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NO. 98487-5

SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE DEPENDENCY OF A.L.K., L.R.K.S., D.B.K.S.

L.K,

Petitioner,

v.

STATE OF WASHINGTON, DEPARTMENT OF CHILDREN, YOUTH
AND FAMILIES,

Respondent.

**DCYF RESPONSE TO PETITIONER'S MOTION FOR
DISCRETIONARY REVIEW**

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I. INTRODUCTION

The Court of Appeals correctly affirmed the trial court's orders of dependency and disposition, and L.K. presents no basis for this Court's review under RAP 13.4(b). Consistent with federal and state Indian Child Welfare Acts, the Department made timely and continuing efforts to provide remedial services and rehabilitative programs to L.K., from filing of the dependency petition through the disposition hearing.

The Court of Appeals properly determined that L.K.'s express and repeated refusals to meet with the Department or otherwise engage in the services offered and available to her and the repeated disavowals of parental deficits she and her attorney made throughout trial comprise invited error. L.K. abandoned her previous strategy of denying the parental deficits alleged. Now, L.K. laments the insufficiency and untimeliness of the very service offerings she rejected and faults the Department for not providing her help that she declared she would not accept. In this case, on these facts, the Court of Appeals properly applied invited error, and L.K. presents no basis for this Court's review.

II. RESTATEMENT OF THE ISSUES

1. Where the Department made timely and continuing efforts to provide remedial services and rehabilitative programs to the mother from the time the dependency petition was filed to the disposition hearing, did the trial court correctly find that the

Department made the active efforts required by federal and state law?

2. Does invited error preclude L.K.'s appellate attack on the adequacy of the Department's active efforts?

III. STATEMENT OF THE CASE

L.K.'s three young children were placed into protective custody by law enforcement in August of 2018, in response to allegations of L.K.'s suspected drug use and complaints that L.K. was neglecting basic parenting duties and abandoning her children for days at a stretch without providing adequate food, diapers and other supplies for them.¹ CP 1-6. The Department had been involved with the family for over five years, providing voluntary services, which L.K. selectively partook of, refusing all chemical dependency related services despite recurrent concerns about drug abuse. CP 3-5.

L.K.'s two children, L.R.K.S and D.B.K.S. are subject to the provisions of the state and federal Indian Child Welfare Acts (ICWA and WICWA)² through their father's membership in the Northern Arapaho Tribe of the Wind River Reservation. CP 2, 4³. The tribe intervened early

¹ L.K. assigns no error as to the Court of Appeals ruling in A.L.K.'s case, which that court consolidated with those of her Indian children, D.B.K.S and R.L.K.S. This briefing is responsive to L.K.'s motion as it concerns D.B.K.S. and R.L.K.S.

² The Indian Child Welfare Act (ICWA), Pub. L. 95-608, 92 Stat. 3069, 25 U.S.C. 1901 *et seq.*; Washington State Indian Child Welfare Act (WICWA), RCW 13.38 *et seq.*

³ References to Clerk's Papers Volume I, COA #366219.

when contacted by the Department and remained involved. CP 3-5, 78-79.

Active efforts to identify and remediate parental deficits began in 2013, when the Department responded to a methamphetamine relapse reported by L.K.'s DOC officer, by offering counseling, drug testing, chemical dependency evaluation and treatment, and family preservation services. Caseworker Welch testified that the case lasted about seven months rather than the usual ninety days, closing in June of 2014 when L.K. declined further services. RP 24-27, 252, 257. A second, even more comprehensive Family Voluntary Services case was initiated in 2017, after another relapse occurring during L.K.'s pregnancy with D.B.S.K, reported by Swedish Hospital staff. RP 258. That case included services to assist L.K. in finding and maintaining safe, stable housing; parenting education; family preservation services; free full-time daycare; chemical dependency testing and assessment with full inpatient and outpatient treatment available; one-on-one coaching; mental health counseling; transportation in connection with the job search /job readiness process; assistance in appealing the denial of TANF benefits; and other intensive supports tailored to build L.K.'s skills and rehabilitate the parental deficits that continued to destabilize the family and place the children at risk. RP 258, CP 5, 57. About five months prior to filing of the current petition, the second Family Voluntary Services case concluded, after L.K. declined three alternative

safe and stable housing options that the Department had procured for the family, in favor of living at a motel, where she was eventually evicted for nonpayment. RP 35, 265.

