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Chapter 48: Protecting Vulnerable Adults from Predatory Power of Attorney Practices

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Chapter 48: Protecting Vulnerable Adults from Predatory Power of Attorney Practices

Ekaterina Deaver

Code Sections Affected

Probate Code § 4231.5 (new), § 4231 (amended).
SB 1038 (Harman); 2010 STAT. Ch. 48.

I. INTRODUCTION

For many elders and dependent adults, as well as their families, a financial power of attorney is a very attractive and useful instrument “because of its simplicity, convenience, and flexibility.”¹ Preparation of a power of attorney is easy, inexpensive, and often does not require any legal assistance.² It also allows elders to avoid guardianship and maintain their privacy.³ However, the features that make the power of attorney so attractive also “make it an effective tool for financial exploitation.”⁴ Some commentators have even gone so far as to nickname a power of attorney a “license to steal”⁵ because “with one signature you [grant] another person the ability to sell your house, empty your bank accounts, and cancel your insurance.”⁶

Problems contributing to the abuses of powers of attorney include unclear standards of conduct,⁷ fairly limited supervisory power of courts,⁸ and a general

1. Jennifer L. Rhein, *No One in Charge: Durable Powers of Attorney and the Failure to Protect Incapacitated Principals*, 17 ELDER L.J. 165, 166 (2009).

2. Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 GA. L. REV. 1, 1-2 (2001); GOVERNMENT LAW CENTER OF ALBANY LAW SCHOOL, GOVERNMENT LAW ONLINE, ABUSE AND THE DURABLE POWER OF ATTORNEY: OPTIONS FOR REFORM 4 (March 1994), available at www.governmentlaw.org/files/1993_Sandman.pdf [hereinafter GOVERNMENT LAW CENTER] (on file with the *McGeorge Law Review*).

3. LORI A. STIEGEL & ELLEN VANCLEAVE KLEM, AARP PUBLIC POLICY INSTITUTE, POWER OF ATTORNEY ABUSE: WHAT STATES CAN DO ABOUT IT, A COMPARISON OF CURRENT STATE LAWS WITH THE NEW UNIFORM POWER OF ATTORNEY ACT 5 (Nov. 2008), available at http://www.flprobatelitigation.com/uploads/file/AARP_2008_17_poa.pdf (on file with the *McGeorge Law Review*).

4. Rhein, *supra* note 1, at 166.

5. STIEGEL & KLEM, *supra* note 3, at 5.

6. Nina A. Kohn, *Elder Empowerment as a Strategy for Curbing the Hidden Abuses of Durable Powers of Attorney*, 59 RUTGERS L. REV. 1, 2 (2006); see also Carolyn L. Dessin, *Acting as Agent under a Financial Durable Power of Attorney: An Unscripted Role*, 75 NEB. L. REV. 574, 575 (1996) (expressing concern that the power of attorney can be “an instrument of abuse rather than a useful tool”).

7. Dessin, *supra* note 6, at 575-76.

8. See Linda S. Whitton, *Durable Powers as an Alternative to Guardianship: Lessons We Have Learned*, 37 STETSON L. REV. 7, 10 (2007) (describing court supervision of attorneys-in-fact as “more illusory than real”).

lack of monitoring of the actions of an attorney-in-fact.⁹ Perhaps one of the most noticeable legislative trends in this area concerns the imposition of enhanced penalties for the abuse of a power of attorney.¹⁰ Following this trend, the California Legislature recently recognized that California law contained no provisions establishing “liability for attorneys-in-fact who breach their statutory, legal and/or fiduciary duties . . . , or [addressing] the enhanced liability of an attorney-in-fact who knowingly or wrongfully misappropriates the monies of the principal.”¹¹ Chapter 48 is the Legislature’s attempt to clarify liability of attorneys-in-fact in order to provide elders and dependent adults with enhanced protection from financial exploitation.¹²

