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# Japan

## International Estate Planning Guide

Individual Tax and Private Client Committee

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## I. Wills and Disability Planning Documents

### A. Will Formalities and Enforceability of Foreign Wills

Under the Japanese Civil Code Article 961, any person who has attained 15 years of age may make a will. There are three types of wills. Article 967 of the Civil Code provides that “A will shall be made by holograph document, notarized document, or sealed and notarized document; provided that this shall not apply to the case where it is permissible to use a special method.”

To make a will by holograph document the testator must write the entire text, the date, and his/her name in his/her own hand and affix his/her seal.<sup>1</sup>

A will by notarized document shall be made in compliance with the following items:

- no fewer than two witnesses shall be in attendance;
- the testator shall give oral instruction of the contents of the will to a notary public;
- a notary public shall take dictation from the testator and read this aloud to, or allow inspection by, the testator and witnesses;
- the testator and witnesses shall each sign the certificate and affix his/her seal after having approved its accuracy. If a testator is unable to sign, a notary public may sign on his/her behalf, with supplementary registration providing an explanation of the notary's signature; and
- a notary public shall give supplementary registration to the effect that the certificate has been made in compliance with the formalities listed in each of the preceding items, sign the supplementary registration, and affix his/her seal.<sup>2</sup>

A will by sealed and notarized document shall be made in compliance with the following formalities:

- the testator shall sign, and affix his/her seal to, the certificate;
- the testator shall seal the certificate and, using the same stamp as that used for the certificate, affix his/her seal;
- the testator shall submit the sealed certificate before one notary public and not less than two witnesses, with a statement to the effect that it is his/her own will, giving the author's name and address;
- after having entered the date of submission of the certificate and the statement of the testator upon the sealed document, a notary public shall, together with the testator and witnesses, sign it and affix his/her seal.<sup>3</sup>

In 1964, Japan ratified the Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions. As a result of the ratification of the Convention, the Act on Governing Laws Relating to the Form of Testamentary Dispositions was enacted. According to this Act, the form of a testamentary disposition shall be valid if it complies with the laws of one of the following jurisdictions:<sup>4</sup>

- the jurisdiction where the testator made the disposition,

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<sup>1</sup> Civil Code Article 968

<sup>2</sup> Civil Code Article 969

<sup>3</sup> Civil Code Article 970

<sup>4</sup> Article 2 of Act on Governing Laws Relating to the Form of Testamentary Dispositions

- a nationality possessed by the testator, either at the time when he made the will or at the time of his death,
- a jurisdiction where the testator had his domicile, either at the time when he made the will or at the time of his death,
- the jurisdiction where the testator had his habitual residence, either at the time when he made the will or at the time of his death, or
- regarding immovables, the jurisdiction where they are located.

#### B. Will Substitutes (Revocable Trusts or Entities)

A trust may act as a will substitute. The Trust Act (Act No. 108 of December 15, 2006) provides rules regarding the establishment and operation of a trust.

The term "trust" as used in the Act means an arrangement in which a specific person, by a trust agreement, will, or manifestation administers or disposes of property in accordance with a certain purpose and conducts any other acts that are necessary to achieve such purpose.<sup>5</sup> A trust can be created by an agreement between a settlor and a trustee, by a will of the settlor or by declaration of trust by the settlor.<sup>6</sup>

#### C. Powers of Attorney, Directives, and Similar Disability Documents

A power of attorney allows a person to act on behalf of another person. According to the Civil Code of Japan, Article 653, a mandate shall terminate when the principal or agent dies.<sup>7</sup> The courts have determined that this provision does not prohibit the parties from agreeing to extend the effect of the mandate beyond the death of the principal.<sup>8</sup>

### II. Estate Administration

#### A. Overview of Administration Procedures

According to the Civil Code of Japan, a custodian of a will other than a notarized will, after becoming aware of the commencement of inheritance, shall without delay submit the will to the family court and apply for probate. If there is no custodian of a will, the same shall apply after an heir discovers the will. A will that has been sealed may not be opened unless it is opened in the family court and in the attendance of an heir or his/her representative.<sup>9</sup>

