s 90(6)(e)). The determination of an issue such as 'adequacy' requires the Court to formulate a judgment.

27In the case law to which I will refer, the word "discretion" is not deployed in any technical common law sense. It extends to matters which may more accurately be described as the formulation of a judgment, as distinct from exercising a power to choose. Each of the matters pertinent to the present case, ie, the formulation of a state of satisfaction that it is "appropriate" to vary or rescind an order and the determination of the "adequacy" of the standard of care, fall within the concept of a "discretion" as so

understood. (Cf F Bennion "Distinguishing Judgment and Discretion" [2000] *Public Law* 368; F Bennion "Judgment and Discretion Revisited: Pedantry or Substance" [2005] *Public Law* 707. See also *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2000] HCA 47; (2000) 203 CLR 194 at [19]-[21]; *Dwyer v Calco Timbers Pty Limited* [2008] HCA 13; (2008) 234 CLR 124 at [37]-[40]; *Perpetual Trustee v Khoshaba* [2006] NSWCA 41 at [34]-[40]; *Director of Public Prosecutions v Sami El Mawas* [2006] NSWCA 154; (2006) 66 NSWLR 93 at [64]-[70]).

28By reason of its comprehensive treatment of the circumstances in which an international instrument can have an effect on Australian legal decision-making, and his Honour's subsequent elevation to the High Court, the most frequently cited judgment on these matters is that of Gummow J in *Minister for Foreign Affairs and Trade v Magno* [1992] FCA 566; (1992) 37 FCR 298 (" *Magno* "). His Honour states that an administrative decision-maker may have regard to an international agreement or obligation in "exercising a discretion" under a municipal law (at [18]).

29Although this particular question did not directly arise in *Magno* and, accordingly, was not expressly considered by the other member of the majority in that case, it is pertinent to note that the same proposition appears in an earlier joint judgment of the Full Court of the Federal Court, in which Gummow J participated (*Gunaleela v Minister for Immigration and Ethnic Affairs* [1987] FCA 277; (1987) 15 FCR 543 at [50]-[59]) and in another judgment of the Full Court where Gummow J wrote the principal judgment, with which the other members agreed (*Heshmati v Minister for Immigration* [1991] FCA 387; (1991) 31 FRC 123 at [21]-[22]). In each of these earlier cases, the Full Court of the Federal Court concluded that Australia's international obligations under the *Convention Relating to the Status of Refugees* (1951) was relevant to the exercise of discretions by decision-makers under the *Migration Act* 1958 (Cth).

30A particularly apposite application of this line of authority was the acceptance by French J, when a judge of the Federal Court, that the CROC could be a relevant consideration for an administrative decision under the *Migration Act* 1958 (Cth) . In *Le v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 875, his Honour said (at [59]):

> "There is nothing in s 501 which expressly requires that the Minister have regard to the best interests of the visa holder's children as a condition of the valid exercise of the cancellation power. Nor is there anything in the language of the Act to support an implication to that effect. In the international context, Australia is a party to the Convention on the Rights of the Child and therefore is bound, in international law, by the obligation, in legislative, executive and judicial decision-making to treat the best interests of the child as a primary consideration 'in all cases concerning children'. However the existence of that obligation at international law does not, unless incorporated by the Parliament into domestic legislation, give rise to a corresponding substantive obligation which conditions the exercise of statutory powers. The provisions of an international treaty to which Australia is a party may be a relevant consideration in the exercise of statutory discretions (*Magno* , at [18], Gummow J). Such considerations do not thereby become mandatory."

31French J went on to refer to, and apply, the principle that an international obligation is not a mandatory relevant consideration attracting judicial review for jurisdictional error. His Honour referred to the joint judgment of McHugh and Gummow JJ in *Re Minister for Immigration Multicultural and Indigenous Affairs; Ex parte Lam* [2003]