II. LEGAL BACKGROUND

A. Duties and Standard of Care Under the Power of Attorney Agreement

A power of attorney is a written instrument, executed by a natural person (principal) having the capacity to contract, that grants to an attorney-in-fact¹³ the authority to perform specified acts on behalf of the principal.¹⁴ If an attorney-in-fact has expressly agreed in writing to act for the principal, he or she has a duty to act pursuant to the terms of the agreement, even if there is no compensation provided under that agreement.¹⁵ The Probate Code generally proclaims that, in dealing with property of the principal, an attorney-in-fact shall observe the standard of care that a prudent person dealing with the property of another would observe, and that no other statute restricting investments by fiduciaries limits the actions of an attorney-in-fact.¹⁶ However, if an attorney-in-fact has special skills or expertise, or if he or she made a representation of special skills or expertise to the principal, then he or she must observe the standard of care that would be observed by other attorneys-in-fact with similar skills or expertise.¹⁷ “An

9. *See id.* at 26, 31 (power of attorney statutes do not provide any monitoring of the attorney-to-be by anyone other than the principal which means the loss of any supervision when the principal loses capacity to monitor the attorney-in-fact).

10. Rhein, *supra* note 1, at 174.

11. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1038, at 3 (June 15, 2010).

12. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1038, at 3-4 (May 4, 2010).

13. CAL. PROB. CODE § 4014 (West 2009). Attorney-in-fact is “a person granted authority to act for the principal in a power of attorney,” regardless of whether the person has the title of an attorney-in-fact or agent, or some other title. *Id.*

14. CAL. PROB. CODE § 4022; *People v. Ranger Ins. Co.*, 31 Cal. App. 4th 13, 21, 36 Cal. Rptr. 2d 807, 812 (Ct. App. 1994); *Estate of Huston*, 51 Cal. App. 4th 1721, 1727, 60 Cal. Rptr. 2d 217, 221 (Ct. App. 1997).

15. CAL. PROB. CODE § 4230(c) (“The agreement to act on behalf of the principal is enforceable against the attorney-in-fact as a fiduciary regardless of whether there is any consideration to support a contractual obligation.”).

16. *Id.* § 4231(a).

17. *Id.* § 4231(c); *see also id.* § 4237 (“An attorney-in-fact with special skills has a duty to apply the full extent of those skills.”).

attorney-in-fact has a duty to act solely in the interest of the principal and to avoid conflicts of interest.”¹⁸

To the extent that laws governing powers of attorney do not cover the rights and obligations of an attorney-in-fact, the general law of agency governs such rights and obligations.¹⁹ Agency law generally requires agents to act “loyally for the principal’s benefit in all matters connected with the agency relationship.”²⁰ Specifically, fiduciary duty requires that the agent: (1) not acquire a material benefit from a third party as a result of his or her position as an agent;²¹ (2) not deal with the principal on behalf of an adverse party;²² (3) not compete with the principal;²³ (4) act in accordance with the terms of the contract between the agent and the principal;²⁴ and (5) “act with the care, competence, and diligence normally exercised by agents in similar circumstances.”²⁵

“[A] principal may grant authority to an attorney-in-fact to act on the principal’s behalf with respect to all lawful subjects and purposes or with respect to one or more express subjects or purposes.”²⁶ The Probate Code specifically authorizes a principal to grant to an attorney-in-fact the authority to make decisions regarding the principal’s real and personal property.²⁷

B. Liability of an Attorney-in-Fact

Prior to the enactment of Chapter 48, the Probate Code provided different standards of liability for compensated and uncompensated attorneys-in-fact.²⁸ An uncompensated attorney-in-fact was “not liable for a loss to the principal’s property unless the loss result[ed] from the attorney-in-fact’s bad faith, intentional wrongdoing, or gross negligence.”²⁹ Thus, prior law provided a “presumption against liability for uncompensated attorneys.”³⁰ Taking into consideration the fact that the majority of attorneys-in-fact are family members

18. *Id.* § 4232(a). However, “[a]n attorney-in-fact is not in violation of [the duty to act in the interest of the principal] solely because the attorney-in-fact also benefits from acting for the principal, has conflicting interests in relation to the property, care, or affairs of the principal, or acts in an inconsistent manner regarding the respective interests of the principal and the attorney-in-fact.” *Id.* § 4232(b).

