

DON'T FORGET THE CHILDREN: COURT PROTECTION FROM PARENTAL CONFLICT IS IN THE BEST INTERESTS OF CHILDREN

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This commentary notes that the White Paper of the Honoring Families Initiative failed to address how including the child's voice in *best interests* of the child determinations fits or does not fit into their proposal. To the extent appropriate and possible, the child's preferences and voice should be heard. In addition, the White Paper's emphasis on avoiding the adversarial nature of litigation distracts it from a necessary emphasis that conflict is the enemy of children and that conflict can emanate from one or more of numerous sources, some connected to the court processes and some independent of court. This commentary ends by noting that courts are needed for enforcement of orders and protection, yet they also have much more to do despite the inconvenient truth of dwindling resources. As the figurative and literal head of each community's interdisciplinary team, courts must continue to serve as conflict managers protecting children in high-conflict families.

Key Points for the Family Court Community:

- To the extent appropriate and possible, the child's preferences and voice should be included in best interests determinations.
- Effective system reform must reduce conflict or protect children from the harmful effects of conflict.
- Courts must play an indispensable role in coordinating and facilitating efforts to help children and families in conflict.

Keywords: *Child's Voice; Children in Mediation; Court as Conflict Manager; Court Leadership; Custody; Harmful Effects of Conflict; Inconvenient Truth; and Interdisciplinary Partnerships.*

INTRODUCTION

[E]xperience has shown that the question of custody, so vital to a child's happiness and well-being, frequently cannot be left to the discretion of parents. This is particularly true where . . . estrangement of husband and wife beclouds parental judgment with emotion and prejudice.¹

This article is an invited commentary on the White Paper of the Institute for the Advancement of the American Legal System's Honoring Families Initiative (HFI) on the court and separating and divorcing families.² The stated goal of the White Paper is "to facilitate a national dialogue on how courts and communities can better meet the needs of parents and children that arise from the transitions of separation and divorce."³ The HFI seeks "to advance empirically informed models for dignified and fair processes for the resolution of divorce and child custody cases in a manner that is more accessible and more responsive to children, parents, and families."⁴ I support this initiative, so long as we "don't forget the children,"⁵ we find a way to hear the child's "voice," and we recognize that court protection from the harmful effects of parental conflict is in the best interests of children.

This commentary focuses on three areas not adequately addressed in the White Paper. First, planning for the future of children and families should, to the maximum extent appropriate and possible, include the child's voice. Second, given the robust and consistent research demonstrating the causal role of conflict in the litany of harms and risks to children, any effective system reform must reduce conflict and/or protect children from the harmful effects of conflict. And finally, even during times of economic crisis, courts must play an indispensable leadership role as conflict manager and facilitator of the interdisciplinary partnerships that help and protect children in high-conflict families.

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THE IMPORTANCE OF HEARING CHILDREN'S VOICES

The White Paper does not mention the child's voice in any decision-making process. The failure to integrate input from children into either the legal proceedings about them or the outside-of-court dispute resolution processes is not uncommon. But is the absence of the child's voice in the White Paper purposeful and, if so, why?

Numerous arguments have been made for excluding the child's voice in custody disputes. Children do not have legal standing in divorce actions⁶ and have been viewed as lacking the competence or capacity to be a rights holder in the proceedings.⁷ Many are concerned that children lack the ability to assimilate relevant information about the family justice process and may not understand what they are being asked.⁸ Some who emphasize parental self-determination express concerns that granting children a voice conflicts with parental authority and family autonomy.⁹ Others view involving children in family decisions as placing them in a loyalty bind or as imposing unfair responsibilities that may burden (or provide) them with an inappropriate degree of power.¹⁰ During family turmoil, children's attitudes and preferences can be temporary and transient.¹¹ When questioned directly, children may tell each parent what they think that parent wants to hear.¹² Some children prefer one parent over the other, while others align with a parent as a way of managing the stress of the parental conflict.¹³ Other children remain silent because they do not want to have to deal with any emotional pressure from one or both parents.¹⁴

Child advocates point out, however, that the fact that the child is suggestible, bribable, or being manipulated should not mean the child's voice should not be heard.¹⁵ Children often want to be heard on matters affecting them. This perspective posits that decision makers need information about the child's perspective in order to fashion an appropriate order.¹⁶ Child advocates point to the U.N. Convention on the Rights of the Child for a framework on including the child's voice. This framework distinguishes the right to be heard as different from giving the child the ultimate decision-making power. The views of the child should be "given due weight in accordance with the age and maturity of the child."¹⁷

Most parents believe children should have a say in the decision in order to feel heard in the decision-making process.¹⁸ Research on children has previously demonstrated a strong relationship between the child's perception of the fairness of the parenting arrangements and the extent to which they were allowed to participate.¹⁹ Other research demonstrates that fourteen-year-olds often understand various processes just as well as those who are eighteen and legally capable of making decisions for themselves.²⁰ Children can also be empowered by having input into negotiations not directly related to residency or parenting time.²¹ Some children want to meet with the judge who will decide their case, others do not.²² In addition, children who have experienced violence, abuse, or high levels of conflict are more likely to say that it ought to be up to children to choose their residence and contact arrangements.²³ These children may feel they have less reason to respect their parents' feelings or trust their parents' capacity to consider their needs and care for them.²⁴ Sometimes children's views are introduced into family law proceedings through experts.²⁵ Many have called for children to be provided with lawyers through which their voices can be heard in court.²⁶ Previous efforts to include children in alternative dispute resolution processes such as mediation²⁷ were not referenced in the White Paper.