HCA 6; (2003) 214 CLR 1 at [101].
32However, the issue that arises in the present case is not whether Balla DCJ was obliged to take into account provisions of the CROC as relevant considerations. The issue in the present case is whether her Honour failed to take into account a relevant consideration by rejecting any reliance on the CROC, as she did explicitly. The relevant jurisdictional error is her Honour's positive statement, in effect, that none of the provisions of the CROC were capable of constituting a relevant consideration.
33Although the above line of authority is concerned with the exercise of discretions conferred upon the executive branch of government, there is authority that extends this principle to discretions conferred upon the judiciary. (See, eg, *McKellar v Smith* (1982) 2 NSWLR 950 at 962 [the exercise of a discretion to admit a confessional statement made by a child or young person into evidence pursuant to the *Child Welfare Act* 1939] and see generally the cases set out by Bell J in *Tomasevic v Travaglini* [2007] 17 VSC 337; (2007) 17 VR 100 at [73] fn 49; see also Wendy Lacey, "Judicial Discretion and Human Rights: Expanding the Role of International Law in the Domestic Sphere" (2004) *Melbourne Journal of International Law* 4.) In my opinion, the principle referred to at [23] above does apply to the exercise of a judicial discretion.
34In a case involving the sentencing of a mother whose imprisonment would separate her from her child, two judges of the NSW Court of Criminal Appeal accepted that the CROC could be referred to for purposes of the exercise of the sentencing discretion. (See *R v Togias* [2001] NSWCCA 522; (2001) 127 A Crim R 23 at [81]-[85] per Grove J, [119]-[120] per Einfeld AJ. I left the issue open in my judgment at [36].)
35Understandably, the application of the CROC with respect to the exercise of a discretion by a court has arisen most frequently in the context of family law. In the present proceedings particular reliance was placed on the detailed analysis of the issues undertaken by Brereton J in *Director-General, Department of Community Services; Re Thomas* [2009] NSWSC 217; (2009) 41 Fam LR 220 (" *Re Thomas* ").
36In that case his Honour was concerned with the exercise of the *parens patriae* jurisdiction of the Court. The respondent submitted that matters arising in the Court's inherent jurisdiction are quite distinct from matters arising under a statute. Clearly there are differences. However, both are discretionary decisions and no relevant basis for differentiation was suggested to the Court.
37In *Re Thomas,* Brereton J said, relevantly:

> "[37] Australia is a signatory to *CROC* , and although this does not incorporate the Convention into our domestic law, it has relevance to decisions made in respect of children by administrative and judicial decision-makers. In my view, a Court exercising the *parens patriae* power should take into account, as a relevant consideration, the provisions of *CROC* , as must the Family Court when exercising its welfare jurisdiction (and this Court when exercising that jurisdiction pursuant to the (CTH) *Jurisdiction of Courts (Cross-vesting) Act* 1987) - although, just like the child's wishes in *Re W* , the child's rights under *CROC* , while relevant, are not conclusive. This is so for several reasons:
> ...
> Fourthly, in the exercise of a discretion, regard may be had to an international obligation or agreement which has been ratified by Australia, though not otherwise incorporated into domestic law - unless the domestic law prohibits it [*Murray v Director Family Services, ACT* (1993) FLC 92-416, 81,255-256; *B and B* , 84,224]. This is directly relevant to discretionary decision-making in the *parens patriae* jurisdiction;
> Fifthly, insofar as the *parens patriae* jurisdiction overlaps the welfare

> jurisdiction of the Family Court of Australia, it is material that *Family Law Act* , s 43(c), provides that the court, in the exercise of its jurisdiction, must have regard to the need to protect the *rights of children* and to promote their welfare [*B and B* , 84,226 [10.7]]. In *B and B* , the court rejected the Attorney-General's submission that s 43 could not be interpreted as applying to *CROC* , and thought it difficult to see how *CROC* could be considered not to be relevant [*B and B* , 84,226 [10.9-10.13]]. Indeed, *CROC* is entitled to special significance because it is almost an universally accepted human rights instrument, and is a declared instrument appearing in the schedule to the (CTH) *Human Rights and Equal Opportunity Commission Act* 1986, and thus has much greater weight than an ordinary bi-lateral or multi-lateral treaty not directed at such ends [*B and B* , 84,227 [10.14 - 10.19]]."

38Of particular significance for present purposes is the judgment of the Full Court of the Family Court of Australia upon which Brereton J relied, *B and B: Family Law Reform Act 1995* (1997) 21 Fam LR 676. In an extended *obiter dictum* the Full Court, in a joint judgment, emphasised the relevance of the CROC for the purposes of family law (see 737). This has become a leading case on the paramountcy principle and on the role of CROC in family law.

39Although I find some of the reasoning in *B and B* difficult to accept, for present purposes the relevant part is in a narrow compass. The Full Court expressly drew upon the reasoning of Gummow J in *Magno's* case with respect to the exercise of a statutory discretion by the Court (at [10.18]).

