

**SUPREME COURT OF NOVA SCOTIA**  
**(FAMILY DIVISION)**

**Citation:** Wolodka v. Wolodka, 2013 NSSC 207

**Date:** 20130508

**Docket:** SFSNMCA 076173

**Registry:** Sydney

**Between:**

Andrea Wolodka

Applicant

v.

John Wolodka

Respondent

**Judge:** The Honourable Justice Darryl W. Wilson

**Heard:** April 15, 16, and 22, 2013, in Sydney, Nova Scotia

**Oral Decision:** May 8, 2013

**Written Reasons:** June 26, 2013

**Counsel:** Elaine Gibney, for the Applicant  
Clara Gray, for the Respondent

**By the Court:**

[1] The applicant mother, Andrea Wolodka, and the respondent father, John Wolodka, began their relationship in 1999 while attending a local university. They were living together by 2002 and were married in 2004. They are the parents of two children. Matthew, born in June 2007, and William, born in March 2010. They separated on Mother's Day in May, 2010, when the father told the mother that he had a relationship with another woman who had just given birth to a girl.

[2] They continued to reside in the matrimonial residence until May, 2011, when the mother changed the locks on the doors, thus preventing the father's entry. The parties had been occupying the residence on a rent-to-purchase arrangement.

[3] The father moved to his girlfriend's apartment. The mother remained in the matrimonial residence for a short time with the children but soon relocated to her parent's residence in Sydney. She continues to reside at her parent's home which was renovated to accommodate her and the children.

[4] The mother filed an application pursuant to the *Maintenance and Custody Act* in June, 2011, seeking an Order for custody, child support, and spousal support. She also seeks a division of matrimonial assets pursuant to the *Matrimonial Property Act*.

[5] In the fall of 2011, the father purchased a home in River Ryan where he now resides with his partner and their daughter. This residence is about twenty minutes by motor vehicle from the mother's residence.

[6] At the time of separation the mother was employed by the Cape Breton Regional Hospital on a casual basis as a ward clerk. In September of 2012, she was accepted into the Bachelor of Science Nursing Program at Cape Breton University and has just completed the first year of a four year program. She plans on obtaining employment during the school breaks.

[7] The father is employed by Co-Operators Insurance. He earned \$40,490.00 in 2011 and pursuant to an Interim Order issued in November, 2011, is paying child support of \$586.00 monthly.

**ISSUES:**

[8] The following issues were identified by counsel for determination:

1. The appropriate Order with respect to custody and access.
2. The appropriate Order with respect to child support.
3. The appropriate Order with respect to spousal support.
4. The appropriate Order with respect to division of assets and debts.

**PARENTING ARRANGEMENTS -**

[9] The mother is seeking an Order naming her as the children's primary caregiver and her residence as their primary residence. She proposes the father have the following parenting time:

- every Tuesday after work from 4:30 p.m. until 7:00 p.m.
- every second weekend from Friday until Sunday at supper time
- every other weekend with one overnight either Friday or Saturday with the exception of one weekend per month when the children are with the mother
- reasonable access during holidays, special occasions, birthdays, and Father's Day

[10] The mother also requests an Order with conditions that the children not be left alone for extended periods of time with the father's girlfriend and that they attend a church which follows Roman Catholic traditions when in the father's care.

[11] The mother agrees the father should have direct access to the records of all third parties or professionals involved with the education, health, religious training and general welfare of the children. The mother agrees to inform and consult the father respecting all matters involving the children. However, she requests that the Order provide her with final decision making authority for major decisions

rather than shared decision making because of the father's inability to consult and communicate with her in a positive way when dealing with parenting issues. According to the mother, the father intimidates her in face to face meetings preferring to threaten court involvement than cooperation, sends her harassing emails and posts veiled threats on Facebook.

[12] The mother's parenting plan includes residing with the children in renovated accommodations in her parent's home. This residence is a short walk to the elementary school. Her parents will provide after school care for Matthew. She plans on completing her nursing degree at Cape Breton University. The younger child attends daycare on the university campus and travels back and forth with her. The older boy, Matthew, has been described as happy and active and one who enjoys playing games while at home. He had difficulty adjusting to attendance at daycare and his first year at school. He has been assigned a Teacher's Assistant and a referral was made to Children and Adolescent Services to address aggressive behaviours with other students. William has been described as content and loveable. Both boys are attached to their mother and love spending time with their father. The mother is concerned that the father makes it difficult for the boys to transition between residences. He often lingers at her parent's door when returning the children, crying, and holding on to the children. This behaviour upsets the children and causes difficulty in their transition to the mother's home.

