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NO. 94798-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In Re the Dependency of E.H.,

A minor child.

**CORRECTED SUPPLEMENTAL BRIEF OF
COURT APPOINTED SPECIAL ADVOCATE, LAURA CLOUGH**

Kathleen C. Martin,
WSBA #25636
King County Superior Court
Dependency CASA Attorney
Maleng Regional Justice Center
401 4th Ave. North, Room 3081
Kent, WA 98032
Telephone: (206) 477-2768

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INTRODUCTION

E. H. recently had his tenth birthday and he entered the dependency system three and one-half years ago (with his seven siblings). His Court Appointed Special Advocate (CASA) is Laura Clough, who also is the CASA for his two younger siblings. Three of his siblings are adults, and two are teen-agers who are also dependent and represented by attorneys. E.H. has not lived with his mother, R.R., since 2013 and his multiple placement history is somewhat confusing. Joint Appendix (JA) 219.¹ R.R. is incarcerated in a federal prison with a release date of July 2019.

The CASA adopts the *Gunwall* analysis and arguments of the State. *State v. Gunwall*, 109 Wn.2d 54, 720 P.2d 808 (1986).

In August 2016, R.R. requested the juvenile court to appoint counsel for E.H. (but not for his younger siblings,) claiming that federal and state law require counsel for all children in dependency to provide them with due process in dependency proceedings. The juvenile court denied the motion, finding that the federal and Washington State's constitutions do not require appointment of counsel for all children and that due process is satisfied by a careful and thorough analysis of each child's individual circumstances. JA 11. The Appellate Commissioner properly

¹ Counsel for R.R., the Attorney General, and the CASA have combined appendices from the Motion for Discretionary Review and Responses to the Motion filed in the Court of Appeals, Division I. This combined appendix is herein referenced as Joint Appendix (JA.)

denied R.R.'s Motion for Discretionary Review, finding that RCW 13.34.100 is presumed to be constitutional, that the juvenile court exercised proper discretion, and that the CASA has been a "zealous" advocate for E.H.'s best interests and stated interests. Pet. MDR, App. A.

The CASA - who, by statute, is a party to this case and is charged with representing the best interests of the child involved in the case, RCW 13.34.030(11), 13.34.100 - submits that all children in dependency are entitled to meaningful advocacy and that due process is not met by a blanket requirement of appointment of an attorney, representing their legal interests only, but is met by the court carefully considering each child's individual needs, development and circumstances.

The CASA asks this Court to affirm that RCW 13.34.100 is constitutional in its grant of discretion to the trial and juvenile courts whether or not each child under the age of twelve should be appointed counsel, and to hold here, as in *M.S.R.*, that due process is met when the lower court appropriately considers, "[t]he private interests at stake, the government's interest, and the risk that the procedures used will lead to an erroneous decision." *In re Dependency of M.S.R.*, 174 Wn.2d 1, 14, 271 P.3d 234 (2012) (citing *Lassiter v. Department of Social Services of Durham County, N. C.*, 452 U.S. 18101 S. Ct. 2153, 68 L.Ed.2d 640 (1981)).

The Rules of Professional Conduct note, “[t]he normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects.” RPC 1.14, Comment 1. RPC 1.14(b) suggests that when clients cannot “adequately act in their own interests,” that the attorney should take protective action, including requesting appointment of a guardian ad litem.

In 2016, 86 per cent of children with dependency petitions filed in Washington were under twelve years old, and 61 per cent were under six years old. Washington State Center for Court Research: *Dependent Children in Washington State: Case Timeliness & Outcomes, Annual Report* (2016). With the vast majority of children subject to dependency actions younger than twelve, and given the traumatic circumstances in which many of those children have spent their lives, there should be no assumption that all children in dependency have the capacity to understand their own interests. RPC 1.4 requires attorneys to “reasonably consult with a client about the means by which the client’s objectives are to be met...” For children who are not capable of formulating an objective or understanding why their objective is unattainable, having an attorney who

is their representative in name only is not protective in dependency proceedings. Children are entitled to meaningful advocacy, already contemplated by the statute for those children under twelve as best interests' advocacy, and the juvenile court's decision should be upheld. RCW 13.34.100(7)(c).