40It is pertinent to note that the paramountcy principle was enacted in the *Family Law Act* 1975 (Cth) in its original form. It appears to have provided the basis of NSW predecessor provisions now reflected in the paramountcy principle in s 9(1) of the Act. The relevant jurisprudence of the Family Court does not treat as material the different formulation for which CROC provides in Article 3, namely a "primary consideration" test.

41The use to which the CROC is put with respect to the exercise of statutory discretions under the *Family Law Act* 1975 (Cth) cannot, in my opinion, be distinguished from its use in the cognate legislation presently under consideration. This Court should follow another intermediate court of appeal unless it is convinced that the reasoning is incorrect. I am not so convinced.

42The proposition for which the appellant contends has the support of a significant body of analogous case law. The application of this principle by the Full Court of the Family Court in the cognate sphere of family law is entitled to particular weight with respect to the CROC ground of appeal.

The Relevance of CROC

43With respect to the contention that reference to the CROC is relevant to the weight to be given to the maintenance of a child's relationship with his or her natural parents, the appellant relied on the following Articles:

> "Article 3
>
> 1 In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
>
> 2 States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and

administrative measures.

...

Article 5

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

...

Article 7

1 The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

...

Article 9

1 States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

...

Article 18

1 States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern."

44With respect to the proposition that reference to the CROC is relevant to the weight to be given to the original cultural identity of the child, the appellant relied on the following Articles:

"Article 8

1 States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

...

Article 29

1 States Parties agree that the education of the child shall be directed to:

...

(c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;

...

Article 30

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of

> his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language."

45In my opinion, these provisions of the CROC are capable of being relevant to the exercise of the discretion to make the relevant order sought by the appellant, ie, that the existing order be rescinded.

46I refer particularly to Art 7.1 which refers to a right *of the child* "to be cared for by his or her parents". The inclusion of a parental relationship as a right in the CROC suggests the importance of a parental relationship to a child's safety, welfare and wellbeing. This is pertinent to the application of the paramountcy principle contained in s 9(1) of the Act.

47Furthermore, the references to the rights and duties of parents in Arts 3.2 and 5, together with the first clause in Art 9.1 - providing that a child shall not be separated from parents against their will - indicates that weight is to be given to maintaining the bond with the natural parents.

48With respect to the issue of cultural identity, Arts 8(1) and 29 may reinforce the significance of this consideration with respect to both the issue of "adequacy" and in the exercise of the discretion to make an order.

49Accordingly, I am of the view that her Honour, by rejecting the relevance of the CROC, committed a further jurisdictional error.

50**BEAZLEY JA** : I agree with Spigelman CJ

51**GILES JA** : The District Court made orders under the *Children and Young Persons (Care and Protection) Act* 1998 ("the *Care Act* ") whereby the applicant's child, now aged 5, remained under the parental responsibility of the Minister to age 18 and aspects of the parental responsibility were exercised jointly by the Minister and a carer, CH, or were the sole responsibility of CH. The applicant applied to this Court for orders pursuant to s 69 of the *Supreme Court Act* 1970 quashing the decision of the District Court and remitting the matter to be heard and determined according to law.

52The District Court filed a submitting appearance. The other respondents, being the Minister, CH and the child's independent legal representative, opposed the application.

53Relief may be granted if there be shown jurisdictional error or error of law on the face of the record of the proceedings in the District Court (*Craig v South Australia* (1995) 184 CLR 163 at 175-6). The record includes the reasons of the District Court (*Supreme Court Act* , s 69(4)). For the reasons which follow, in my opinion the reasons of the learned District Court judge disclose error of law and jurisdictional error, and the relief sought should be granted.

Background

54The applicant is the child's mother. She and the father of the child are Cambodian. They were married in 2001 or 2002. The child was born in August 2005, in Cambodia.

55In October 2006 the applicant travelled to Australia with the child on a tourist visa. She was stopped and arrested on a charge of carrying heroin, and was taken into custody. The child was placed with foster carers, LH and her daughter CH (who herself had a daughter then aged 5).

56In January 2007 the Children's Court made an order under the *Care Act* that the child be placed under the parental responsibility of the Minister until she attained 18 years of age.

57The applicant pleaded guilty to drug importation. On 2 November 2007 she was convicted and sentenced to imprisonment for 4 years and 5 months with a non-parole period of 2 years and 9 months, backdated to 10 October 2006.