19. *People v. Ranger Ins. Co.*, 31 Cal. App. 4th 13, 21, 36 Cal. Rptr. 2d 807, 812 (Ct. App. 1994).

20. RESTATEMENT (THIRD) OF AGENCY § 8.01 (2006).

21. *Id.* § 8.02.

22. *Id.* § 8.03.

23. *Id.* § 8.04.

24. *Id.* § 8.07.

25. *Id.* § 8.08.

26. CAL. PROB. CODE § 4123(a) (West 2009). Thus, the scope of a power of attorney can be either general (if it allows the attorney-in-fact “to act to the full extent authorized” under the Probate Code) or narrow (if the principal limits the attorney-in-fact’s power to specific actions). Rhein, *supra* note 1, at 172.

27. CAL. PROB. CODE § 4123(b).

28. *Id.* § 4231(b).

29. *Id.*

30. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1038, at 3 (June 15, 2010).

or friends of the principal who serve without formal compensation,³¹ prior California law effectively excused most attorneys-in-fact from liability to a principal for loss to the principal's property.³²

C. *Need for Chapter 48*

Elder protection advocates generally agree that the power of attorney laws “today fall short of where they need to be to adequately protect incapacitated principals from financial exploitation.”³³ They recognize that “[e]ven if the [power of attorney] abuse is detected, there are several reasons why it can be difficult for the civil justice system to hold the agent liable.”³⁴ Commentators often suggest that imposition of harsher liability on abusers can serve as a safeguard for combating power of attorney abuse.³⁵

One of the most serious problems with the power of attorney legislation is the lack of “legal standards and clarity about the duty the agent owes to the principal.”³⁶ This is especially true when a principal fails to restrict the actions of the attorney-in-fact, essentially giving that individual a “license to do [almost] anything with the principal's property.”³⁷ Thus, a power of attorney “creates enormous potential for abuse,”³⁸ allowing the attorney-in-fact “to sell an elderly person's home and assets, make investments, cancel insurance policies, name new beneficiaries, and empty bank accounts.”³⁹

When a friend or a family member acts as an attorney-in-fact without compensation, he or she may feel entitled to reimbursement from the principal's property, especially if such attorney-in-fact is not a beneficiary of the principal's estate.⁴⁰ This feeling of entitlement sometimes causes the attorney-in-fact to help herself or himself to the principal's property, and abuse his or her fiduciary duty to the principal.⁴¹

With its adoption of Chapter 48, the California Legislature attempted to address these concerns by enhancing the liability of an attorney-in-fact who breaches his or her duties to the principal, even if such attorney-in-fact does not receive any compensation for his or her services.⁴²

31. Whitton, *supra* note 8, at 27.

32. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1038, at 2-3 (June 15, 2010).

33. Rhein, *supra* note 1, at 198.

34. STIEGEL & KLEM, *supra* note 3, at 6.

35. GOVERNMENT LAW CENTER, *supra* note 2, at 44; Boxx, *supra* note 2, at 55.

36. STIEGEL & KLEM, *supra* note 3, at 5.

37. GOVERNMENT LAW CENTER, *supra* note 2, at 10.

38. Rhein, *supra* note 1, at 167.

39. *Id.* at 165.

40. GOVERNMENT LAW CENTER, *supra* note 2, at 68.

41. *Id.*

42. CAL. PROB. CODE § 4231.5 (enacted by Chapter 48); ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1038, at 2-3 (June 15, 2010).