ISSUES FOR REVIEW

1. Whether the juvenile court properly found that due process in E.H.'s particular case did not require appointment of counsel for him and properly applied the *Mathews* factors in its determination.
2. Whether RCW 13.34.100 is constitutional in its due process protection of children in dependency proceedings by authorizing discretion to the juvenile court to appoint counsel upon consideration of each child's needs and the circumstances of each case before the court.

STATEMENT OF THE CASE

E.H.'s mother, R.R., is incarcerated in federal prison with a release date of 2019. At the time R.R. filed her motion for appointment of counsel, she was incarcerated in the Dublin Federal Correctional Institution in California, where she had been since June 2013, with a release date of July 2019. JA 206. R.R. had furloughs for some time which allowed her to travel to Washington to attend dependency hearings and visit the children, but, at the time she filed her motion for Discretionary Review, that

furlough had been revoked, as the Bureau of Prisons had granted the furloughs by mistake. JA 206.

R.R.'s Order of Dependency provides for telephone visitation for R.R. and her youngest three children and allows for "liberal, supervised" visits if she obtained a furlough from prison to visit in person. JA 25. Visitation with her older dependent children was at their discretion. JA 25.

The mother's motion for appointment of counsel appears to have been prompted in part by the CASA's recommendation of adoption as a primary permanent plan in a February 2016 Report to Court. JA 55. R.R.'s motion ignores that in the May 2016 CASA Report to Court, Ms. Clough recommended adding guardianship as a permanent plan based on her conversations with E.H. and his *stated* wishes regarding his permanence. JA 242. In August 2016, R.R. filed her motion in the juvenile court asking for appointment of counsel for E.H., who "does not trust easily ... finds it hard to open up" and whose therapist reports that he "becomes sad when the subject of his mother and siblings comes up." JA 207. His CASA and E.H. have a trusting relationship developed over time and with the help of their common participation in his school's basketball program. JA 207. R.R. did not ask for appointment of counsel for his younger siblings, who have been reluctant to visit with her, have refused visitation with her, and in one instance E.H.'s younger brother told the mother he did not want her

to call him. JA 72, 78, 240. As shown through her many detailed CASA reports, Ms. Clough has advocated for both E.H.'s best interests and his stated interests, as required by RCW 13.34.105. JA 204-243.

E.H. has suffered much trauma in his life. As reported by Ms. Clough in her reports to court, he has been diagnosed with Anxiety Disorder and Adjustment Disorder. JA 239. His therapist reported that he "shut down" when his therapist broached the topic of his mother, and that he is anxious at the idea of separation from his current caregivers and finding himself alone. JA 239. "He is obsessed with money; wanting to sell toys he is not using, almost as though he is preparing to take care of himself." JA 239. E.H. has disclosed that he believes it is "not okay for him to be happy," described living in "bad" homes, physical abuse by his mother's friends, and being traumatized over his grandmother's shooting death. JA 239.

ARGUMENT

The case of E.H. provides almost a textbook lesson in how best interests advocacy functions as intended by RCW 13.34.105, the Guardian ad Litem Rules, and this Court in *M.S.R. M.S.R.* at 19, 20. It also meets the criteria for meeting due process established by the *Lassiter* Court:

For all its consequence, "due process" has never been, and perhaps can never be, precisely defined. "[U]nlike some legal rules," this Court has

said, due process “is not a technical conception with a fixed content unrelated to time, place and circumstances.” *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230. Rather, the phrase expresses the requirement of “fundamental fairness,” a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what “fundamental fairness” consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake. *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 31-32, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981).