58Prior to and after the sentencing, orders were made providing for the child to have contact with the applicant.

59On 4 July 2008 the applicant filed an application in the Children's Court seeking rescission or variation of the placement order and the then current contact order (*Care Act* , s 90). She claimed orders whereby the child would be placed in the parental responsibility of the Minister until 10 July 2009 (being the day after the applicant was to be released from custody), with aspects of the parental responsibility to be exercised jointly by the Minister and the applicant.
60The learned Senior Children's Magistrate gave his decision on 15 May 2009. He declined to make orders which would have the effect of returning the child to the applicant's care, and made orders whereby she was placed under the parental responsibility of the Minister to the age of 18 years and aspects of the parental responsibility were exercised jointly by the Minister and LH and CH or were the sole responsibility of LH and CH. (The orders used the language of sharing and allocation, but from the identifying sections of the *Care Act* , ss 79(1)(b) and 81, should be so understood.)
61By a summons filed on 27 May 2009 the applicant appealed to the District Court (*Care Act* , s 91). The appeal was by way of a new hearing (s 91(2)). The District Court had all the functions and discretions of the Children's Court under the relevant provisions of the *Care Act* (s 91(4)), and its decision was taken to be the decision of the Children's Court (s 91(6)). The applicant claimed an order placing the child under her parental responsibility.
62The applicant was released from custody on 9 July 2009. She was subject to deportation to Cambodia, and the trial judge, Balla DCJ, found that she "will be deported probably in 2011". It was common ground that, if the applicant were successful in her application, the child would be returned to Cambodia with her.
63The appeal to the District Court was not heard until 31 May 2010 and subsequent days. Shortly before the hearing, on 11 April 2010, LH died.
64Judgment in the appeal was given on 28 July 2010. The judge dismissed the summons, and affirmed the orders of the Children's Court made on 15 May 2009 "except to vary Orders 3 and 4 to insert ' *CH* ' in lieu of ' *LH and CH*' ."
65The applicant filed her summons in this Court on 11 November 2010.

Least intrusive intervention

66Ground 1 of the grounds of relief was -

> "That the learned trial judge misdirected herself as to the law in that correct principle required a compelling reason to remove a child from its natural parents, but her Honour reversed that principle by requiring compelling reasons to interfere with existing care arrangements."

67The submissions came to focus on the judge's regard to s 9(2)(c) of the *Care Act* . Section 9 is "intended to give guidance and direction in the administration of [the *Care Act*]" (s 7). By s 9(1), the *Care Act* is to be administered under the principle that, in any action or decision concerning a particular child or young person, the safety, welfare and well-being of the child or young person are paramount. Section 9(2) then sets out "the other principles to be applied in the administration of [the *Care Act*]", that in s 9(2)(c) being -

> "(c) In deciding what action it is necessary to take (whether by legal or administrative process) in order to protect a child or young person from harm, the course to be followed must be the least intrusive intervention in the life of the child or young person and his or her family that is consistent with the paramount concern to protect the child or young person from harm and promote the child's or young person's development.

68The child had been with the carers, latterly CH alone, from the age of 13 months. The

context of the judge's regard to s 9(2)(c) was as follows.

69The matters the judge was required to take into consideration included the length of time she had been in the care of the present caregivers, the strength of her attachments to her birth parents and the present caregivers, and the risk to the child of psychological harm if the present care arrangements were varied or rescinded (*Care Act* , s 90(6)(c), (d), (f)).

70The judge recorded and evidently accepted the evidence of Dr Lennings that LH and CH had been exemplary carers, and that CH was the child's primary attachment figure with "a secure, loving, caring, long term, strong bond which has developed firstly because of the length of time they have lived together and secondly because CH had demonstrated child focussed behaviours." Dr Lennings considered that, while the applicant was not the child's primary attachment figure, an attachment existed and they had "a good warm relationship". The child had not seen her father since her arrival in Australia, and there was no evidence of any attachment between them.

71The judge considered, under that heading, the risk of psychological harm if the care arrangements were varied. She identified as one issue the loss of Cambodian identity and culture if the child remained in Australia, and as the other the effect of removal from the primary attachment figure, CH.

72Her Honour accepted that CH's commitment to doing her best to expose the child to Cambodian culture as it existed in Australia, in ways her Honour described, could not replace the experience of growing up in Cambodia with Cambodian parents. She said that Dr Lennings was unable to predict with any confidence whether the child was likely to develop an adjustment issue or a more serious personality disorder through growing up as part of the carer's family but understanding that she had another family in another country, leading to "an issue with identity".

