Date: 2011 05 13
File: T1-CP-2008-00028

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF the *Child and Family Services Act*,
S.N.W.T. 1997, c.13, as amended;

AND IN THE MATTER OF the children,

S. S.
Born: February 9, 2003

H. S.
Born: June 20, 2007

Apprehended: September 16, 2010

REASONS FOR DECISION
of the
HONOURABLE JUDGE GARTH MALAKOE

These Reasons are subject to Publication Restrictions pursuant to section 87 of the *Child and Family Services Act*, S.N.W.T. 1997, c.13, as amended

87. No person shall publish or make public information that has the effect of identifying
   (a) a child who is
      (i) the subject of the proceedings of a plan of care committee or a hearing under this Act, or
      (ii) a witness at a hearing; or
   (b) a parent of foster parent of a child referred to in paragraph (a) or a member of that child's family or extended family

And further . . .

90. Every person who contravenes a provision of this Act for which no specific punishment is provided is guilty of an offence and liable on summary conviction to a fine not exceeding $10,000, to imprisonment for a term not exceeding 12 months or to both.

Application for a Permanent Custody Order by the Director of Child and Family Services, pursuant to section 28(1)(e) of the *Child and Family Services Act*.

Heard at:	Yellowknife, Northwest Territories April 11, 12 and 15, 2011
Date of Decision:	May 13, 2011
Counsel for the Director:	Sheila M. MacPherson and Michelle Jones
Counsel for the Mother:	Donald P. Large, Q.C.

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IN THE MATTER OF the *Child and Family Services Act*,
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S., (S.)
Born: February 9, 2003

S., (H.)
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A. BACKGROUND AND ISSUES

A.1 Introduction

[1] This is an application by the Director of Child and Family Services (the "Director") seeking an order to have the two children, S.S. (8 years and 2 months) and H.S. (3 years and 10 months) (together referred to as the "children") declared to be in need of protection and to have them placed in the permanent custody of the Director as those terms are defined in the *Child and Family Services Act* (the *"Act"*).

[2] For the reasons stated in this Decision, I have found that the children are in need of protection within the meaning of section 7(3)(r) of the *Act* which states that a child is in need of protection if:

> the child's parent is unavailable or unable or unwilling to properly care for the child and the child's extended family has not made adequate provision for the child's care or custody.

[3] Further, I have made a permanent custody child protection order pursuant to section 28(1)(d) of the *Act*, which states:

> 28. (1) A court may make one of the following child protection orders that is, in the opinion of the court, in the best interests of the child who is the subject of the hearing:
>
> . . .
>
> (d) the child be placed in the permanent custody of the Director, and the court may specify in the order
>
> (i) any terms and conditions that the court considers necessary and proper, and
>
> (ii) that the child's parent or person having actual care of the child
>
> . . .
>
> (B) at the time the child was apprehended, where the child was apprehended,
>
> be granted access to the child on the terms and conditions that the court considers appropriate.

A.2 Participation of Parents in the Hearing

[4] The hearing of this matter was scheduled for April 11th and 12th, 2011. When it commenced, the biological mother, J.S. and her legal counsel were present. The biological father, B.J. and his then legal counsel were also present. The father was in RCMP custody, having been arrested in Edmonton, Alberta for a parole violation approximately one week prior. Shortly after the beginning of the trial on the morning of April 11th, the Director and the mother, through their counsel, indicated that they were ready to proceed. The father stated that because of his custodial situation, he had not had the opportunity to speak to his counsel and requested at least a week long adjournment. After adjourning to the afternoon of April 11th, I directed that the hearing would proceed on the morning of April 12th and that following the Director's case, there would be an adjournment until April 15th for the mother and father to call evidence and for closing submissions.

[5] On the morning of April 12th, the mother did not attend and she was not present for the remainder of the hearing. The father was brought to the Courtroom by the RCMP. He advised that he and his lawyer did not see "eye to eye" and requested an adjournment of a week or two to obtain new legal counsel. I denied the request for an adjournment for the reasons given orally at the time. I asked the father's lawyer to stay as *amicus*. The father stayed in the courtroom for a brief time; however, in the midst of the testimony of the first witness, he left the courtroom. He returned briefly at the beginning of the afternoon session to state that the lawyer who I asked to stay as *amicus* was no longer his lawyer and that he would not stay in the courtroom or participate in the hearing without legal representation. Mr. J. left at this point. Given Mr. J.'s position, I allowed his former lawyer to leave since there was no practical reason for his further involvement. Although Mr. J. remained in Yellowknife pursuant to a Removal Order which brought him from Edmonton and kept him in Yellowknife until the hearing concluded, he did not attend the hearing.