[13] The mother's submission is that her parenting plan is in the children's best interest because she was the children's primary care parent before and after separation. She is more capable than the father to provide a stable and secure home environment for the children that will address all their development needs.

[14] The father is seeking a cooperative co-parenting arrangement with physical care of the children alternating between the parents on a weekly basis or a shorter period as agreed. He stated that he was an 'equal parent' with the mother in providing childcare during the marriage. He requests the Order provide him with final decision making authority or that separate spheres of responsibility be assigned to each parent with respect to major decisions impacting the children.

[15] The father submits it is not in the children's best interest to provide the mother with final decision making authority since it would deprive the children of his full participation in their lives. The father claims that since separation the

mother has made unilateral decisions respecting the children including the choice of daycare, school and extra curricular activities without consulting him. She has made decisions that were not in the children's best interests such as questioning the need of a referral for assessment of Matthew's behaviour by Children and Adolescent Services and ignoring the father's concerns relating to the cause of William's celiac condition. She has imposed a highly restricted and limited access schedule despite his request for more time. She has insisted the children, who were baptized in the Roman Catholic faith, attend the Roman Catholic Church when they are in his care and not the Ukrainian Catholic Church which he attended as a youth.

[16] The father's submission is that it is in the children's best interests for both parents to have equal involvement in their lives. His plan is to care for the boys as a family with his partner and daughter while they are in his care. He works 9:00 a.m. - 5:00 p.m. Monday to Friday but is available to care for them at all other times. He has the support of his mother who provided child care for Matthew and briefly for William. His partner is a teacher who would be working full time during the school year. The boys participate in many family oriented activities with his daughter, Emma, who enjoys having them around, when they are with him.

[17] The father and his partner are members of the School Advisory Committee of the elementary school attended by Matthew. The father also is involved in the school's breakfast program every Thursday morning at which time he takes fresh fruit to the school for children to enjoy. He is on the Board of Directors of the Whitney Pier Boys and Girls Club. This position is a sense of pride for him since he attended the Boys and Girls Club as a youth. The father is concerned that he and the boys never know who will be present for the exchange when he returns them to the mother's residence. The mother's parents are often aggressive and physically remove the children from his arms. He finds it difficult during transitions because the boys don't want to return to the mother's home. He takes time trying to reassure them.

[18] The father claims he is better at disciplining the children than the mother who he alleges is prone to yelling. He describes himself as a mild person who usually involves the children in their own discipline by explaining to them why they are being disciplined.

[19] This proceeding was initiated pursuant to the *Maintenance and Custody Act*, R.S.N.S. 1989, c 160, as amended. Section 18(5) requires the court to give paramount consideration to the best interest of the child in matters concerning their care and custody or access and visiting privileges.

[20] Section 18(6) requires the court to consider all relevant circumstances in determining the child's best interest including:

- (a) the child's physical, emotional, social and educational needs, including the child's need for stability and safety, taking into account the child's age and stage of development;
- (b) each parent's or guardian's willingness to support the development and maintenance of the child's relationship with the other parent or guardian;
- (c) the history of care for the child, having regard to the child's physical, emotional, social and educational needs;
- (d) the plans proposed for the child's care and upbringing, having regard to the child's physical, emotional, social and educational needs;
- (e) the child's cultural, linguistic, religious and spiritual upbringing and heritage;
- (f) the child's views and preferences, if the court considers it necessary and appropriate to ascertain them given the child's age and stage of development and if the views and preferences can reasonably be ascertained;
- (g) the nature, strength and stability of the relationship between the child and each parent or guardian;
- (h) the nature, strength and stability of the relationship between the child and each sibling, grandparent and other significant person in the child's life;
- (i) the ability of each parent, guardian or other person in respect of whom the order would apply to communicate and co-operate on issues affecting the child; and
- (j) the impact of any family violence, abuse or intimidation, regardless of whether the child has been directly exposed, including any impact on
  - (i) the ability of the person causing the family violence, abuse or intimidation to care for and meet the needs of the child, and
  - (ii) the appropriateness of an arrangement that would require co-operation on issues affecting the child, including whether requiring such co-operation would threaten the safety or security of the child or of any other person.