Social workers from these voluntary services cases testified to L.K.'s longstanding pattern of selectively accepting some services while refusing UAs and all other chemical dependency-related services, and her continued inability to stabilize and maintain a safe, stable residence or secure employment. *See, e.g.*, RP 221, 252.

In the present dependency, renewed active efforts with L.K. and the family began the day after the children were removed, with a Family Team Decision Making meeting that L.K. attended. RP 212-216. Investigator Stephens-Adamek, who authored the dependency petition, testified to the Department's conclusion that L.K.'s untreated chemical dependency was the primary, driving parental deficit torpedoing progress or success in the Family Voluntary Services cases. RP 209-212. Investigator Stephens-Adamek identified multiple factors contributing to the Department's identification of chronic chemical dependency as a critical parental deficit, including allegations of methamphetamine abuse made by L.K.'s current landlady; allegations of chronic drug abuse and association with drug users made by the motel manager who evicted L.K. four months prior; A.L.K.'s drawings of her mother smoking from a glass pipe; and L.K.'s Departmental

history of declining to complete the intensive outpatient programs and random urinalysis testing meant to follow inpatient treatment and prevent relapse. RP 220-222. Investigator Stephens-Adamek testified,

The Department's been after her for years to complete a urinalysis. She's refused.... She was court ordered at shelter care to complete a hair follicle test and urinalysis. My co-worker, Valerie Bollinger, went above and beyond to make sure that that was available to her in such a short timeframe and she failed to complete that as well. RP 221.

In trial, L.K. denied that her homelessness or residential instability and lifestyle choices create an ongoing, substantial safety risk to her children, but it was illustrated by testimony concerning her frequent moves and historical rejection of safe housing options. For example, L.K. acknowledged that in 2017, she became pregnant, relapsed, and checked herself into an intensive perinatal drug treatment program in Seattle, leaving her two older children in the care of friends who, the Department learned, were known by Seattle area law enforcement to be associated with drug use, weapons, and the prostitution of minors. RP 261. The Department also presented testimony from the manager of the Moonlight Motel where L.K. had lived with the children in early to mid-2018, regarding L.K.'s apparent involvement in ongoing drug activities with other motel guests and visitors, and the disturbing evidence of drug abuse in the room following L.K.'s eviction. RP 354-358. Officer testimony also established that J.C., who L.K.

and the children stayed with following eviction, is a schizophrenic felon who allows homeless persons to live in his garage and whose residence is a frequent site of police raids and emergency responses requiring multiple officers to assure officer safety. RP 138-139. L.K.'s trial testimony denying that any of these living circumstances placed her three young, vulnerable children at risk underscored the Department's contention that they were unsafe in her continued care.

After the trial court established shelter care and ordered emergency out-of-home placement of the children, L.K. engaged in the offered visitation, but expressly and repeatedly rejected all services the Department offered. RP 157, 205. At the initial shelter care hearing, the Court ordered a hair follicle drug test, which L.K. declined to complete over the next few months, advising the Court "I am not...." RP 20, CP 1-10. In the five months spanning removal and fact-finding L.K. maintained contact with the Department to access visitation, but refused to meet with her social worker and continued rejecting voluntary and court-ordered services. She emphatically confirmed her decision to reject all service offerings at fact-finding:

The report is a complete lie.... And I've asked the Department to please fix that and I am not – it's the hair follicle, it's the UA, it's every service that the Department has asked me to do except for my visits at this time. I've done my visits and that's all I

have done. RP 20.

L.K. and the father of A.L.K., H.R., contested dependency in January of 2019. CP 82-104. Dependency was established pursuant to RCW 13.34.030(6)(c).⁴ CP 130, 142, 153. At disposition, the tribe submitted a Qualified Indian Expert Statement, opining that the Department had made active but unsuccessful efforts to avoid removal of the children from their home. The statement warned that returning the children to L.K.'s care would put them at significant risk of substantial harm. CP 151-155. At disposition, the trial court found that DCYF

....(m)ade active efforts by actively working with the parents....to engage in remedial services and rehabilitative programs to prevent the breakup of the Indian family beyond simply providing referrals to such services, but those efforts have been unsuccessful. CP 141, 152.