A testator may, by will, designate one or several executors, or entrust that designation to a third party. If a person who has been entrusted with the designation of an executor intends to resign from that entrustment, he/she shall notify the heir(s) to that effect without delay.<sup>10</sup> If an executor consents to serving, he/she shall undertake his/her duties immediately.<sup>11</sup> If no executor was appointed or the office becomes vacant, the family court may appoint an executor on the application of an interested party.<sup>12</sup>

An executor shall, without delay, prepare an inventory of inherited property and deliver this to the heir(s).<sup>13</sup> An executor shall have the rights and duties of administration of inherited property and all other necessary acts for the execution of a will.<sup>14</sup> An executor shall be deemed the representative of

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<sup>5</sup> Trust Act Article 2

<sup>6</sup> Trust Act Article 3

<sup>7</sup> Civil Code Article 653 (i)

<sup>8</sup> Supreme Court Judgment (September 22, 2002)

<sup>9</sup> Civil Code Article 1004

<sup>10</sup> Civil Code Article 1006

<sup>11</sup> Civil Code Article 1007

<sup>12</sup> Civil Code Article 1010

<sup>13</sup> Civil Code Article 1011

<sup>14</sup> Civil Code Article 1012

the heir(s).<sup>15</sup> Under the Japanese Civil Code, legal title, rights, and obligations, etc., are immediately transferred from the deceased person to the heir(s) upon his/her death in accordance with the will. Therefore, the executor distributes assets or discharges obligations on behalf of the heir(s).

The family court may determine the remuneration of an executor according to the status of the inherited property and other circumstances, unless the testator has specified remuneration in the will.<sup>16</sup> If an executor has failed to perform his/her duties, or if there is any other justifiable reason, an interested party may apply to the family court for the dismissal of the executor. An executor may resign from his or her duties with the permission of the family court if there is a justifiable reason.<sup>17</sup>

## B. Intestate Succession and Forced Heirship

In the case of intestate succession, the Japanese Civil Code provides for statutory heir(s) and statutory shares. The child of a decedent is an heir. If a decedent's child predeceased or lost the right to inheritance by application of the provisions of law or disinheritance, the child of the decedent's child shall be a per stirpes heir. This rule does not apply if the substituted heir is not a lineal descendant of the decedent.<sup>18</sup>

In the case where there is no child or issue of children, lineal ascendants of the decedent are the statutory heir(s). Between persons of differing degrees of kinship, the person who is of closer relationship shall have higher priority of inheritance. If there are no children, issue of children or ascendants, siblings of the decedent are the statutory heir(s).

The spouse of a decedent is always an heir. If there is a person entitled to become an heir pursuant to the provisions of Article 887 or the preceding Article, the spouse shall be of the same rank as that person.<sup>19</sup>

If there are two or more heirs, their shares in inheritance shall be determined according to the following rules:<sup>20</sup>

- if a child and a spouse are heirs, the child's share and the spouse's share shall be one half each;
- if a spouse and a lineal ascendant are heirs, the spouse's share shall be two thirds and the lineal ascendant's share shall be one third;
- if a spouse and sibling(s) are heirs, the spouse's share shall be three quarters and the sibling(s)'s share shall be one quarter;
- if there are two or more children, lineal ascendants, or siblings, the share is divided equally among the group. However, the share for a child out of wedlock shall be one half of the share for a child in wedlock, and the share of a sibling who shares only one parent with the decedent shall be one half of the share of a sibling who shares both parents.

Under the Japanese Civil code, if there are two or more heirs, the inherited property belongs to those heirs in co-ownership.<sup>21</sup> Joint heirs may at any time divide inherited property by agreement. If agreement is not, or cannot be, settled between joint heirs regarding the division of inherited property, each of the joint heirs may make an application to the family court for a division of the inherited property.<sup>22</sup> Upon the division of inherited property, the type and nature of rights associated with the

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<sup>15</sup> Civil Code Article 1015

<sup>16</sup> Civil Code Article 1018

<sup>17</sup> Civil Code Article 1019

<sup>18</sup> Civil Code Article 887

<sup>19</sup> Civil Code Article 890

<sup>20</sup> Civil Code Article 900

<sup>21</sup> Civil Code Article 898

<sup>22</sup> Civil Code Article 907

inherited property, as well as the age, occupation, mental and physical state, and financial circumstances of each heir, and all other matters, shall be considered.<sup>23</sup>