[21] Section 18(8) provides:

In making an order concerning care and custody or access and visiting privileges in relation to a child, the court shall give effect to the principle that a child should have as much contact with each parent as is consistent with the best interests of the child, the determination of which, for greater certainty, includes a consideration of the impact of any family violence, abuse or intimidation as set out in clause (6)(j).

[22] I have considered the evidence of the mother and that of her sister and her mother who testified on her behalf. I have considered the evidence of the father and his mother and the Principal of the elementary school attended by Matthew who testified on the father's behalf. I have considered the submissions of counsel and the Legislation.

[23] Evidence from the parties relating to the extent of parental roles prior to and after separation, the nature of their relationship and the reasons for their inability to cooperate and communicate on parenting matters was in conflict. The mother's evidence where it conflicts with the father's evidence on these matters is more credible. I will briefly review this evidence and why I find the mother's evidence to be more credible.

[24] Matthew was born in 2007 and William in 2010. The parties separated soon after William's birth although they continued to reside in the same home for another year. The father's evidence is that he was an equal parent with the mother in all aspects of parenting the children. The mother's evidence is that she was primarily responsible for the children's care and the father and his mother only provided care when she was working. According to the mother beginning in 2008 the father was away from home a great deal including overnights. She believed he was working or with friends. When he was home he was either sleeping or playing video games and not spending much time with Matthew. They attended marriage counselling in 2009.

[25] According to the father, the parties' relationship began to sour in 2008 because of the mother's mood swings, which often led to tantrums in which she broke items and hoarding behaviours which left the home untidy. He mused that she may be bipolar but could not prove it. The father stated that they discussed their relationship in the privacy of their home and agreed to a separation. As neither was prepared to leave the home, they decided not to inform their families. He began sleeping on the chesterfield. According to the father, the mother agreed

that they could pursue other relationships. While living as friends their relationship and the mother's behaviours began to improve. They decided to reconcile. However the reconciliation only lasted three weeks because the mother reverted to her old behaviours. It was during this reconciliation that William was conceived. The father returned to a relationship with his girlfriend which led to her pregnancy and the birth of his daughter. He continued to live with his wife and son while he pursued a relationship with his girlfriend unbeknownst to his wife. The husband stated that his wife knew his girlfriend personally (but not that she was in a relationship with him). She would have seen her and known she was pregnant, however, he did not tell his wife that he was the father of her expected child until after his daughter's birth.

[26] According to the mother, she was shocked and her self esteem shattered when the father told her in May, 2010, that he had a relationship with another woman who had just given birth to a daughter. She asked him to leave but he insisted that the home was as much his as hers. Initially she did not have the emotional strength to take action to get him out of the home. Also, she needed time to think before acting on what was best for the children. She wanted them to have a stable home and contact with a father. As a result, this news was kept from their families and she remained in the home. During this time the father's girlfriend would drop their daughter at the residence so she could visit with him and her step brothers. On occasion the father asked and the mother agreed to assist with care for his daughter. She went to a movie with the father's girlfriend. The father was insisting that both families live together in the same home. She was having difficulty coping with the circumstances. Eventually she sought legal advice and personal counselling and decided to give the father notice to leave the home. When he did not leave, she changed the locks preventing his entry.

[27] The father acknowledges that he was between residences after the births of William and Emma. He was spending time with both families. He was upset that he was locked out of the home by his wife. He denies requesting that both families live together in the same residence as claimed by his wife. He did not explain how he intended to stay fully involved in the lives of his children who lived in separate residences with their mothers. I can only assume that since he did not want both families to live together, he believed both mothers would agree to his coming and going between residences as he pleased.



[28] The mother denies completely the father's description of their relationship leading to their separation and his assertions that she is bipolar, yells at the children, throws tantrums and hoards items. She was completely surprised when informed of his other life.

[29] The father posted a Facebook entry on February 5, 2013, in which he stated that he would fight with every moment of his breath to see his children and that his children's needs were being ignored. He also stated that waiting for justice was difficult when the abuse is so rampant and in plain sight for all to see.