73As to removal from CH's care, her Honour recorded and evidently accepted Dr Lenning's opinion that "short to medium term psychological benefits are maximised by the child staying with CH". The child would initially experience a period of grieving for CH and her family, and would have to make a cultural transition complicated by language barriers. In order that the child re-form a secure attachment to her mother, the mother "would need to provide adequate parenting so that she would have to be responsive to the child, able to anticipate and meet the child's needs and be present in her life". There would be adjustment difficulties for at least a year, and good support and understanding from the applicant's extended family would be necessary with support and encouragement of kinds her Honour described. Her Honour said, apparently from the evidence of Dr Lennings, that there "would always be a potential for some harm to the child arising from the breaking of the attachment to CH".

74Another matter the judge was required to take into consideration was "the capacity of the birth parents to provide an adequate standard of care for the child ... " (*Care Act* , s 90(6)(e)). For reasons she gave, the judge was "not persuaded that the evidence shows that it is likely that the child's material and health needs will be adequately met in Cambodia ... ". It is not necessary to detail the reasons. They included concern as to the stability of the applicant's relationship with her husband, uncertainty as to where the child would live and thus the child's likely living arrangements and standard of living, and failure of the evidence to establish whether the child would be able to receive medication and medical attention for a serious heart condition in Cambodia.

75Having addressed the matters under s 90(6) and certain other matters, the judge described s 9 as a section intended to give guidance and direction in the administration of the *Care Act* and (save for s 9(2)(e)) set it out. She said that the meaning of s 9(2)(c), when it had been s 9(d), had been explained in the decision of Forster J in *Re Louise and*

Belinda [2009] NSWSC 534, and cited from that decision -

> "53 While in an ideal world, it may well be best for a child to be cared for by his or her natural parents, in my opinion, that submission states the role of section 9(d) too broadly. As I see it, section 9(d) is not intended to promote either living with natural parents or living with carers. Absent considerations to the contrary, it promotes stability, absence of change and the maintenance of the *status quo* .
> 54 In my opinion, the section is ambulatory. In the case of a care application made under section 60 of the Act, it has the effect of requiring the court to be reluctant to remove a child from its natural parents unless there is a compelling reason to do so. On the other hand, where an application is made not under section 60, but under section 90, for the rescission or variation of a care order, the sub-section has a different effect. In that case, the least intrusive form of intervention would normally mean not interfering with existing care arrangements. Needless to say, the force of the requirement imposed by section 9(d) will vary from case to case, and a court will undoubtedly have regard *inter alia* to the strength of the respective bonds that a child may have with his or her natural parents and his or her foster carers."

76The judge then came to her decision, including taking up a principle of least intrusive form of intervention plainly taken from the explanation of the now s 9(2)(c) in *Re Louise and Belinda* -

> " **6. Finding**
> In determining what Order would best ensure the safety, welfare and well-being of the child I take into account the matters I have set out above and place great weight on the following considerations:
>
> - The child has lived with CH for most of her life. She would have no memory of life with her mother. CH is now the child's primary attachment figure.
>
> If the child was removed into the care of her mother she could reform a secure attachment to her mother. However for that to occur a number of matters are essential - including the need for the mother to provide adequate parenting and the need for the extended family to be accepting and encouraging of the transition process. The evidence does not enable me to find that the mother and in particular the extended family are likely to be able to exercise the required parenting skills for this to occur.
> After the child returns to Cambodia, the child's progress through the transition period will not be monitored by the Department.
> Even if the reattachment occurs, it is likely that the child will have adjustment difficulties for a year.
> Further she is vulnerable because she was taken from her mother when she was 13 months of age. If in the first year after removal other problematic things occur there would be a cumulative risk. It is always possible that such things could occur.
> If the reattachment process is unsuccessful there will be serious consequences for the child who will grow up with less ability to regulate emotion and will have distorted relationships as an adult.
> If the reattachment process is unsuccessful there will be serious consequences for the child who will grow up with less ability to regulate emotion and will have distorted relationships as an adult.
>
> - It is unknown whether the birth parents would be able to provide an adequate standard of care for the child. This is particularly relevant as

the child has a serious medical condition which requires ongoing monitoring and treatment. There is no satisfactory evidence to establish that the parents will be able to access the medication, pay for the medication and medical attention or whether the appropriate medical support is available.