In special situations, if it is not evident whether an heir exists, an estate may be treated as a juridical person.<sup>24</sup> If there is no person who asserts a right as an heir within the statutory period, upon application and the court's finding of reasonableness, the family court may grant a person the property remaining after liquidation, in whole or in part. Persons who may receive a decedent's property in the absence of heirs include a person who shared a livelihood with the decedent, a person who contributed to the medical treatment and nursing of the decedent, or any other person who had a special connection with the decedent.<sup>25</sup> The remaining portion of inherited property shall belong to the National Treasury.<sup>26</sup>

Heirs other than siblings shall receive, as a legally reserved portion, an amount equivalent to the ratio prescribed in each of the following items in accordance with the divisions listed therein (forced heirship):<sup>27</sup>

- in the case where only lineal ascendants are heirs, one third of the decedent's property; and
- in all other cases, one half of the decedent's property.

A gift made within one year before death shall be included in the amount calculated pursuant to the provisions of the preceding Article. A gift made before one year prior to death shall be included in the amount calculated pursuant to the provisions of the preceding Article if it was made with the knowledge of both parties that it would diminish a claimant's legally reserved portion.<sup>28</sup>

A statutory heir may renounce his/her legally reserved portion; however, renunciation before the commencement of inheritance shall only be effective with court approval.<sup>29</sup>

### C. Marital Property

Under the Japanese Civil Code, property owned by a husband or wife before marriage and property obtained in the name of the husband or wife during marriage shall be separate property (property owned singularly by one party to a marriage). Property that does not clearly belong to either the husband or wife shall be presumed to be held in co-ownership.<sup>30</sup>

One party to a divorce may claim a distribution of property from the other party. If the parties do not, or cannot, agree with regard to the distribution of such property, either party may make a claim to the family court for a disposition in lieu of agreement within two years from the day of divorce. The family court shall determine whether to make a distribution, and the amount and method of that distribution, taking into account the amount of property obtained through the cooperation of both parties and all other circumstances.<sup>31</sup>

### D. Tenancies, Survivorship Accounts, and Payable on Death Accounts

There are no such concepts under Japanese law. According to Japanese court cases, the effect of a will that states that a particular asset "should be inherited" by a particular heir shall cause immediate transfer of title of the asset upon death of the testator without any action by the executor.<sup>32</sup> The legal affairs bureau also issued an announcement that the heir of particular real property who succeeded to

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<sup>23</sup> Civil Code Article 906

<sup>24</sup> Civil Code Article 951

<sup>25</sup> Civil Code Article 958-3

<sup>26</sup> Civil Code Article 959

<sup>27</sup> Civil Code Article 1028

<sup>28</sup> Civil Code Article 1030

<sup>29</sup> Civil Code Article 1043

<sup>30</sup> Civil Code Article 762

<sup>31</sup> Civil Code Article 768

<sup>32</sup> Supreme court judgment April 19, 2001

title by a will containing the phrase “should be inherited” may register the real property to himself/herself.<sup>33</sup> Therefore, the heirs of such a will may dispose of assets without waiting for the executor to complete execution of the will.

### III. Trusts, Foundations, and Other Planning Structures

#### A. Common Techniques

Trusts can be used when certain interests in property will be allocated to different people. For example, if shares in a family corporation are transferred to a trust where the economic interest is equally distributed to the beneficiaries, but voting rights and the right to dispose of shares is controlled by the trustee, it is possible to avoid a situation where operation of the company is impaired by disagreement among the family members or the shares are sold to non-family members. A trust can be used to designate successor beneficiaries of the asset after the first succession. For example, the first beneficiary of the property is the spouse, and after her death the second beneficiaries are the surviving children. However, in order to avoid a perpetual trust, the Trust Act provides that “A trust with provisions that upon the beneficiary's death, the beneficial interest held by said beneficiary shall be extinguished and another person shall acquire a new beneficial interest (including provisions that upon the death of the predecessor beneficiary, another person shall acquire a beneficial interest as the successor beneficiary) shall be effective, in cases where any beneficiary who is alive when 30 years have elapsed since the creation of the trust acquires a beneficial interest pursuant to said provisions, until such beneficiary dies or until the beneficial interest of such beneficiary is extinguished.”<sup>34</sup>