E.H.’s CASA’s actions demonstrate that fundamental fairness is brought to a child by meeting her obligations under RCW 13.34.105 to investigate, to monitor the progress of the case, to facilitate visitations and meeting other needs of the children and reporting to the court in detail. Most importantly, she advocates for E.H. in a way that gives meaning to the words, “advocacy” and “fundamental fairness”. She advocates for what she, as an adult with an understanding of the complexity of the legal process of dependency and the full implications of the family’s circumstances, believes to be in E.H.’s best interests. She also follows the statute’s requirement to ascertain E.H.’s stated interests and report those to the court, even though his stated interests and best interests may be at odds

at times, as is the case with most children.

A. Federal and State Laws Require Best Interests Advocacy in Dependency Proceedings.

Best interest representation by a guardian ad litem (GAL) or CASA is fundamental to protecting children in dependency proceedings and is a well-established right, upheld by *M.S.R.* and codified in the Child Abuse Prevention and Treatment and Reform Act (CAPTA) which requires:

[every state to have] provisions and procedures requiring that in every case involving a victim of child abuse or neglect which results in a judicial proceeding, a guardian ad litem, who has received training appropriate to the role, including training in early childhood, child, and adolescent development, and who *may* be an attorney or a court appointed special advocate who has received training appropriate to that role (or both), shall be appointed to represent the child in such proceedings— (I) to obtain first-hand, a clear understanding of the situation and needs of the child; and (II) *to make recommendations to the court concerning the best interests of the child ...* 42 U.S. Code § 5106a (2)(B)(xiii) *emphasis added.*

Under RCW 13.34.105 the CASA is obligated:

To investigate, collect relevant information about the child's situation, and report to the court factual information regarding the best interests of the child; (b) To meet with, interview, or observe the child, depending on the child's age and developmental status, and report to the court any views or positions expressed by the child on issues pending before the court; (c) To monitor all court orders for compliance and to bring to the court's attention any change in circumstances that may require a modification of the court's order. . . (e) Court-appointed special advocates and guardians ad litem may make recommendations based upon an independent investigation regarding the best interests of the child, which the court may consider and weigh in conjunction with the recommendations of all of the parties; (f) To represent and be an advocate for the best interests of the child.

The purpose of appointing an advocate for the child is to protect the child's interests. *In re Dependency of R.H.*, 129 Wn. App. 83, 89, 117 P.3d 1179 (2005). Washington State Guardian ad Litem Rules instruct and require the CASA to "become informed about case[s]... make reasonable efforts to become informed about the facts of the case and to contact all parties... examine material information and sources of information, taking into account the positions of the parties." GALR(2)(g).

The underlying facts of this case refute what the mother claims can only be achieved through legal representation for E.H. The juvenile court found that "it is unclear what counsel could contribute that a conscientious CASA represented by counsel cannot." JA 10. This conclusion was borne out through the number of reports to court Ms. Clough provided which have detailed descriptions of each of the three siblings' particular circumstances. JA 204-243. There is no room for the claim that the court was not provided with E.H.'s stated desires both for himself and his mother. His stated wishes do not coincide with what *can* occur, given that his mother's situation cannot be remedied by appointment of an attorney for E.H.

The CASA spoke with E.H. three days before submitting her report to court regarding the mother's motion for appointment of counsel and

“through his tears, he told [the CASA] that he wants to be reunited with his mother as soon as possible, and wants to make sure the CASA tells the court that he strongly desires to stay in his current placement until his mother can return to him.” JA 205.

At the time of the mother’s motion before the Court of Appeals, the permanent plans established by the September 1, 2016 Permanency Planning Order for E.H., were primary plans for adoption or guardianship with an alternate plan of return to the mother, reflecting the CASA’s recommendation for a permanent plan that did not require termination of parental rights. While E.H. may not agree with any plan for permanence besides reunification with his mother, that plan may never be possible.

The CASA has reported that E.H. wants visits with his older siblings, but due to the siblings’ actions, visits are not always possible. She reported the sadness E.H. feels if his older siblings fail to go to visits, such as when one of the older siblings did not go to a visit as scheduled between himself, the younger children and R.R., which made E.H. sad and hurt to the point that E.H. declined the CASA’s offer to set up future telephone visitation. JA 207.