[6] With respect to the absence of the mother after April 11th, the Director called evidence on April 15th indicating that the mother had been arrested for being intoxicated in a public place on the evening of April 11th and would have been released early in the morning of April 12th and prior to Court beginning at 10:00 a.m. The lawyer for the mother stated that he was prepared to proceed in her absence and without her further instructions.

A.3 The Hearing

[7] At the beginning of the hearing, when Mr. J.'s lawyer was still acting for him, a number of documents were submitted on consent of all parties:

(a) Plan of Care Agreement, May 2008;

(b) Originating Notice, Notice of Motion and various affidavits of L.H. and M.P. previously filed in the within action;

(c) Permanent Custody Order of the Supreme Court of the Northwest Territories dated April 10, 2008;

(d) Criminal Record of B.J.;

(e) Pediatrician Reports from Dr. R. with respect to S.S. (dated December 21, 2010) and H.S. (dated December 20, 2010);

(f) Foster Home Study of D.J. dated January 18, 2011;

(g) Receipt from J.S. dated June 18, 2010, indicating that B.J. gave $200 for his children's birthday; and

(h) Case Notes from the Director's file documenting contact between B.J. and his children.

[8] Three witnesses were called on behalf of the Director: M.P., the child protection worker responsible for the file involving the two children; S.L., the foster mother of the children; and Cst. T.R., the RCMP officer who arrested the mother, J.S. on April 11, 2011. There were no witnesses called on behalf of the mother or the father and aside from the documentary evidence referred to earlier, no evidence presented on their behalf.

[9] Section 80 of the *Act* allows for the use of affidavits in a proceeding such as the one before the Court. These affidavits can be based on information and belief. With respect to the affidavits of M.P., Ms. P. testified before the Court. With respect to the affidavits of L.H., L.H. did not testify. Counsel agreed that I was to make findings of fact based on the affidavits and the *viva voce* evidence.

[10] I have taken the Criminal Record of B.J. to be an accurate representation of his convictions for criminal offences. With respect to the pediatrician reports, counsel agreed that the Court is to accept the medical opinion of Dr. R. without the need for further evidence.

[11] On April 15, 2011, I heard submissions on behalf of the Director and the mother. As stated earlier, the father did not participate. I reserved my decision.

B. ANALYSIS

B.1 Are the Children in Need of Protection?

[12] The children were apprehended on September 16, 2010. The apprehension was confirmed by an Order of this Court on October 4, 2010, made pursuant to section 12.4 of the *Act*. The application by the Director for a declaration that the children were in need of protection and for a child protection order, by way of a Notice of Motion and Affidavit, was filed on October 1, 2010.

[13] The documents that were filed on October 1, 2010, were served on the mother, father and the Fort Good Hope Band.

[14] The Director is relying on section 7(3)(r) of the *Act* as the basis for seeking a declaration that the children are in need of protection, i.e., that the children's parents are unavailable or unable or unwilling to properly care for the children and the children's extended family has not made adequate provision for the children's care or custody.

[15] I will examine each of the situations of the father, the mother and the extended family, in turn.

The Father

[16] B.J. was arrested and jailed on June 10, 2009, with respect to certain charges. On September 10, 2009, he was sentenced to a federal penitentiary term of 2 years and 45 days for the following offences: two assaults, a failure to comply with a condition in an undertaking and uttering threats. At the time of the hearing of this matter (during the week of April 11th, 2011), B.J. was in custody. He had been on parole and living in a halfway house in Edmonton, Alberta since February 2011. On April 3, 2011, he was incarcerated and his parole was suspended.

[17] As a result of an Order from the Supreme Court of the Northwest Territories dated April 10, 2008 (the "April 10, 2008 Order"), J.S. was granted interim and permanent sole custody of the children. B.J. was granted supervised access to the children to be arranged through a third party acceptable to J.S.