A foundation is subject to the Act on General Incorporated Associations and General Incorporated Foundations (Act No. 48 of 2006). A foundation needs at least 3 million yen of fundamental assets.<sup>35</sup> Since a foundation is an independent legal entity it is suitable for perpetual activities with more public purposes. A foundation will be qualified as a public foundation if it is so approved by the Public Interest Corporation Commission (PICC), which is a council in the Cabinet Office and composed of seven Commissioners appointed by the Prime Minister.<sup>36</sup>

#### B. Fiduciary Duties

Under the Japanese Trust Act, a trustee shall administer trust affairs consistently with the purpose of the trust, and a trustee shall administer trust affairs with the due care of a prudent manager.<sup>37</sup> In the case of a trust with two or more beneficiaries, the trustee shall perform his/her duties equitably on behalf of these beneficiaries.<sup>38</sup> The act also requires that a trustee must segregate property that belongs to the trust from the trustee's own property and property which belongs to other trusts by the method specified in the act.<sup>39</sup> When there are sufficient grounds to suspect trustee misconduct or material violations of laws, regulations or the provisions of the trust in connection with administration, the beneficiary may file a petition with the court for the appointment of an inspector in order to have the inspector investigate the status of the trust administration as well as the status of trust property and the obligation covered by the trust property.<sup>40</sup>

The board members and director of a foundation shall perform their obligations to the foundation in a faithful manner.<sup>41</sup> The directors shall report to the internal auditor if they find a fact that would cause significant loss to the foundation.<sup>42</sup>

#### C. Treatment of Foreign Trusts and Foundations

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<sup>33</sup> August 22, 1972 Min Koh Answer No. 3656

<sup>34</sup> Trust Act Article 91

<sup>35</sup> Article 153 of Act on General Incorporated Associations and General Incorporated Foundations

<sup>36</sup> Law for Certification of Public Association and Public Foundation of 2008

<sup>37</sup> Trust Act Article 29

<sup>38</sup> Trust Act Article 33

<sup>39</sup> Trust Act Article 34

<sup>40</sup> Trust Act Article 46

<sup>41</sup> Articles 83 and 197 of Act on General Incorporated Associations and General Incorporated Foundations

<sup>42</sup> Articles 85 and 197 of Act on General Incorporated Associations and General Incorporated Foundations

Foreign trusts and foundations will be treated similarly to domestic trusts and foundations. However, it is an open question whether a foreign trust that is not consistent with Japanese law is valid under Japanese law. Although it is not necessary to be consistent with Japanese law as to minor points, a trust with major violations of Japanese law such as a denial of forced heirship could be found invalid under the “public order and public interest principle.”<sup>43</sup>

#### IV. Taxation

##### A. Domicile and Residency

According to the Japanese Income Tax Act, a person who is domiciled in Japan or who has a place of residence in Japan for one year or more continuously shall be a tax resident.<sup>44</sup>

##### B. Gift, Estate, and Inheritance Taxes

Under Japanese law, liability for payment of the inheritance tax lies with the statutory heirs and universal legatees individually, not the estate.<sup>45</sup> The executor or administrator has no personal responsibility for filing tax returns or paying the tax. The inheritance tax is calculated separately for each statutory heir, regardless of how and to whom the property is to be distributed.<sup>46</sup> If the decedent leaves a surviving wife and three children, there will be four separate applications of the tax rate to the wife's and children's statutory shares (one-half to the wife and one-sixth to each child). The total tax thus determined is then apportioned between those who will actually receive the decedent's property in accordance with his will or by agreement of the heirs on partition. That is, the tax is calculated on the basis of the decedent's statutory heirs while the liability to pay the tax falls on those who inherit the property. If those who inherit the property are not in the first degree of relationship to the decedent or his spouse, there is a surtax of 20%.<sup>47</sup> The basic exemption is yen 50 million plus yen 10 million for each statutory heir.<sup>48</sup> The spouse's tax credit has likewise been increased and is equal to the statutory share to which the spouse is entitled.<sup>49</sup>