III. CHAPTER 48

Chapter 48 establishes a uniform standard of liability for all attorneys-in-fact, regardless of whether they receive compensation for their services, by eliminating the exemption from liability for uncompensated attorneys-in-fact.⁴³ Chapter 48 also adds section 4231.5 to the California Probate Code, providing rules of liability for attorneys-in-fact who breach their duties under a power of attorney.⁴⁴ If an attorney-in-fact breaches a duty to his or her principal, he or she may be charged with interest for any loss or depreciation in the value of the property, any profit made through the breach, or any profit that would have accrued to the principal if the loss or profit is the result of the breach.⁴⁵ Chapter 48 also establishes enhanced liability for an attorney-in-fact who has “in bad faith wrongfully taken, concealed, or disposed of property belonging to a principal.”⁴⁶ Such an attorney-in-fact is liable for twice the value of the property recovered.⁴⁷ The principal, or the principal’s successor in interest, can receive this remedy in addition to any other remedy available at law.⁴⁸ However, if the attorney-in-fact acted reasonably and in good faith under the circumstances as known to him or her at the time, the court has discretion to excuse him or her from liability.⁴⁹

IV. ANALYSIS

According to findings from an American Association of Retired Persons (AARP) survey, forty-five percent of Americans who are fifty years old and above have a durable power of attorney.⁵⁰ Among seventy-year old adults, this figure rises to seventy percent.⁵¹ Recognizing that misuse of powers of attorney is a widespread problem, “states are beginning to formulate consequences for those who take advantage” of a power of attorney.⁵² In support of Chapter 48, the author of the bill wrote that “[a]ttorneys-in-fact are entrusted with enormous power and should be held accountable when they breach [their] duties or fail to adhere to the standards set forth in the Probate Code.”⁵³

43. CAL. PROB. CODE § 4231 (amended by Chapter 48); ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1038, at 2 (June 15, 2010).

44. CAL. PROB. CODE § 4231.5 (enacted by Chapter 48).

45. *Id.* § 4231.5(a) (enacted by Chapter 48).

46. *Id.* § 4231.5(c) (enacted by Chapter 48).

47. *Id.*

48. *Id.*

49. *Id.* § 4231.5(b) (enacted by Chapter 48).

50. WHERE THERE IS A WILL. . . LEGAL DOCUMENTS AMONG THE 50+ POPULATION: FINDINGS FROM AN AARP SURVEY 5 (Apr. 2000), <http://assets.aarp.org/rgcenter/econ/will.pdf> (on file with the *McGeorge Law Review*).

51. *Id.*

52. Amanda A. Thilges, Comment, *Abuse of a Power of Attorney: Who is More Likely to be Punished, the Elder or the Abuser?*, 16 J. AM. ACAD. MATRIMONIAL L. 579, 591 (2000).

53. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1038, at 3 (June 15, 2010).

A. Introduction of a Uniform Standard of Liability for Compensated and Uncompensated Attorneys-in-Fact

While prior law provided a presumption against liability for uncompensated attorneys-in-fact, it did not provide any definition of what constituted “compensation” under the Probate Code.⁵⁴ Lack of a statutory definition of compensation led to confusion and uncertainty “with respect to those who [were] uncompensated and exempt from liability.”⁵⁵ For example, it was not clear whether an attorney-in-fact who did not receive any regular payments for his or her services, but used cash withdrawals from the principal’s bank account or reimbursements from the principal, could be held liable for abusing a power of attorney when he or she was not acting in bad faith, intentionally, or with gross negligence.⁵⁶ Similar uncertainty existed when an attorney-in-fact (often a “good friend” or a family member of the principal) accepted “de minimus or in-kind compensation (e.g., meals) in return for the assistance he or she provide[d] or to offset a sacrifice he or she has ma[de].”⁵⁷ Thus, prior law created a situation where an uncompensated attorney-in-fact who took money from the principal without the principal’s knowledge was not liable to the principal unless the principal or his or her beneficiaries could prove that the attorney-in-fact acted in bad faith, intentionally, or with gross negligence.⁵⁸