[30] He also posted a Facebook entry on William's third birthday that stated "stood up to a pretty big bully today" and then referred to "19 more days when the truth proves itself". These court proceedings were to begin 19 days after William's birthday. The father said this posting referred to a 91 year old woman that came into his office at work with a roof claim and whose policy expired in 19 days. Later in the same posting he said that he was fortunate to have an incredibly strong family and group of friends to help him fight for what was right and best for two young boys who had no voice of their own for a long time. He acknowledges that this part of the posting referred to the court proceeding.

[31] According to the father, the postings were made in a moment of weakness when he lost his composure and was frustrated about handing over screaming children who did not want to go to their mother's residence and who only wanted to be tucked in by their father. On an earlier occasion the father also lost his composure when he blurted out in the presence of Matthew and William that Emma was their sister before he and the mother had discussed this with them.

## **CONCLUSION**

### **Parenting:**

[32] The father's evidence is inconsistent and exaggerated and therefore lacks credibility. For example, his evidence that the parties privately decided they would live together as friends is inconsistent with his attendance at marriage counselling and a statement that the mother held on to the relationship more than him. Also, the father's failure to tell the mother of his other relationship is

inconsistent with the statement that they agreed each could pursue other relationships while living as friends.

[33] The father's evidence was also prone to exaggeration. For example, he concludes the mother is bipolar but cannot prove it; he claims a Facebook entry to a bully was a reference to a 91 year old client and not the mother when the context suggests otherwise and he also claims the maternal grandparents physically remove the children from his arms despite a significant difference in their ages and physique.

[34] While the father agreed he could have handled the separation better, his evidence was less about the benefits to the children of shared care than the injustice of the mother's conduct in denying him appropriate parenting time.

[35] I have concluded that it is in the children's best interest for the parents to have joint custody with primary care to the mother and not shared care as requested by the father. In arriving at this conclusion I have considered the young age of the children, their level of development, their need for emotional as well as physical stability and each parents ability to meet those needs. I find:

1. The mother was the children's primary caregiver while the parties were living together and has continued as the primary care parent since separation. The father is capable of meeting the children's basic needs and has cared for the children when the mother was not available. However, he was away from home a great deal, including overnights, after 2008 and was not an 'equal' parent with the mother as he claims.
2. Shared care is not appropriate in these circumstances because the father's residence is not in close proximity to the mother's residence and Matthew's school. The father purchased a home in River Ryan, a 20 minute motor vehicle ride from the mother's residence, after the mother had established a residence for the children in her parent's home. Matthew will benefit from developing on-going and consistent relationships with school friends in the vicinity of the mother's residence. This would be difficult if he was required to reside in different communities each week.

3. The on-going conflict between the parents, at present, while not extreme, is sufficiently acrimonious that the level of communication and cooperation needed for shared care is not present. The father should reconsider posting negative comments on social media sites which only serve to increase the level of conflict and make cooperation less likely.
4. The legislative principal of maximum contact with each parent does not presume shared care and is subject to the requirement that the contact be consistent with the best interests of the children.
5. Joint custody is not inappropriate since the mother is willing to inform, consult and discuss child related issues with the father going forward despite her allegations that the father intimidates her. Therefore, there is a realistic hope that the parties will be able to discuss child related issues for the benefit of the children in the future.
6. The mother's plan of care as described provides more stability and security for the children. The father's plan of care lacked sufficient detail for the court to arrive at the same conclusion.
7. The mother is more likely to consider the children's needs ahead of her own than the father. The mother has always been available for the children whereas the father was away from home a lot after 2008. The children seem to be able to transition to the father's care without much difficulty. Given the level of distress reported when the children return to the mother's home, the father seems unable to appreciate the importance to the children of minimizing this discomfort.
8. Both parents have positive relationships with the children and the father is actively involved with them when they are in his care.
9. I concluded the following parenting schedule to be in the children's best interest:
  - the father shall have parenting time with the children according to a bi-weekly rotation. In week one the father shall have care of both children from Thursday after work until Sunday at 5:00 p.m. In week two the father will have care from Wednesday after school to Thursday a.m.
  - Summer vacation is defined as an eight week period beginning the first Monday of July and ending on the last Sunday in August after eight weeks have elapsed. The parents will share parenting time with the children on a weekly basis with the

mother having parenting time during weeks 1, 3, 5 and 7, and the father having parenting time during weeks 2, 4, 6 and 8. Each parent may opt to have a block of two weeks during this period. Beginning in 2014, the father shall notify the mother in writing by May 15<sup>th</sup> if he intends to exercise this option and the time requested. The mother shall notify the father by June 1<sup>st</sup> if she intends to exercise this option and the time requested.