[18] It is not necessary to go beyond the fact that B.J. has been and is in custody, to find that he is unable to properly care for the children at time of this hearing.

The Mother

[19] The children were first apprehended on July 19, 2008. During the approximately 33 months since that first apprehension and the hearing of this matter during the week of April 11th, 2011, the children had been in the care of the mother,

J.S. for approximately 10 weeks (between June 28, 2010 and September 16, 2010). For the remaining time, they were in foster care.

[20] While the children were in the care of the Director, the Plans of Care filed August 18, 2008, March 30, 2009, September 16, 2009 and March 8, 2010, identified family violence, addictions and homelessness as primary issues.

[21] When the children were last apprehended on September 16, 2010, the grounds for the apprehension involved the mother's abuse of alcohol and the safety of the children. The child protection worker received an anonymous telephone call that there was a party taking place at the apartment of J.S. and that there were no sober caregivers for the children. When the child protection worker, her supervisor and the RCMP attended at 6:30 p.m., J.S. appeared intoxicated: she was slurring her speech, her right eye was partially closed, she was dishevelled and she staggered when she walked. The children were in the bathtub supervised by a sober friend of the mother. J.S. became aggressive and loud. She was swearing and would not listen to either the authorities or her friend.

[22] Based on safety concerns for the children, the child protection worker gave J.S. the option of her leaving the apartment, her friend leaving the apartment with the children or the children being apprehended. J.S. told the child protection worker to take the children.

[23] The evidence presented at the hearing shows that the mother did not maintain consistent contact with the children since they were apprehended on September 16, 2010. A number of visits were arranged for the mother and children but were subsequently cancelled when J.S. did not confirm the times or did not show up. There were attempts by J.S. to arrange other visits but for various reasons, which were not all the fault of J.S., these arrangements could not be made.

[24] In the early part of 2011, J.S. moved to Edmonton to be in a new relationship. On January 28, 2011, she signed a document whereby she agreed that the children could be placed in the permanent custody of the Director. This document had been filed with the Court but her consent was withdrawn by her lawyer at the beginning of the hearing.

[25] J.S. returned to Yellowknife in March of 2011. Between returning to Yellowknife and the commencement of the hearing, she had one visit with the children.

[26] With respect to issues with alcohol, in the weeks prior to the hearing, J.S. had completed a program with the Salvation Army called Withdrawal Management Service. This program is a two week program that she had taken once before and which is an introductory program to addictions and awareness of addictions. It is not a treatment program.

[27] The evidence of M.P. which was based on her conversation with the father is that B.J. paid for J.S. to fly from Edmonton to Yellowknife in March 2011, to oppose the application for permanent custody.

[28] The evidence of Cst. T.R. was that on the evening after the commencement of the hearing on April 11, 2011, J.S. was arrested for public intoxication. J.S. did not appear again at the hearing; nor did she communicate with her lawyer.

[29] It is clear that J.S. continues to have issues with alcohol addiction and her commitment to the children. These issues, in my view, make her unable to look after the children at this point in time.

The Extended Family

[30] Evidence was presented with respect to the interest of the extended family of J.S. and B.J. for the placement of the children.

[31] In August of 2009, the following individuals were considered as potential placements for the children: E.S. of Fort Good Hope, who is J.S.'s mother and R.K. of Fort Good Hope, who is J.S.'s aunt. E.S. was prepared to be a provisional foster home placement for the children but was not prepared to custom adopt the children. B.J. stated that R.K. had cancer and smoked marijuana as a medical treatment for this disease. This information appears to have been accepted by the Director and no further consideration of R.K. as a placement was considered.

[32] D.J. is the 23 year old daughter of B.J. and T.B. She is therefore the step-sister to both of the children. She expressed an interest in fostering the children and as a result, a Foster Home Study report was prepared on January 18, 2011. This report was submitted as an exhibit during the hearing. The report identified three matters that needed to be in place before a placement would be approved: (1) established childcare arrangements need to be secured; (2) D.J. needs to participate in conflict resolution training/counselling; and (3) D.J. needs to participate in some form of child development training, particularly in the area of parenting children with special needs. Since the report was prepared, D.J. had not addressed these matters and had quit her employment.