The children's Court-appointed GAL submitted an Addendum to Fact Finding, observing,

...[L.K.] has failed to comply with Court orders for UAs and a hair follicle test, nor has she cooperated with the social worker to access other voluntary services. It appears that [L.K.] has issues with drug abuse and mental instability, anxiety and PTSD, but has refused to voluntarily participate in services offered by the Department. [L.K.] has not demonstrated that she can provide safe and stable housing for her children. CP 76.

L.K. testified that she had no drug problem and did not need a hair

⁴ D.S., father of both Indian children, entered agreed orders of dependency and disposition in advance of L.K.'s contested fact- finding trial.

follicle test, U.A.s, evaluation, treatment, or counseling. RP 57-74. Yet on cross-examination, she admitted to relapses on methamphetamine during at least two pregnancies, and acknowledged several drug-related criminal convictions and probation violations. RP 17, 29, 40-42. She also admitted her diagnoses for PTSD and anxiety disorder. RP 25-26.

Ample evidence supported the conclusion that L.K.'s children were at risk in her care, and her insistence that she had not abandoned or neglected them was contradicted by several witnesses. RP 181-186. L.K.'s claim that she would submit to UAs or hair follicle testing but for the Department's "complete lie," was contradicted by social worker testimony that she had "refused urinalysis throughout her time with Family Voluntary Services and beyond." RP 213. L.K.'s assertions that concerns about current drug abuse were baseless were also belied by A.L.K.'s drawing of her mother smoking from a glass pipe, and the testimony of L.K.'s landlord that she had left a baggie of what appeared to be methamphetamine on a sink in the house. RP 212. L.K.'s assertion at trial that she was not homeless because she had a Pace Arrow RV suitable for the family was questionable in light of her acknowledgments that she owned it before the children were removed, she had no driver's license, and could not say where it was parked. RP 68, 78.

The trial court's disposition order maintained out-of-home placement and expressly found the Department had made sufficient but unsuccessful active efforts to avoid removal of the children from the home. CP 103, 118. L.K. now seeks discretionary review on the sole issues of whether the Department's active efforts between removal and trial were adequate, and whether she is precluded from attacking these due to the invited error created by her words and actions before and during trial. Notably, L.K. does not dispute that the trial court received evidence of active efforts made by the Department, and she never questioned the adequacy of active efforts at trial.

IV. ARGUMENT

A. The Department Made Active Efforts As Required By ICWA and WICWA To Prevent the Breakup of the Family, But These Efforts Were Unsuccessful.

In the order of disposition, the trial court found that the Department made active and continuing efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of L.K.'s family, that these efforts were unsuccessful, and that continued custody would likely result in serious emotional or physical damage to the children. CP 170. The trial court's finding of active efforts is consistent with federal and state ICWA and WICWA law, and the mother presents no basis for review under RAP 13.4(b).

1. **Both ICWA and WICWA require the Department to make affirmative, timely and thorough active efforts as a prerequisite to foster care placement.**

Dependency and disposition are two different components of a child welfare case. An order of dependency determines whether the State has proven, by a preponderance of the evidence, that the children meet one of the statutory definitions of "dependent child" under RCW 13.34.030(6). RCW 13.34.110(1)-(3). An "active efforts" finding is not required prior to entry of an order of dependency. *See* RCW 13.38.040(1). L.K. does not challenge the sufficiency of the evidence supporting the finding of her children's dependency pursuant to RCW 13.34.030(6)(c).

An order of disposition follows an order of dependency and determines, among other things, where the children will live. RCW 13.34.130(1). An "active efforts" finding is prerequisite to a "foster care placement" for an Indian child. RCW 13.38.040(1)(a). "Foster care placement" means "any action removing an Indian child from his or her parent... for temporary placement in a foster home...where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated." 25 C.F.R. § 23.2; RCW 13.38.040(3)(a). ICWA and WICWA require the juvenile court to determine that active efforts have been made to prevent the breakup of an Indian family prior to that foster care placement. Both ICWA and WICWA

provide that any party seeking to effect foster care placement shall satisfy the court “that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.” 25 U.S.C. § 1912(d); RCW 13.38.130(1).