The legislature has recognized that not every child in every dependency or termination proceeding is developmentally capable or even safe if they have to choose between what the parents ask of the court and

what they themselves may want. RCW 13.34.105 grants the CASA discretion about whether it is appropriate for a child to be required to make a decision or weigh in on the emotionally charged issues before the court in dependency and termination proceedings. Fortunately for E.H., he trusts Ms. Clough and she has reported his expressed opinions to the court. While Ms. Clough has advocated for E.H.'s permanence by recommending guardianship as a permanent option, she has never failed to let the court know that E.H. himself wants to live with his mother.

E.H. is in the most unfortunate of circumstances and as a child with a traumatic history, family violence, separation, and clearly in need of special services, he also has the protection afforded by RCW 13.34.100 in that he has a CASA to represent his best interests in court. He is protected by RCW 13.34's requirement that the court regularly hear updates on his situation and RCW 13.34.105's requirement that his CASA report to the court. He also is protected by RCW 13.34.100(7)(b), which allowed the court to review his circumstances to determine whether or not an attorney could assist him.

The juvenile court judge did not err when, after examining all the information before the court, she found that E.H.'s particular circumstances are such that an attorney would not add to the court's knowledge of his opinions or views on matters before the court, and an attorney would not be

able to lessen the impact of the dependency on him, allow him to live with his mother, or shorten the time he will spend in legal limbo.

Since King County has jurisdiction over E.H.'s dependency, unlike in many counties, his CASA is also provided legal counsel through the King County Superior Court Dependency CASA Program. His CASA participated in 30 hours of mandatory pre-training to become a volunteer and has twelve hours of additional training per year. She is directly supervised by a Masters in Social Work CASA Specialist in addition to her assigned attorney.² While the CASA's counsel does not represent E.H., his CASA does have the benefit of understanding and participating in the legal process of dependency through counsel specializing in child welfare law. The lower court recognized that providing the CASA with legal counsel overcomes the "barriers discussed in Professor Mandelbaum's article."³ JA 10. Professor Mandelbaum addresses the varying theories of what type of representation can meet the needs of young children, and if this Court holds that appointment of counsel is mandated for all children in dependencies, the next hurdle is deciding what type of representation the attorneys will provide, peculiar to Washington State. Having legal counsel allows the CASA to fully participate in the dependency proceedings and the CASA

² <https://www.kingcountycasa.org/menus/training>. Last visited Jan. 19, 2018.

³ R. Mandelbaum, *Revisiting the Question of Whether Young Children in Child Protection Proceedings Should be Represented by Lawyers*, Loyola U. Chicago 1 (Fall 2000).

believes this practice should be implemented across the state and in every CASA program.

RCW 13.34.100(7)(c) provides for appointment of counsel for all children twelve years and older. While appointments across Washington may not be uniform in all jurisdictions, that can be solved without compromising judicial discretion granted in RCW 13.34.100(7)(b). Even for some children over twelve, best interests advocacy may be required to satisfy due process when they are unable to provide any assistance or communicate with an attorney. RPC 1.14(b).

The current measures governing appointment of counsel for children under twelve in RCW 13.34.100, RCW 13.34.105 and *M.S.R.* are designed to provide that very fundamental fairness described in *Lassiter*, to all children in dependency regardless of their age or circumstance. *M.S.R.* at 21, 22.

B. The juvenile court did not err in applying the *Mathews* factors to deny appointment of counsel for E.H. and the Court of Appeals decision is consistent with decisions of this Court.

In 2012, this Court held in *M.S.R.* that RCW 13.34.100, which grants the juvenile court discretion over appointment of counsel for children, was constitutional:

“[C]hildren whose parents are subject to dependency and termination proceedings have vital liberty interests at stake and may constitutionally be entitled to counsel, if necessary to protect those interests. But whether any

individual child is entitled to counsel must be decided case by case. We hold that RCW 13.34.100(6)⁴ is constitutionally adequate and that the deprivation, if any, of a child's right to counsel in such circumstances may be protected by appellate review." *M.S.R.* 174 Wn.2d at 21-23.