- It is likely that the child will lose a significant part of her Cambodian identity and culture if she remains in Australia. There is a quantifiable but unpredictable possibility that this could lead to issues with identity in adolescence.
- The least intrusive form of intervention normally means not interfering with existing care arrangements subject to the overriding principle that the safety, welfare and well-being of the child are paramount.

This is not a contest between the mother and the foster carer. I accept that the child has an attachment to the mother and that the mother loves her child. However, I am satisfied that the overriding obligation to regard the safety, welfare and well-being of the child as the paramount consideration must mean that she stays with the foster carer. She has been safe and very well cared for since she was placed with the foster carer and her late mother and there is no evidence to suggest that this is likely to change in the future. The law provides that in these circumstances a court would not normally interfere with the existing care arrangements unless there were compelling reasons. In this case there is said to be the loss of culture and identity. This is certainly a consideration. But in my view the evidence as to the possible consequence of such a loss are not sufficiently compelling reasons. In addition there are a number of other significant issues militating against restoration being in the best interests of the child." (emphasis added)

77From the sentence secondly emphasised, her Honour considered that where the child had been safe and very well cared for since she was placed with LH and CH and there was no evidence to suggest that this was likely to change in the future, "[t]he law provides" that a court would not normally interfere with the existing care arrangements unless there were compelling reasons. This came from the statement first emphasised concerning the least intrusive form of intervention, itself founded on s 9(2)(c) of the *Care Act* as explained by Forster J.

78As a proposition of law, it is not correct that compelling reasons are normally required in order to interfere with existing care arrangements. Reading the reasons as a whole, I do not think her Honour intended such a proposition of law; rather, she was expressing the effect (in her view) of applicable law in the circumstances. Be that as it may, the problem lies deeper.

79With respect, in my opinion s 9(2)(c) did not prescribe a principle of least intrusive form of intervention in the circumstances with which her Honour was concerned. Its prescription is confined to when it is necessary to take action in order to protect a child or young person from harm, and when taking action is necessary the course to be followed must be one of least intrusive intervention as further described. There must be a prospect of harm if action is not taken, and the question is then the nature of the action. Where the question is whether an order should be made whereby existing care arrangements are displaced and the child or young person is returned to his or her family, the harm which would or might come about if an order is made whereby the child or young person is taken from an existing carer is not harm against which action is necessary in order to protect the child or young person; nor is the harm which would or might come about if an order is made whereby the child or young person is left with an

existing carer. Section 9(2)(c) has no effect in preservation of existing care arrangements in the present circumstances.

80This understanding of s 9(2)(c) is consonant with the specific reference to it in s 79(3) of the *Care Act* . Section 79(1) authorises an order placing a child or young person under the parental responsibility of the Minister, or an order allocating parental responsibility to one parent to the exclusion of the other or to various combinations of parents, the Minister and other suitable persons, if the Children's Court finds that the child or young person is in need of care and protection. By s 79(3), an order allocating parental responsibility must not be made unless the Court "has given particular consideration to the principle in section 9(2)(c) and is satisfied that any other order would be insufficient to meet the needs of the child or young person". The occasion for consideration of the principle is removal of a child or young person from his or her parents or one of them because of a need for care or protection; not some preference for continuance of an existing position. So also, s 9(2)(c) speaks of the least intrusive intervention in the life of the child or young person and his or her family, suggesting protection of a child or young person in his or her family environment.

81This is not to deny that preference for continuance of existing care arrangements, rather than return of the child or young person to his or her parents, may be a material matter in determining where the paramount safety, welfare and well-being of the child or young person lies on an application to vary or rescind a care order. Apart from its obvious relevance to the paramountcy principle, the considerations in s 90(6)(c), (d) and particularly (f) of the *Care Act* may give weight to preservation of an existing care arrangement. But it does not have the statutory prescription of least intrusive intervention found in s 9(2)(c).

82In *Re Louise and Belinda* relief was sought in relation to an order restoring parental responsibility to childrens' mother. The judge had found that both the mother and the foster mother were capable of looking after the safety, welfare and well-being of the children. The Minister and the mother each relied on the then s 9(d), the Minister for least intrusive intervention by leaving the children with the carer and the mother for least intrusive intervention by returning the children to their mother. Forster J was referring to the latter submission at [53], and his Honour considered that the judge had "failed to apply the principles required to be applied by section 9(d)" (at [55]).