ICWA does not provide a statutory definition of active efforts. Instead, active efforts are defined in the implementing federal regulations as “affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family.” 25 C.F.R. § 23.2. Active efforts must be tailored to the facts and circumstances of the case and assist the parent with accessing or developing the resources necessary to satisfy the case plan. 25 C.F.R. § 23.2. The federal regulations also provide examples of active efforts, including:

Supporting regular visits with parents or Indian custodians in the most natural setting possible as well as trial home visits of the Indian child during any period of removal, consistent with the need to ensure the health, safety, and welfare of the child;

... Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child’s parents or, when appropriate, the child’s family, in utilizing and accessing those resources;

... Considering alternative ways to address the needs of the Indian child’s parents and, where appropriate, the

family, if the optimum services do not exist or are not available.

25 C.F.R. § 23.2 (7), (8), and (10).

Unlike ICWA, WICWA provides a statutory definition of active efforts. RCW 13.38.040(1). When the Department seeks out-of-home foster care placement, it must establish the Department social workers actively worked with the parent to engage the parent in remedial services and rehabilitation programs to prevent the breakup of the family, beyond simply providing referrals to such services. RCW 13.38.040(1)(a); RCW 13.38.040(1)(a)(ii). WICWA provides that voluntary services offered prior to filing a dependency petition are relevant to proving that the Department made active efforts prior to filing. RCW 13.38.040(1)(a)(i). Past and recent voluntary services cases can also assist the Department in identifying and tailoring services offered after a dependency petition is filed to the facts and circumstances of the case, as ICWA requires. 25 C.F.R. § 23.2.

Whether active efforts have been sufficient to satisfy ICWA and WICWA at any given stage of a proceeding is a mixed question of law and fact, weighed by the clear, cogent and convincing standard. *Matter of DJS*, 12 Wn.2d 1, 32, 456 P.3d 820 (2020). In determining whether active efforts have been made, each case is adjudged based upon the individual case circumstances. *Id.* at 32. For purposes of determining whether the State

engaged in active efforts, the court weighs a parent's demonstrated lack of willingness to participate in treatment. *Id.* at 32.

2. The Department made active efforts to prevent the children's out of home placement at the time of the disposition hearing.

The trial record does not support L.K.'s claim that the Department relied entirely on actions from previous interventions to illustrate it made active efforts, nor the assertion that the Department "denied" L.K. services. Motion at 13, 16. From the time the Department filed the dependency petitions in August of 2018 until the trial court ordered dependency and disposition in February of 2019, the Department actively offered and provided a variety of services to the parents and family, making timely, thorough, and affirmative efforts to prevent the breakup of the family and working in conjunction with the tribe.

Social worker Reeves testified that at the outset of the dependency case, she conferred directly with L.K. to learn her preferences regarding placement of the children, and attempted to find a suitable Indian relative placement for D.B.K.S. and R.L.K.S. RP 288. She arranged for three in-person visits for L.K. a week, with all the children in attendance. RP 288. She arranged an in-person meeting with L.K. to plan and discuss all the services being offered on a voluntary basis prior to the dependency trial. RP 288. During that meeting, she connected L.K. with housing resource

network options and Catholic Community Family or Catholic Charities for rapid rehousing options. RP 289. She also asked L.K. to complete a U.A. and chemical dependency assessment, which L.K. refused. RP 289. Social worker Reeves crafted a proposed service plan for L.K., recommending and asking her to engage in a chemical dependency evaluation and random UA.'s, a domestic violence assessment, parenting education, and a psychological evaluation. RP 305-306. She communicated with L.K. via text, but L.K. was always unwilling to come in to meet with her, or to telephone her to discuss issues. RP 310. Social worker Reeves testified that when she asked L.K about her wishes or requests regarding services and supports, and whether she would engage in counseling or parenting education, L.K. requested only financial assistance. RP 312. On several occasions, L.K. told Reeves, she “will not engage in services but would only participate in visits.” RP 312.