[33] Given the situation of the mother, the father and the extended family as stated above, I find that at the time of the hearing, both J.S. and B.J. were unavailable or unable or unwilling to properly care for the children and the children's extended family had not made adequate provision for the children's care or custody. I declare that the children are in need of protection.

B.2 Permanent Custody Order versus Temporary Custody Order

[34] Given the declaration that the children are in need of protection and the filing of the Plan of Care Report dated April 11, 2011 (Exhibit 6), it is necessary to make one of the child protection orders allowed in subsection 28(1) of the *Act*. The options are to have the children returned (s.28(1)(a)); a supervision order (s.28(1)(b)); a temporary custody order (s.28(1)(c)); or a permanent custody order (s.28(1)(d)):

> 28. (1) A court may make one of the following child protection orders that is, in the opinion of the court, in the best interests of the child who is the subject of the hearing:
>
> (a) the child remain with or be returned to his or her parent or the person having actual care of the child
> (i) at the time the declaration was made under subsection 27(2), where the child was not apprehended, or
> (ii) at the time the child was apprehended, where the child was apprehended;
>
> (b) the child remain with or be returned to his or her parent or the person having actual care of the child
> (i) at the time the declaration was made under subsection 27(2), where the child was not apprehended, or
> (ii) at the time the child was apprehended, where the child was apprehended,
> subject to supervision by a Child Protection Worker and to any terms and conditions that the court considers necessary and proper, for a specified period not exceeding 12 months;
>
> (c) the child be placed in the temporary custody of the Director for a specified period not exceeding 12 months, and the court may specify in the order
> (i) any terms and conditions that the court considers necessary and proper, and
> (ii) that the child's parent or person having actual care of the child
> (A) at the time the declaration was made under subsection 27(2), where the child was not apprehended, or
> (B) at the time the child was apprehended, where the child was apprehended,
> be granted access to the child on the terms and conditions that the court considers appropriate;
>
> (d) the child be placed in the permanent custody of the Director, and the court may specify in the order
> (i) any terms and conditions that the court considers necessary and proper, and
> (ii) that the child's parent or person having actual care of the child
> (A) at the time the declaration was made under subsection 27(2), where the child was not apprehended, or
> (B) at the time the child was apprehended, where the child was apprehended,
> be granted access to the child on the terms and conditions that the court considers appropriate.

[35] Given what I have stated in the preceding section, I do not find that returning the children to either J.S. or B.J., either unsupervised or supervised to be acceptable options. Neither parent is in a position to care for the children.

[36] The father, B.J., is in jail and his status with respect to this incarceration is unknown to the Court. In any case, the Custody Order of April 10, 2008 gives sole custody of the children to J.S. with only supervised access to B.J. Section 28(4) of the *Act* prohibits the children from being returned to a person who does not have lawful custody of the children unless the person had actual care of the children at the time they were apprehended.

[37] The mother, J.S., is an alcoholic whose addiction has affected her ability to care for the children in the past. At the time of the hearing, it appears to have prevented her from being present and assisting the Court in deciding their future. There is no evidence before the Court as to where she lives except that she has a boyfriend in Edmonton and was in Edmonton prior to returning to Yellowknife for Court. Her addiction and her personal circumstances are such that she is currently unable to look after the children.

[38] In my view, I must decide whether the children should be placed in the temporary custody or the permanent custody of the Director. These two child protection orders are the only realistic options. Counsel for the Director and for J.S. concede that although in the past 33 months, the children have been in the care of the Director for all but 10 weeks, it is open to the Court to make a temporary custody order.

[39] The *Act* instructs me, as one would expect it to, to make the child protection order that is in the best interests of S.S. and H.S.

[40] The *Act* provides some guidance when considering what is in the "best interests" of these two children:

> 3. Where there is a reference in this Act to the best interests of a child, all relevant factors must be taken into consideration in determining the best interests of a child including the following factors, with a recognition that differing cultural values and practices must be respected in making that determination:
>
> (a) the child's safety;
> (b) the child's physical, mental and emotional level of development and needs, and the appropriate care or treatment to meet those needs;
> (c) the child's cultural, linguistic and spiritual or religious upbringing and ties;
> (d) the importance for the child's development of a positive relationship with his or her parent, a secure place as a wanted and needed member of the family, and a stable environment;
> (e) the importance of continuity in the child's care and the possible effect on the child of disruption of that continuity;
> (f) the risk that the child may suffer harm through being removed from, kept away from, returned to, or allowed to remain in, the care of a parent;
> (g) the merits of any proposed plan of care for the child;
> (h) the child's relationship by blood or through adoption;
> (i) the child's view and preferences, if they can be reasonably ascertained;
> (j) the effects on the child of a delay in making a decision.