“In order to close this loophole and hold bad actors accountable,” Chapter 48 eliminates the issue of compensation from the factors considered in imposing liability on attorneys-in-fact and declares that all attorneys-in-fact should be held liable for breaching their duty to the principal.⁵⁹

B. Introduction of Enhanced Penalties for Abuse of Power of Attorney

The author of Chapter 48 expressed his concern that the Probate Code contained neither provisions setting forth liability for attorneys-in-fact who breached their duties under the power of attorney agreement nor provisions establishing enhanced liability of attorneys-in-fact who knowingly misappropriated assets of the principal.⁶⁰

Chapter 48 introduces explicit provisions into the Probate Code specifying categories of damages recoverable by the victim from the attorney-in-fact, including any profit made by the attorney-in-fact through the breach of duty and

54. *Id.*

55. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1038, at 3 (May 4, 2010).

56. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1038, at 3 (June 15, 2010).

57. *Id.*

58. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1038, at 2 (May 4, 2010).

59. *Id.* at 4.

60. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1038, at 3 (June 15, 2010).

any profit that the principal would have received absent the breach of duty.⁶¹ Thus, remedies for breach of fiduciary duty under the power of attorney agreement go beyond compensating the principal or his or her beneficiary under the principles of contract law, which usually put the victim “in the same position as he [or she] would have been in absent the breach.”⁶² By providing that an attorney-in-fact must disgorge any profits he or she received as a result of the breach, the Legislature intends not only to compensate the victim for his or her loss, but also “to put the fiduciary-wrongdoer in the same position she would have occupied had she not breached her duties.”⁶³

While granting discretion to courts to release honest attorneys-in-fact from liability,⁶⁴ Chapter 48 increases the liability of attorneys-in-fact who acted in bad faith, making them chargeable with twice the value of the property recovered by the principal.⁶⁵ This provision of Chapter 48 further demonstrates that penalties for breach of duty under the power of attorney agreement go beyond compensatory damages provided by general contract law.⁶⁶

C. Support for Chapter 48

The Executive Committee of the Trusts and Estates Section of the California State Bar supported Chapter 48 because it was concerned with reports by trusts and estates attorneys indicating an unfortunate increase in situations where “predatory attorneys-in-fact agree[] to serve on behalf of the principal without compensation—and then skim[] large sums of money from the principal’s estate.”⁶⁷ While supporting introduction of enhanced penalties for dishonest attorneys-in-fact, the Trusts and Estates Section also encourages giving courts discretion to excuse attorneys-in-fact from liability in appropriate cases.⁶⁸

D. Some Cautionary Notes

Although Chapter 48 is a non-controversial bill without any known opposition,⁶⁹ some commentators express their concern that the usefulness of a power of attorney “is threatened by well-meaning proposals intended to curb abuse.”⁷⁰ In particular, commentators worry that the potential penalties for misuse

61. CAL. PROB. CODE § 4231.5(a) (enacted by Chapter 48).

62. *Boxx*, *supra* note 2, at 18.

63. *Id.*

64. CAL. PROB. CODE § 4231.5(b) (enacted by Chapter 48).

65. *Id.* § 4231.5(c) (enacted by Chapter 48).

66. *Boxx*, *supra* note 2, at 18.

67. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1038, at 3-4 (June 15, 2010).

68. *Id.* at 3.

69. *Id.* at 1, 4.

70. *Boxx*, *supra* note 2, at 14.

of a power of attorney can be so foreboding as to “make the power of attorney too unattractive to be useful.”⁷¹

Despite an increase in predatory power of attorney practices,⁷² “[t]he vast majority of attorneys-in-fact carry out their duties faithfully, and those attorneys-in-fact deserve a safe harbor from the abuse penalties.”⁷³ Imposition of enhanced civil penalties on agents not acting in bad faith is alarming for such honest attorneys-in-fact.⁷⁴ Commentators have voiced their dissatisfaction with placing increased “risks of falling short on one’s duty” on attorneys-in-fact when the Legislature fails to clarify the definition of duties under power-of-attorney agreements.⁷⁵