The Court further held that while due process demands appointment of counsel for some children, "the right to appointment of counsel is not universal. We further hold that RCW 13.34.100(6) is constitutionally adequate to protect the right of counsel for such children." *Id* at 23. While *M.S.R.* specifically addressed appointment of counsel for children in a termination proceeding, the decision upholds the underlying principle that a court should have the discretion over appointment of counsel. The *M.S.R.* Court was instructed by the *Lassiter* Court that the appropriate method to reach a decision whether due process demands appointment of counsel is for the lower court to apply the *Mathews* factors. *M.S.R.* at 15, (citing *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 31-32, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981); *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct.893, 47 L.Ed.2d 18(1976)).

Neither *M.S.R.* nor the statute stands for the proposition that E.H. must be appointed counsel, but both the statute and case law demand that

⁴ RCW 13.34.7(a) currently applies to children in dependency; RCW 13.34.100 was amended effective July 1, 2014 and Section (6)(a) now applies only to children who have been legally free six months and have not achieved permanence.

his individual circumstances must be considered when the court decides that issue.

C. The Juvenile Court correctly considered the *Mathews* factors and correctly decided that, given this child's individual and unique circumstances, due process did not require appointment of counsel.

Under *Mathews*, the court must consider, “First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest.” *Mathews*, 424 U.S. 310 at 903. This mandate is a threshold for the lower court to determine whether, after applying the factors, the child's due process rights can only be protected by appointment of counsel. If the court acts within the discretion allowed to decline appointment in the particular circumstances, the court's decision should be reviewed for abuse of discretion.

The Court in *M.S.R.* held that each case must be decided on its individual facts and that in *M.S.R.* there was no constitutional violation of the children's rights because there was no evidence to show that appointment of counsel was necessary. *M.S.R.* at 22. The juvenile court addressed each factor in R.R.'s motion, recognizing that E.H. has a significant interest in the proceedings and his interests are those identified in *M.S.R.*: Removal from home, placements in foster care, and being

placed in the care of parents who cannot safely or adequately parent the child. *M.S.R. at 17, 18*, JA 9. E.H.’s circumstances are particular in that there is no alternative for his placement in foster care. JA 10, 11. His liberty and contact with his biological family have been unalterably impaired by his mother’s long incarceration and the abuse and trauma which predated the dependency action. JA 71, 206, 212, 219, 228, 232, 239. *M.S.R.* also requires lower courts to consider “each child’s individual and likely unique circumstances” when deciding whether due process demands appointment of counsel. *M.S.R. at 22*.

D. RCW 13.34.100 is presumed to be constitutional and the Washington State Constitution, Article 1, Section 3 should not be read as requiring appointment of counsel for all children in dependency.

Statutes are “presumed to be constitutional” barring a showing “beyond a reasonable doubt that the statute is unconstitutional and a party who challenges the statute bears the burden to show beyond a reasonable doubt that it is not constitutional.” *Amunrud v. Bd. of Appeal*, 158 Wn.2d 208, 215, 143 P.3d 571 (2006); *Bellevue School Dist. v. E.S.*, 171 Wn.2d 695, 710-714, 257 P.3d 570 (2011); *Fed. Way Sch. Dist. No. 210 v. State*, 167 Wash.2d 514, 523–24, 219 P.3d 941 (2009); *M.S.R.*, ar 174 Wn.2d at 12-13. When considering whether all children in truancy proceedings are entitled to counsel, this Court, hearing similar due process arguments from the petitioner as R.R. makes now, found that “the fact that [a] statute

explicitly provides the right to counsel cuts against [the petitioner's] argument because it shows that the legislature is capable of requiring counsel in circumstances where it deems counsel necessary. *Bellevue School District* at 712.

While strong arguments were made in *Bellevue* that truancies may lead to detention and physical restrictions on liberty, those restrictions should not be compared to the situation of children in dependencies. Children by their very nature of being children do not have unlimited liberties. Unless their parents are not able to care for them or abuse and neglect them, their parents have a right to significant controls over every aspect of a child's life. The rights in jeopardy for children in dependencies are those identified in RCW 13.34.020: The right to safety, nurture, protection of their physical and psychological health, and a speedy resolution of the proceedings.