[41] In my view, the test that I should apply in deciding between a temporary versus a permanent custody order is as follows. Is there a substantial likelihood that within a reasonable time period from the date of the making of the child protection order, either or both of the parents will be in a position to provide sustained adequate care for the children?

[42] The components of this test have been judicially considered in other Courts. For example, in *British Columbia (Director of Child, Family and Community Service) v. S.G.*, [2006] B.C.J. No. 779 (B.C. P.C.), where the governing legislation provides some guidance in choosing between a permanent versus a temporary custody order, the Court stated:

> 11 . . .Central to it is the ability and the willingness of both these parents to one day resume custody of their children and whether there is a significant likelihood that their ability to co-parent these children will improve within a reasonable time in future.
>
> 54 . . .By reason of section 49(5), I may make a continuing custody order in favour of the Director under the Act if there is no significant likelihood that (a) the circumstances that led to the child's removal will improve within a reasonable period of time, or, (b) the parent will be able to meet the child's needs.

[43] In using the "best interests of the children" as a test in determining whether to make a temporary custody order or a permanent custody order, it is not a mechanical process of looking at each factor and finding a situation where the highest number of factors are satisfied. Looking at all of the factors that comprise "best interests", it is possible, even with a satisfactory parenting situation, to find some other hypothetical or even real placement that maximizes all of the interests of the children. That is not the methodology for my decision. It is to be remembered that the consideration by the Court of a child protection order only occurs when the child is found to be in need of protection.

[44] I must look at the impediments of each parent that prevent him or her from providing adequate care to the children and determine if these impediments can be remedied in a reasonable period of time.

[45] If these impediments cannot be remedied in a reasonable period of time or if they will be remedied on a temporary basis, so that the children will be in need of protection again shortly after they are returned to a parent, it is not in the best interests of the children to be subject to a temporary custody order.

[46] It is in the best interests of a child to have decisions affecting them made and implemented without delay (s.2(j)). Further, continuity and a stable environment are important factors that need to be considered (s.3(d) and s.3(e)).

[47] The possibility of placement of the children to a member of their extended family is not relevant to this type decision except that in exceptional cases, it might lengthen the "reasonable period of time" that the parent is given to deal with his or

her impediments to parenting. Given the situation with respect to the extended family, as was discussed earlier in this decision, this is not a relevant factor in this case.

[48] For the reasons stated earlier, the emotional and physical safety of the children is at risk if they are returned to J.S. The evidence presented to Court establishes that when the mother is drinking, she is unable or unwilling to care for the children. She has been involved in at least two relationships which were marked with domestic violence which occurred while the children were in her care.

[49] Since the children were apprehended on September 16, 2010, there is no evidence that J.S. has made any significant progress with her alcohol addiction. She did take the Withdrawal Management Program but did not take a treatment program. Her drinking on the evening of the day that the hearing for this matter commenced and her failure to attend the remainder of the hearing is evidence that alcohol still dominates her life.

[50] The only evidence that the Court has with respect to whether or not domestic violence continues to be an issue is the evidence of M.P. The Court recognizes that this is hearsay evidence but it is the only evidence before it, given the mother's lack of participation in the hearing. M.P. stated that she was advised by B.J. that J.S.'s new boyfriend had "pounded her up a couple of times".

[51] With respect to the issue of the safety of the children and B.J., since the mid-1980's, B.J. has not been out of jail for more than a year and a half at a time. The offences on his criminal record involve violence, alcohol, drugs and breaches of court orders. Evidence presented by the foster mother indicates that B.J. was capable of violence and volatility. There is no evidence before the Court that B.J. has changed in such a way that he can provide the children with a safe environment.

[52] The Court heard the evidence of M.P. and S.L. with respect to the level of emotional, physical and mental development of the children. The reports of Dr. R. were introduced as evidence.