In compliance with ICWA and WICWA, the Department initiated contact with the tribe after removal, including the tribe in meetings, case planning, and hearings. RP 222. Social worker Reeves initiated paternity testing for D.B.K.S. and followed up with the tribe to solicit tribal preferences and input for placement with a relative or an Indian family. RP 290. The Department made direct, active efforts to contact relatives of the Indian children to inquire about placement with an Indian relative or in a

culturally appropriate foster home. RP 222. While unable to locate an Indian home locally, the Department placed the Indian children together, and began in-person visitation with L.K. the day of shelter care, in robust compliance with ICWA and WICWA guidelines. RP 222. The Tribe's Qualified Indian Expert statement opined that the Department made the active efforts described, and warned that returning L.K.'s children to her care would pose a risk of serious emotional or physical harm. CP 150-154.

The evidence of services offered across several years and ending approximately five months prior to the filing of the petition, which L.K. dismisses as untimely, illustrates the Department's use of active but ultimately unsuccessful efforts to prevent removal of the children. Those efforts assisted the Department in identifying chemical dependency as an intransigent parental deficit standing in the way of reunification. L.K. complains that she was "denied" the services and active efforts ICWA and WICWA require after the children's removal, but the trial record reflects otherwise. Motion at 16; RP 416. The Department never abrogated its duty to continue offering voluntary services, but it could not force L.K. to engage in drug testing or any other service before disposition, and success was impossible without her participation. Sufficient evidence supports the trial court's finding that the Department made active efforts tailored to L.K.'s

case, as required under ICWA and WICWA. This fact specific appeal does not present a basis for this Court's review under RAP. 13.4(b).

B. The doctrine of invited error precludes L.K.'s challenge to the adequacy of the Department's active efforts.

The Court of Appeals correctly concluded that invited error estops L.K. from her appellate attack on the sufficiency of the Department's active efforts to offer her services. L.K. presents no basis for review under RAP 13.4(b).

"Invited error" is not a substantive rule of evidence; rather, it is an appellate remedy that prohibits a party from setting up error in the trial court and then complaining of it on appeal. *State v. Rushworth*, ___ Wn. App. ___, 458 P.3d 1192, 1198 (2020). The invited error doctrine prohibits a party from relief on appeal after inducing the commission of error at trial. *State v. Lang*, ___ Wn. App ___, 458 P.3d 791, 794 (2020). Under the doctrine of invited error, a party may not materially contribute to an erroneous application of law at trial and then complain of it on appeal. *In re Dependency of K.R.*, 128 Wn.2d 129, 147, 904 P.2d 1132 (1995); *In re Detention of Rushton*, 190 Wn. App. 358, 372, 359 P.3d 935 (2015). An appellant cannot "complain about an alleged error at trial that he set up himself." *In re Marriage of Blakely*, 111 Wn. App. 351, 360, 44 P.3d 924 (2002).

L.K. contends that invited error does not preclude discretionary review because the Department failed to supply her with the benefits of active efforts and services to remediate parental deficits following removal of the children. Yet, she invited any error by actively refusing and rebuffing the need for and relevance of those efforts and services before and during the dependency trial. L.K. argues that she never “waived” the right to active efforts, but the doctrine of invited error does not require express waiver of a right or option to be applicable. The Court of Appeals correctly found that an appeal assigning error to the trial court’s findings regarding sufficiency of the Department’s active efforts was estopped by her trial strategy and testimony. *See*, e.g., *State v. Studd*, 137 Wn.2d 533, 973 P.2d 1049 (1999) (invited error doctrine was applicable to defendants who proposed erroneous instruction without attempting to add remedial instruction and reasoning, although error was of constitutional magnitude and presumed prejudicial, defendants invited error and could not complain on appeal).

In trial, L.K. and her attorney confirmed that she had rebuffed the Department’s active efforts, refusing all services offered after the children were removed because she believed there was no need for the services, yet on appeal, she argued that she was wrongly denied such services during that timeframe. RP 20. This is the invited error precluding discretionary review. L.K.’s trial attorney summarized his theory of the case, namely that L.K.