Eliminating the distinction between the standard of liability of compensated and uncompensated attorneys-in-fact also may make it “difficult for a principal with contentious family members to find an agent—a relative or non-relative—who is willing to serve without the assurance that only reckless or dishonest actions will subject the agent to liability.”⁷⁶

The California Legislature tried to address this concern by providing that a court can release an attorney-in-fact who acted in good faith from liability even if the principal suffered loss or depreciation of property as a result of the attorney-in-fact’s actions.⁷⁷

Another concern is that “the unknowing or unwilling attorney-in-fact will be held liable for non-action with respect to the principal’s real or personal property.”⁷⁸ However, the Probate Code provides protection for such attorneys-in-fact.⁷⁹ If the attorney-in-fact does not know of the designation, he or she is not liable for inaction with respect to the principal’s property.⁸⁰ Further, once a

71. See *id.* at 14, 61 (criticizing the Arizona reform of power of attorney legislation which enhanced penalties and monitoring requirements for attorneys-in-fact and led some practitioners to start advising clients to avoid using powers of attorney for disability planning).

72. See GOVERNMENT LAW CENTER, *supra* note 2, at 4 (noting “the emergence of reported durable power of attorney abuse”); STIEGEL & KLEM, *supra* note 3, at 7 (“Practitioners in the civil justice system report growth of the [elder abuse] problem.”).

73. Boxx, *supra* note 2, at 61.

74. *Id.* at 43.

75. *Id.* at 44.

76. Whitton, *supra* note 8, at 30. The San Diego County Bar Association voiced a similar opinion that there are policy reasons to apply a lower standard of conduct to volunteer agents than to compensated professional fiduciaries. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1038, at 4 (May 4, 2010).

77. CAL. PROB. CODE § 4231.5(b) (enacted by Chapter 48); SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1038, at 4 (May 4, 2010).

78. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1038, at 4 (May 4, 2010).

79. *Id.*

80. See CAL. PROB. CODE § 4230(a),(c) (West 2009) (providing that unless an attorney-in-fact has expressly agreed in writing to act for the principal, he or she has no duty to exercise the authority granted in the power of attorney and is not subject to the other duties of an attorney-in-fact).

person has learned about the attorney-in-fact designation, he or she can resign as the attorney-in-fact.⁸¹

V. CONCLUSION

Along with the numerous advantages a power of attorney affords elders and dependent adults, it also has potential downfalls as it provides dishonest attorneys-in-fact with easy access to the principal's property and life savings.⁸² Chapter 48 is the latest legislative attempt to provide greater protection to elders and dependent adults from abusive power-of-attorney practices.⁸³ By removing the "exploitable distinction"⁸⁴ between liability of compensated and uncompensated attorneys-in-fact and increasing the liability of attorneys-in-fact acting in bad faith, the Legislature shows "greedy relatives and friends that the power of attorney right is a status that is to help the elderly, not to take advantage of them."⁸⁵ On the other hand, by leaving it to the courts to determine the proper liability standards of attorneys-in-fact who did not act in bad faith,⁸⁶ Chapter 48 attempts to balance the adopted measures designed to protect the interests of principals against the concerns of honest attorneys-in-fact so as not to destroy the usefulness and attractiveness of power of attorney agreements.⁸⁷

81. *Id.* § 4152(a)(6).

82. *See, e.g.*, STIEGEL & KLEM, *supra* note 3, at 4 (describing different ways in which perpetrators abuse their power of attorney).

83. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1038, at 2 (May 4, 2010).

84. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1038, at 3 (June 15, 2010).

85. Thilges, *supra* note 52, at 591-92.

86. CAL. PROB. CODE § 4231.5(b) (enacted by Chapter 48).

87. *See* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1038, at 4 (May 4, 2010) (pointing out that attorneys-in-fact who acted reasonably or who were not aware of their attorney-in-fact status would not be liable under the new statute).

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