[53] S.S., at the time of the hearing, was 8 years and 2 months old. She had been referred to a diagnostic FASD clinic since there had been an assessment for possible FASD. There were no concerns with her from a physical point of view. M.P. described S.S. as having difficulty retaining words as she read. She also has a hard time understanding multi-step directions. Such directions have to be broken down to one direction at a time. Dr. R. identified the possibility of an underlying learning disability and recommended psycho-educational testing.

[54] H.S., at the time of the hearing, was 3 years and 10 months old. He has nightmares at night and has been given melatonin so that he could sleep. Toilet

training is a difficult issue and he wears pull-ups in the daytime. Dr. R. identified a speech delay and some comprehension difficulties.

[55] It is clear that both children require an environment which ensures that they receive consistent professional attention to the identified difficulties and a structured environment with regular bed times and routines.

[56] Since the last apprehension in September 2010, there has been a significant change in S.S.'s attitude toward her mother. Before that time, she was excited to see her mother. Since then, she has expressed to her foster parent and the social worker that she does not want to see her mother. S.S. expressed that she was excited to see her foster mother because there were rules in the house and there was no hitting or punching allowed.

[57] The children have been in the care of the foster mother, S.L., since October of 2008, except for the 10 weeks ending in the children's apprehension on September 16, 2010. When the children first came into the foster mother's care, H.S. was 14 months and S.S. was 5. During the 10 weeks that the children were in the care of their mother prior to their apprehension, there was a noticeable weight loss in both children. When H.S. returned, he acted in a much more aggressive manner than when he left and as stated above, S.S. did not want to see her mother.

[58] While they were in her care, M.L. encouraged contact between the children and their extended family, including J.S.'s father, her sisters and the children's step-sister D.J.

[59] S.L., the foster mother, testified that if the children stayed in the custody of the Director, she hoped that they would stay with her family. If there was a permanent custody order, she and her husband planned to adopt the children.

[60] The reaction of the children upon their return to S.L. after the apprehension in September 2010, accents the need for stability in their lives. The older child, S.S., has reacted visibly to her mother's continuing alcohol abuse and abandonment of the children. H.S.'s reaction is more visceral given his much younger age. Both M.P. and S.L. testified about these changes in the children.

[61] For H.S., two-thirds of his young life has been spent in foster care. For S.S., a third. The best interests of the children require that they not be offered false hopes. As M.P. stated, the children need an anchor; something solid so that they are secure. They are starting to stabilize since J.S. has moved to Edmonton and B.J. has remained in jail.

[62] In my view, based on the evidence before me, there is no substantial likelihood that within a reasonable time period from the date of the making of the child

protection order, either or both of the parents will be in a position to provide sustained adequate care for the children.

[63] Having come to this decision, I do not wish to leave the impression that I have dismissed the potential of either J.S. or B.J. as parents. My decision is based on the best interests of the children and a prediction of the future based on indicators from the past. The impediments that I have referred to seem to be insurmountable at the present time.

[64] Both parents have exhibited positive behaviour to their children which I have not overlooked. As M.P. stated, J.S. has loving qualities and when she is able to pull herself together, can provide the appropriate environment for her children. Based on the documentary evidence and the testimony of M.P. and S.L., the father has remembered the children's birthdays and made an effort to speak with them over the phone when he is incarcerated. He has also shown his concern over their wellbeing by contacting the child protection worker frequently.

[65] Should either or both of the parents overcome the impediments that I have referred to above, either of them may then bring an application under section 49 of the *Act* to discharge the permanent custody order.

C. CONCLUSION

[66] For the reasons stated above, the application by the Director for a declaration that the children are in need of protection and that the children be placed in the permanent custody of the Director of Child and Family Services is granted.

[67] Until an adoption of the children is completed, the parents shall have reasonable access to the children. The access shall be subject to the discretion of the Director and in the best interests of the children. Such access shall be subject to the provisions of the April 10, 2008 Order while it is in effect.

Garth Malakoe
J.T.C.

Dated at Yellowknife, Northwest Territories, this 13th day of May, 2011.

2011 NWTTC 12

Date: 2011 05 13
File: T1-CP-2008-00028

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