“very much denies the allegation that she is not presently capable to care for her children...(S)he does not have a drug problem, she has not been using drugs, and...does have a place to stay that she can take the kids and care for them.” RP 10. In the case at hand, the contribution or “windfall” that L.K. should not enjoy as a result of invited error is simply discretionary review of the active efforts finding itself.

Generally, Washington strictly applies the doctrine of invited error to prohibit parties from setting up an error at trial and then complaining of it on appeal. *State v. Wakefield*, 130 Wn.2d 464, 475, 925 P.2d 183 (1996). This applies to error of whatever kind, even if the error is of constitutional magnitude. *State v. Henderson*, 114 Wn.2d 867, 792 P.2d 514 (1990).

The trial court met its obligation to apply ICWA and WICWA to the proceedings, and properly considered the adequacy of the Department’s active efforts to avoid removal of the Indian children from L.K.’s care prior to ordering that they would remain out of the home, at disposition. Here, the invited error lies in L.K.’s approach to the case – personally and through her attorney, before and during trial, and the results flowing from that approach. L.K.’s trial attorney never objected to the sufficiency, timing, or appropriateness of active efforts, never challenged when and how these efforts were made, and never argued that additional, specific services would have allowed for a return to L.K.s care prior to disposition. By

characterizing most services offered as unnecessary and invasive, L.K. did “throw down the gauntlet,” and instead of challenging the sufficiency of active efforts at trial, her attorney minimized the need for services and objected to the relevance of testimony offered in support of these.

Nothing in the trial record suggests that L.K.’s approach caused the trial court to excuse the Department from providing evidence of active efforts. L.K. asserts that the Department erred during the several months of shelter care that preceded fact-finding by not engaging her in remedial services that might allow for the timely return of the children to her care. This is a very different message from the one L.K. conveyed at trial, which was, essentially, that she was not in need of Department intervention, and did not wish the services proposed by the Department to be court-ordered in the disposition in short, her trial strategy was to deny that she was in need of services or treatment, and her appellate strategy was to complain that the Department failed to offer sufficient services or treatment.

L.K. and her trial attorney never addressed or questioned the adequacy of active efforts, and he argued against Court-ordered parenting education at disposition. RP 421. L.K.’s approach was to deny she needed any services. She denied her drug problem, asserting that her sustained refusal to submit to a court-ordered hair follicle test, or any other voluntary chemical dependency services was a principled protest against lies and an

“unfair report” from the Department. She denied that her well-documented residential instability was anything more than a reasonable lifestyle choice that did not require her to engage with the housing services offered by the Department. Despite her acknowledged mental health related diagnoses, she denied that mental health services would be helpful to her in any way.

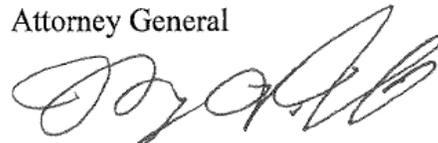
The Court of Appeals reasoned that by expressly rejecting essentially all the Department’s efforts to provide remedial and rehabilitative services after the children were removed, and by asserting throughout trial that she was not in need of, and would not accept services other than visitation, L.K. effectively sacrificed her right to complain on appeal that the Department did not make active efforts and offer enough services to help her address her problems. In this case, on these facts, the Court of Appeals properly applied the doctrine of invited error and L.K. presents no basis for this Court’s review.

V. CONCLUSION

L.K. fails to satisfy any basis under RAP 13.4(b) for this Court’s review, and the Court should deny the motion for discretionary review.

RESPECTFULLY SUBMITTED this ____ day of June, 2020.

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NO. 98487-5

SUPREME COURT OF THE STATE OF WASHINGTON

In Re the Dependency of:
A.L.K., L.R.K.S., D.B.K.S.

L.K. (mother)
Petitioner,

vs

STATE OF WASHINGTON/DCYF
Respondent.

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SERVICE BY EMAIL

I, Debi Truitt, certify that on the 4th day of June, 2020, I caused a true and correct copy of the Department's Response to Motion for Discretionary Review to be served on the parties designated below by email per agreement of the parties pursuant to GR30(b)(4):

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