83His Honour took "harm" in s 9(d) to include an adverse effect on the safety, welfare and well-being of a child (at [49]). But there was no question of taking action to protect the children from that harm, and s 9(d) did not apply. The judge cannot be criticised for following the explanation of the now s 9(2)(c) by Forster J, but in relation to rescission or variation of a care order his Honour, and consequently her Honour, were in error.

84The Minister, adopted by the other respondents, submitted that the judge nonetheless came to her conclusion on the correct basis of the paramountcy principle, referring in particular to the first sentence of the concluding paragraph of her "Finding". Undoubtedly her Honour acted on that principle, but in doing so the considerations upon which she placed great weight included the statement concerning the least intrusive form of intervention and its effect, in her Honour's view, upon what "[t]he law provides" in the circumstances. In my opinion, the error of law was material to her Honour's decision, and vitiates it.

85The Minister also submitted that relief should be refused in the exercise of the Court's discretion, because the evidence was unlikely to change significantly in relation to the child's attachments and meeting her medical needs and it would be a futility to remit the application for rehearing. I do not accept that, on a rehearing, the result will necessarily be the same free from the regard to s 9(2)(c), and would not decline relief.

Consideration of a care plan

86Ground 3 of the grounds of relief was -

> "That the learned trial judge failed to consider a Care Plan pursuant to Section 80 of the *Children and Young Persons (Care and Protection) Act 1998* before making an Order to vary the existing Parental Responsibility Orders pursuant to Section 79 and 81 of the *Children and Young Persons (Care and Protection) Act 1998"*.

87Section 80 of the *Care Act* relevantly provides that the Children's Court -

> " ... must not make a final order:
> (a) for the removal of a child from the care and protection of his or her parents, or
> (b) for the allocation of parental responsibility in respect of the child,
> unless it has considered a care plan presented to it by the Director-General".

88Section 80 applied to and in respect of the hearing of the appeal to the District Court (*Care Act* , s 91(8)). As earlier stated, the judge affirmed the orders of the Children's Court made on 15 May 2009, but varied the orders to refer to CH where there had been reference to LH and CH. The variation was to orders for joint exercise of some aspects of parental responsibility by the Minister and LH and CH and for sole responsibility of LH and CH for other aspects (albeit, as earlier noted, the orders were in language of sharing and allocation). The Minister accepted that this constituted making a final order whereby s 80 came into play. Neither CH nor the independent legal representative said otherwise.

89A care plan dated 15 May 2009 which had been before the Children's Court was also before the judge, but no revised care plan consequent on the death of LH was presented to the District Court. Nor was any formal application made for leave to vary the existing orders as to aspects of parental responsibility (*Care Act* , s 90(1)).

90The Minister submitted that s 80 was satisfied because, the 15 May 2009 care plan being before the District Court, a care plan had been presented. As a matter of common sense, for compliance with s 80 the care plan presented to the Court must be a relevant care plan, proposing rules for the carer or carers under the Court's consideration for those roles. It would be absurd if a care plan contemplating exercise of some parental responsibility by A were sufficient for an order whereby that parental responsibility was exercised by B. It is no different where, as here, the care plan contemplated roles for LH and CH, since the care plan necessarily rested upon the involvement of both LH and CH in addressing the needs proposed as their responsibilities or shared responsibilities. Involvement of CH alone would or might fail to achieve its objectives.

91The 15 May 2009 care plan included that both LH and CH had been assessed by the Department to be appropriate to care for the child until she attained the age of 18, and that CH had been assessed to care for the child "and thus provide continuity in the placement in the event that LH's age or illness in the future precludes her from caring for [the child] in the future." The Minister submitted to the effect that the care plan thus extended to CH as sole carer. However, assessment of CH as an appropriate carer is less than an acceptance of her sole involvement in the aspects of parental responsibility for which she and LH were to be responsible, and in the detail of the care plan there were occasions when tasks were stated for LH alone.

92Early in the hearing the judge suggested that the death of LH was important to her decision, and there was some attention to any significance in her death in the evidence. There should have been an application for variation of the care order in this respect, made by leave pursuant to s 90 of the *Care Act* . It is unfortunate that this was not done, as it is likely to have brought out the necessity for presentation of a revised care plan.