Heirs and legatees who are residents of Japan and inherit property from a decedent are unlimited taxpayers, and subject to Japanese inheritance tax regardless of the location of the property or the domicile of the decedent. Heirs and legatees who are not residents of Japan are limited taxpayers and subject to Japanese inheritance tax if they inherit property of a decedent located in Japan. A nonresident heir or legatee who has Japanese citizenship is subject to Japanese inheritance tax on the entire assets if the decedent or the heir or legatee was a resident of Japan in the previous five years.<sup>50</sup>

Except for nontaxable transfers, any benefit conferred at death is taxable. All property and interests in property in Japan and all property outside Japan that is inherited by heirs and legatees is subject to Japanese inheritance tax.<sup>51</sup> A decedent's property that is situated outside of Japan and is left to a limited taxpayer is excluded from the Japanese inheritance tax.<sup>52</sup>

All gifts made by the decedent within three years of death to an heir or legatee are included. An interest in a trust, the right to receive an annuity, and similar payments are taxable. Life insurance proceeds are included to the extent that the premiums were paid by the decedent. Retirement allowances due at the time of death and paid within three years are included in taxable property.

Charitable bequests are exempt from tax when made to a person, association or foundation that is engaged in worship, religion, charity, science, art or other public interest activities when so specified in the law. There are a number of conditions that must be met for charitable bequests to qualify for

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<sup>43</sup> Article 42 of Act on General Rules for Application of Laws (Act No. 78 of June 21, 2006)

<sup>44</sup> Income Tax Act Article 2 Item 3

<sup>45</sup> Inheritance Tax Act Article 1-3

<sup>46</sup> Inheritance Tax Act Article 16

<sup>47</sup> Inheritance Tax Act Article 18

<sup>48</sup> Inheritance Tax Act Article 15(1)

<sup>49</sup> Inheritance Tax Act Article 19-2(1)

<sup>50</sup> Inheritance Tax Act Article 1-3

<sup>51</sup> Inheritance Tax Act Article 2

<sup>52</sup> Inheritance Tax Act Articles 1(2) and 2(2)

exemption.<sup>53</sup> Property may also be excluded from property subject to inheritance tax if an heir or legatee makes a gift of the inherited property within 10 months of the decedent's death to the Japanese Government, a local government, or a public interest corporation - that is, a corporation formed for religious, charitable, scientific, artistic, educational, cultural, or similar objectives.<sup>54</sup>

The basic inheritance tax is determined for each legal successor by applying the following rates:<sup>55</sup>

Over (million yen)	Not Over (million yen)	Rate (%)
0	10	10
10	30	15
30	50	20
50	100	30
100	300	40
300	—	50

A surviving spouse is entitled to a tax credit equal to the inheritance tax on the spouse's statutory share of the estate. The statutory share is determined under Article 900 of the Civil Code. Under the Civil Code, if the spouse and children survive, the spouse is entitled to a statutory share equal to one-half of the estate. If this amount is less than yen 160 million, 160 million yen is creditable.<sup>56</sup>

Gift Tax is imposed on the donee. The donee is the taxpayer and is liable for the tax. A donee who is a resident of Japan is an unlimited taxpayer and subject to gift tax on all gifts of property whether the property is located in Japan or not. A donee who is not resident in Japan is a limited taxpayer and subject to gift tax only with respect to gifts of property located in Japan.<sup>57</sup> A nonresident donee who has Japanese citizenship is subject to gift tax on the entire assets if the donor or the donee was a resident of Japan in the previous five years.