- Parenting time may be altered on the consent of the parties. Neither parent shall unreasonably deny the other parent's reasonable request for special occasion access.
- Christmas vacation is defined as the period of time beginning on December 24<sup>th</sup> at 6:00 p.m. and ending at 2:00 p.m. on the last day before school begins in January. In the odd number years the father shall have the children from December 25<sup>th</sup> at 2:00 p.m. until December 27<sup>th</sup> at 2:00 p.m. and from December 30<sup>th</sup> at 2:00 p.m. until 2:00 p.m. on the day before school begins in January. In the even number years the father shall have the children from December 24<sup>th</sup> at 6:00 p.m. to December 25<sup>th</sup> at 2:00 p.m. and from December 30<sup>th</sup> at 2:00 p.m. until 2:00 p.m. on the day before school begins. The mother shall have the children in her care during all other times of this period.
- Easter is defined as the period between 5:00 p.m. on Saturday to 5:00 p.m. on Sunday. The parties are to alternate parenting time with the children during this time with the father having parenting time with the children in even numbered years and the mother having parenting time with the children in odd numbered years.
- The children shall be in the mother's care on Mother's Day and in the father's care on Father's Day.
- The non-custodial parent shall have three hours of parenting time with the children on the children's birthdays and on their own birthdays
- The non-custodial parent may have brief phone contact with the children at 7:00 p.m. or another time agreeable by the parties unless previously scheduled plans make contact impossible.

10. COMMUNICATION - neither party shall speak in a disparaging or negative manner about the other party or allow or encourage others to

do so in the presence of the children. The parties shall communicate in all matters relating to the children's health, education, religion and general welfare through e-mail communication.

11. DECISION MAKING AUTHORITY - both parties shall be responsible for routine day to day decision making when the children are in their physical care. Each party shall provide the other with information on routine decisions made with respect to any health, educational and social welfare matters while the children are in their care.
12. Each parent is able to make emergency medical decisions for the children in their care to alleviate the emergency. That parent is to notify the other parent as soon as possible as to the nature of any emergency and treatment taken.
13. Both parties will be allowed to attend religious observances of their choosing when the children are in their care. The children were baptized in the Roman Catholic Church and therefore any participation in formal religious education will follow the teachings of the Roman Catholic Church.
14. Each parent is entitled to attend school meetings, concerts and programs. Both parents are to be named at the school as a contact person in case of illness.
15. Each party has the right to communicate with all professionals involved in the children's lives including the right to obtain information and documentation respecting the children through all medical professionals, educators, and social welfare professionals without the prior consent of the other party.
16. The parties will cooperate and participate in therapeutic interventions deemed appropriate by professionals.
17. Major decisions regarding the children's medical care and treatment, affecting the children's education programs and their social welfare shall be done in consultation with the children's medical care providers, teachers and other professionals so engaged. The parties shall consult each other in regard to all major decisions and if after consultation are not able to reach a decision, the mother's decision will prevail.

**Child Support:**

[36] The father's Line 150 Income for 2012 was \$44,845.00. Based on this amount, the child support guidelines call for support of \$632.00 per month.

[37] The father claims his 2013 income will be less because of a reduction in the rate at which commission income is earned. The father is currently paid a base salary of \$30,600.00 plus commission. He expects to earn approximately \$38,000.00 in 2013 if he has a good year.

[38] The father does not know what his 2013 income will be. It may be less or more than his 2012 income. I accept his income fluctuates from year to year.

[39] Therefore the table amount of support for each year shall be based on his prior year's assessed income subject to adjustment. After the adjustment which is to be calculated by March 15 of the following year, the father may owe more child support or he may have a credit if he has overpaid.

[40] Following this direction, the father owes an additional amount of \$552.00 in child support for 2012. His child support payment pursuant to the Interim Order of \$586.00 was \$46.00 per month less than the \$632.00 payment required.