The legislature has reinforced the federal requirement that all children in dependency proceedings have a right to best interests' advocacy, and has also addressed those instances where it determined that due process does demand appointment for children. RCW 13.34.100 was amended in 2010 in recognition of the presumed increased maturity of children twelve years and older to require both the Department and the GAL or CASA to notify a child of his or her right to counsel when they

reach the age of twelve, inquire as to whether the child wishes an attorney, to repeat the notification every year subsequently if the child has not been appointed counsel, and for the GAL to report the efforts taken to the court. RCW 13.34.100(7)(c). In 2014, RCW 13.34.100 was again amended in hopes of achieving faster permanence for legally free children to include that, if a child is legally free for six months and is not already represented by counsel, the court shall appoint counsel. RCW 13.34.100(6)(a).

R.R. argues that since parents have a right to counsel in dependency proceedings in Washington, it must follow that all children have a right to counsel. However, if R.R. did not have appointed counsel, she would have to fend for herself *pro se* through the complexities of the dependency proceedings. The court addressed the issue of appointment of counsel for indigent parents at the dependency stage and found that even in the early or preliminary stages of the proceedings, the parents have a right to be represented. *In re Welfare of Myricks*, 85 Wn.2d 252, 254, P.2d 841 (1975).

The court found that without counsel:

[t]he full panoply of the traditional weapons of the State are trained on the defendant-parent, who often lacks formal education, and with difficulty must present his or her version of disputed facts; match wits with social workers, counselors, psychologists, and physicians and often an adverse attorney; cross-examine witnesses (often expert) under rules of evidence and procedure of which he or she usually knows nothing; deal with documentary evidence he or she may not understand, and all to be done in

the strange and awesome setting of the trial court. The right to one's child is too basic to expose to the State's forces without the benefit of an advocate. *Id.*

E.H. is protected by the Court, the CASA, the input of his mother and the State, all as intended by the statute, and his circumstances should be differentiated from his mother's. While the mother argues that the CASA's attorney added no protection for E.H., the courts recognized that having an attorney for the CASA guarantees that the CASA has the ability to bring matters before the court when needed. An attorney for the CASA means that the CASA may file motions, act as a full party on behalf of E.H. and is educated about the legal issues regarding the child.

The statute should be construed as the legislature intended and R.R. has not shown beyond a reasonable doubt that the statute is unconstitutional or that Art. 1, Section 3 of the Washington State Constitution requires appointment of counsel for all children in dependency.

CONCLUSION

There was no evidence that having an attorney would have afforded E.H. additional protections in court or kept him from having to reside in foster care or that the juvenile court erred in applying the *Mathews* and *Gunwall* factors. As to the larger issue of whether due process demands appointment of counsel for all children in dependencies, with Washington

Rules of Professional Conduct being clear that legal representation does not extend to best interest representation, the real question is whether appointment of counsel provides fundamental fairness to all children, when they cannot have advocate for their own interests. Just because a child can understand words and some basic concepts at a relatively early age does not mean they grasp the implications that go with the words, especially in the complex world of dependency. As the law stands presently, the court presiding over the dependency can conduct the investigation needed to make the informed decision as to whether and when the child's due process rights are better met through have best interests advocacy.

RESPECTFULLY SUBMITTED this 5th day of February, 2018.


Kathleen C. Martin, WSB # 25636
Attorney for CASA, Laura Clough

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- pshillington@gsblaw.com
- robinlcy@gmail.com
- sgoolyef@atg.wa.gov
- shsseaef@atg.wa.gov

- shstacappeals@atg.wa.gov
- spitzerhd@gmail.com
- tacy.hass@foster.com
- tacy.hass@gmail.com
- wapofficemail@washapp.org
- zydekbe@gmail.com
- Candelaria Murillo (Undisclosed Email Address)
- Sujatha Jagadeesh Branch (Undisclosed Email Address)

Comments:

Sender Name: Vickey L Wilson - Email: vickey.wilson@kingcounty.gov

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