The annual gift tax exemption is 1,100,000 yen for gifts to a donee from all donors.<sup>58</sup>

The gift tax rates are not the same as the inheritance tax rates. Article 21-7 of the IHTL provides for the following gift tax rates:

Annual Taxable Income of Donee (Unit: Million Yen)		
Over	But Not Over	Tax Rate
—	2	10%
2	3	15%
3	4	20%
4	6	30%

<sup>53</sup> Inheritance Tax Act Article 12(1)(iii); Inheritance Tax Act Enforcement Order Article 2

<sup>54</sup> Special Taxation Measures Act article 70; Special Taxation Measures Act Enforcement Order Article 40-3

<sup>55</sup> Inheritance Tax Act Article 16

<sup>56</sup> Inheritance Tax Act Article 19-2

<sup>57</sup> Inheritance Tax Act Articles 1-4(1)(iii) and 2-2(1)

<sup>58</sup> Inheritance Tax Act Article 21-5 Special Taxation Measures Act article 70-2-2

6	10	40%
10	—	50%

### C. Taxes on Income and Capital

Income tax shall be imposed with respect to income specified in each of the following items for the category of person listed in the relevant item.<sup>59</sup>

- (i) A resident other than a non-permanent resident: All income
- (ii) A non-permanent resident: Domestic source income, and any other income paid in Japan or remitted to Japan from abroad

<sup>59</sup> Income Tax Act Article 7 provides that the term "domestic source income" shall include:

- (i) (a) income from a business conducted in Japan or from the utilization, holding or transfer of assets located in Japan or any other income specified by a Cabinet Order as arising from sources within Japan, (b) profit from a business conducted in Japan under a partnership contract, and (c) consideration for the transfer of land or any right on land, or any building and auxiliary equipment or structure thereof, all of which are located in Japan,
- (ii) consideration received by a person who conducts a business that is mainly intended to provide personal services in Japan,
- (iii) consideration for the lending of real estate located in Japan, any right on real estate located in Japan or a right of quarrying, the establishment of a mining lease or the lending of a vessel or aircraft to a resident or domestic corporation,
- (iv) (a) interest on Japanese national government bonds or Japanese local government bonds or bonds issued by a domestic corporation, all of which fall under the category of government or company bonds, (b) interest on deposits or savings which have been deposited with a business office or other office, or any other business facility equivalent thereto, located in Japan, and (c) distribution of profit from a jointly managed money trust, bond investment trust or publicly offered bond investment trust which has been entrusted with a business office located in Japan,
- (v) (a) dividend of surplus, dividend of profit, distribution of surplus or interest on funds which is received from a domestic corporation and (b) distribution of profit from an investment trust or a specified trust issuing a beneficiary certificate which has been entrusted with a business office located in Japan,
- (vi) interest on a loan provided for a person who performs operations in Japan which pertains to the said operations,
- (vii) any of the following royalties or considerations received from a person who performs operations in Japan, which pertain to the said operations:
  - (a) royalty for an industrial property right or any other right concerning technology, a production method involving special technology or any other equivalent right or method, or consideration for the transfer thereof,
  - (b) royalty for a copyright (including right of publication, neighboring right, and any other equivalent right), or consideration for the transfer thereof, (c) royalty for machinery, equipment or any other tool specified by a Cabinet Order
- (viii) any of the following pay, remuneration or pension:
  - (a) salary, compensation, wage, annual allowance, bonus or any other pay or remuneration for the provision of personal services that has the nature of any of these, which arises from work or the provision otherwise of personal services carried out in Japan (including work carried out outside Japan by a person acting as an officer of a domestic corporation and other provision of personal services)
  - (b) public pension, etc.
  - (c) retirement allowance, etc. which arises from work or the provision otherwise of personal services carried out by a person entitled to receive it during the period when he/she has been a resident (including work that has been carried out by a person acting as an officer of a domestic corporation during the period when he/she has been a nonresident and other provision of personal services)
- (ix) monetary award for the advertisement of a business conducted in Japan
- (x) pension received under a life insurance contract, casualty insurance contract or any other contract for a pension concluded via a business office located in Japan or via a person who acts as an agent for conclusion of contracts in Japan
- (xi) certain compensation money for benefits, interest, profit or margin profit
- (xii) distribution of profit received under a silent partnership contract with respect to capital contributions to a person who conducts a business in Japan.

- (iii) A nonresident: Domestic source income for the category of nonresident classified by existence and type of permanent establishment.

If a treaty provides for a different rule, the provision of the treaty will prevail. Japan adopts the OECD model convention type double tax treaty with respect to most of treaty's counterparties.

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