[41] The mother also claims an additional sum of \$1,046.00 in retroactive child support for the period from the date of separation to the date of the Interim Conciliator's Order. According to the mother the table amount required a payment based on the father's income of \$3,596.00 during this period and he only paid \$2,550.00. The father did not dispute these amounts. Therefore, the mother's entitled to an additional sum of \$1,046.00 in retroactive child support for the year 2011.

**Section 7 Expenses:**

[42] The mother claims the following child care expenses were incurred:

July 2011 - August 2012	\$1,520.00
September 2012 - March 2013	\$ 910.00
April and May 2013	\$ 356.00



[48] The mother claimed child care expenses as a deduction from her income in 2012. I do not have her 2011 Income Tax Return and am unable to determine whether she claimed child care expenses as a deduction from her total income in that year. She also claimed tax credits for one child as an eligible dependant and for the second child as a child born in 1995 or later. The mother earned an income in 2011 and 2012 that would have attracted income tax if not for the deductions associated with child care expenses, etc. It may be that she need not have claimed the child care expenses to reduce her income tax liability to zero. However, her 2012 income tax return included a deduction for child care costs and her total income for income tax purposes was reduced as a result of the claim.

[49] The amount of child care expenses for 2012, as per the income tax return was \$1,340.00. I calculate the tax benefit to be \$319.00 (23.79% of \$1,340.00). The father's proportionate share of the after tax costs of child care expenses is \$715.00 (70% of \$1,021.00).

[50] The same calculation should be done for 2011 once counsel can agree on the actual amount of child care expenses paid in 2011. The father will owe the mother his proportionate share of child care expenses for 2011 and 2012.

[51] In 2013 the mother was attending school and was not able to earn the same level of income that she had earned in 2011 and 2012. She is attempting to obtain employment during the months when she is not in school. She may also obtain work occasionally during the period she is in school. I impute income of approximately \$5,000.00 a year for the mother for the year 2013. I conclude there is no tax benefit available to the mother because her income in 2013 is too low to attract income tax. I estimate the total family income for 2013 to be approximately \$50,000.00. The father earns 90% of the family income. Therefore, he should contribute 90% of child care costs incurred by the mother from January 1, 2013, onward.

[52] The mother claimed gym fees of \$211.00 in 2011 and gym fees of \$420.00 and soccer fees of \$110.00 in 2012 as extraordinary expenses for extracurricular activities. Given the level of income of both parties in 2011 and 2012, I am not satisfied that these expenses are extraordinary and therefore I deny the mother's claim for a share of these costs.



**Spousal Support:**

[53] The mother has requested an Order for Spousal Support. She submits that she has a need for support during the period she is pursuing her education. She is agreeable to having the Order for spousal support reviewed when she completes her education.

[54] The spousal support advisory guidelines suggest a range of spousal support from a low of \$262.00 to a high of \$492.00 per month, based on the mother's annual income being zero and the father's annual income being \$44,845.00.

[55] The mother has not suffered economic loss as a result of the marriage. Her decision to leave the workforce to improve her education was made after the parties separated. Her need is a result of this decision. She has the ability to earn an income while attending school or during breaks from the school year. The father lacks the ability to pay spousal support.

[56] I, therefore, deny the mother's claim for an Order of spousal support.

[57] The father shall maintain the children on his medical plan and name the mother as a beneficiary in trust for the children of 2/3 of the value of the father's life insurance policies through his employment. If permitted, the father shall include the mother on his employer's medical plan.

**Division of Assets and Debt:**

[58] The parties have few assets of any value. The mother kept the household contents which are being used for the benefit of the children. The father was seeking the return of a sports card collection. The mother is unable to locate this collection. She is to return this card collection to the father if she locates it. Otherwise, each party shall maintain the matrimonial assets they currently have in their possession.

[59] The mother is seeking an Order requiring the father to pay \$465.00 representing one-half of an outstanding debt to a Trustee in Bankruptcy. The father

claims this is a personal debt of the mother. The father was agreeable to paying the balance of a credit card debt incurred for a new washer and dryer which the mother has in her possession. He also paid a cable account of \$466.00 which related to service after the father left the matrimonial home.

[60] The mother shall be responsible for the balance of the debt owed to the Trustee in Bankruptcy and the father shall be responsible for the cable account as well as the balance of the credit card debt for the washer and dryer.

[61] If parties are unable to agree on costs, I will receive written submissions by August 15, 2013.

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J.