93The revised care plan may not have differed greatly from the 15 May 2009 care plan, but presentation of a care plan and its consideration by the Court is not a formality. The Court then decides the removal of the child or the allocation of parental responsibility with regard to a care plan apt to the current circumstances. The Court may not be obliged to give effect to the care plan (see *George v Children's Court of New South Wales* [2003] NSWCA 389; (2003) 59 NSWLR 232 at [58]), but that does not warrant presentation or consideration of a care plan which can not be implemented.
94In my opinion, there was jurisdictional error in that the judge did not consider a care plan as required by s 80 of the *Care Act* .
95The Minister submitted that, all parties having proceeded in the District Court on the basis that CH would be sole carer following the death of LH, relief should be refused in the exercise of the Court's discretion. It was accepted that the parties so proceeded. Since relief must otherwise be granted, it is not necessary to address that submission.

Wednesbury unreasonableness

96Ground 7 of the grounds of relief was -

> "That the decision is so unreasonable that no reasonable decision maker could have made it".

97Since the applicant's application must be remitted to the District Court for re-hearing, it is not appropriate to go in any detail to the merits. In my opinion, the decision to which the judge came was not Wednesbury unreasonable.

Other matters

98A ground of relief was that the judge erred in law in failing to take into account "relevant provisions" of the *United Nations Convention on the Rights of the Child* (1989) ("the CROC"). Counsel for the applicant submitted to the judge that regard should be paid to the provisions of the CROC, and in particular articles 8 and 9, in exercising the Court's discretion. The judge said that she declined to do so.
99Australia is a signatory to and has ratified the CROC, but it has not been enacted as or adopted in domestic law. Sections 8 and 9 of the *Care Act* state its objects and the principles for its administration. They go beyond the CROC at least in stating in s 9(1) the principle that the safety, welfare and well-being of the child or young person are paramount: compare Article 3 of the CROC stating that the best interests of the child shall be a primary consideration.
100The applicant's submissions did not identify an issue of interpretation of the *Care Act* to which regard to the CROC might be material. Nor, beyond unhelpful generalities, did her submissions indicate how, in the face of the objects and principles stated in the *Care Act* , regard to the CROC might have borne upon the judge's evaluative decision-making. The availability and appropriateness of regard to the CROC should be left for the hearing on remission.
101Another ground of relief was that the judge "failed to apply or to properly apply" the principles under s 9 of the *Care Act* . Somewhat ironically, the complaints in the applicant's written submissions included that the judge had failed to give consideration to taking the least intrusive action as required by s 9(2)(c). Plainly her Honour did so, although not to a result to the applicant's liking and, as I have held, erroneously. On this matter and otherwise, the complaints under the ground went to the merits, and did not provide a basis for judicial review.
102Another ground of relief was that -

> " ... there was no evidence to found the finding that the claimant and her extended family are not likely to be able to exercise the required parenting skills or alternatively as error of law by apparently imposing a burden of proof on that

issue by the applicant."

103The ground was misconceived. The judge did not find that the applicant and her extended family were not likely to be able to exercise the required parenting skills. She said that the evidence "does not enable me to find that the mother and in particular the extended family are likely to be able to exercise the required parenting skills ... " (see in the first dot point in the passage from the reasons earlier set out). This was not through imposition of a burden of proof on that issue on the applicant, but simply as a statement of the state of the evidence.

104The remaining ground of relief was that the judge took into account an irrelevant consideration, that after the child returned to Cambodia her progress through any transition period would not be monitored by the Department. This was one of the considerations on which the judge placed weight (see again in the first dot point). However, it was not an irrelevant consideration. It was relevant to the child's welfare and well-being. The weight was a matter for the judge.

Orders

105The orders claimed in the applicant's summons included an order that each party pay their own costs. No respondent submitted to the contrary. The applicant also claimed a certificate under the *Suitors Fund Act* 1951. An application for relief under s 69 of the *Supreme Court Act* is an appeal for the purposes of the *Suitors Fund Act* , see for example *Production Spray Painting & Panelbeating Pty Ltd v Newnham* (1991) 27 NSWLR 644 and *Commissioner of Corrective Services v Government and Related Employees Appeal Tribunal (No 2)* [2004] NSWCA 337, but s 6(1) of the *Suitors Fund Act* only authorises the grant of an indemnity certificate to a respondent.

106I propose the orders -

(1) Order that the decision of the District Court of New South Wales made on 28 July 2010 be quashed and that the proceedings be remitted to the District Court to be heard and determined according to law.

(2) Make no order as to costs.

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