In sum, despite children's preferences being a part of state statutory lists of best interests factors, children are regularly excluded from decisions made about them. The call to hear children's voices is a response to the growing awareness that decisions made by parents for their children often miss the mark and result in unnecessary suffering.²⁸ Both the legal and mental health communities are enlightened by individually and collectively listening to children and attempting to see divorce and separation through their eyes.²⁹ So too should the HFI.

EXPOSURE TO CONFLICT THREATENS THE BEST INTERESTS OF CHILDREN

Conflict is the enemy. Early views that divorce negatively impacts children have been replaced with more accurate notions that parental conflict is the culprit.³⁰ "High-conflict custody cases seriously

harm the children involved. Children caught in the middle of high-conflict cases face perpetual emotional turmoil.³¹ For several decades, protecting children from conflict has been a central goal for social policy and system reform in child custody matters.³² The state's involvement in families postdivorce reflects its *parens patriae* obligations for protecting those most vulnerable and unable to protect themselves within the context of divorce and parental relationship dissolution.³³ Numerous reforms have identified conflict as the enemy of children and transformed the court's role from faultfinder to that of conflict manager,³⁴ settlement facilitator,³⁵ or administrator of therapeutic jurisprudence.³⁶

Implementation of the proposals in the White Paper would roll back hard-earned advances in legal system reform and place children in high-conflict families at additional risk. Specifically, the White Paper proposes that courts return to the "core functions" of fact finding, creating and enforcing orders, protecting victims from violence, holding abusers accountable, and the administrative function of entry of decree.³⁷ The White Paper's section on the impact of conflict on children recognizes that "parental conflict is toxic for children in divorce" and that "children 'caught in the crossfire of parental acrimony' are at increased risk for a myriad of emotional, behavioral, and psychological problems."³⁸ Yet, the section on children and conflict ends up critiquing the adversarial system more than focusing on children. The White Paper does not address the fact that the high-conflict cases are those that mediators have failed to settle, that counselors and therapists have failed to help, and that attorneys have failed to negotiate.³⁹ It is true that protection and enforcement cases must be "prioritized and given their full due."⁴⁰ For those invested in advocacy for children, the court's protection and enforcement mechanisms must encompass these functions for children in high-conflict families. The White Paper's position on this issue is less than clear.

"Conflict" is a multifaceted factor that can come at different times and from different sources. The type of conflict, the child's level of exposure to it, and whether the child is the focus of the conflict affect a child's postdivorce adjustment.⁴¹ For example, in many cases, predivorce marital conflict can be a better predictor of postdivorce adjustment than postdivorce conflict.⁴² Even when motions are filed in court, conflict has often continued to harm children. One expert commentator noted:

Entering a courthouse to ask a judge to decide a parenting plan for children communicates an inability for one or both parents to work together in the best interests of children. . . . [B]y the time most parents face a judge, one can safely assume that they have had access to many friends, family members, counselors, lawyers, parent education programs, or mediators who have told them to work out their differences. Countless people would have told them that, while they are separating as intimate partners, they will be parents forever. Many people have told them that conflict hurts children. By this stage of appearing in court, the average parent should be starting to appreciate the emotional and financial costs of litigation.⁴³

While the adversarial system can contribute to conflict and its persistence, courts and parents are far from the sole sources of conflict. This was recognized by the following statement of an international Wingspread Conference gathering experts on high-conflict custody cases:

High-conflict custody cases can emanate from any (or all) of the participants in a custody dispute—parents who have not managed their conflicts responsibly; attorneys whose representation of their clients adds additional and unnecessary conflict to the proceedings; mental health professionals whose interaction with parents, children, attorneys or the court system exacerbates the conflict; or court systems in which procedures, delays or errors cause unfairness, frustration or facilitate the continuation of the conflict. High conflict cases can arise when parents, attorneys or mental health professionals become invested in the conflict or when parents are in a dysfunctional relationship, have mental disorders, are engaged in criminal or quasi-criminal conduct, substance abuse or there are allegations of domestic violence, or child abuse or neglect.⁴⁴

One-fourth to one-third of divorcing couples report high degrees of hostility and discord over the daily care of their children many years after separation and well beyond the expectable time for them to

settle their differences.⁴⁵ For about ten percent of all divorcing couples, the unremitting animosity will shadow the entire growing-up years of the children.⁴⁶ These families repeatedly find their way to court, where judges are asked to resolve family dilemmas other professionals cannot resolve, to function as a last resort to make decisions because parents cannot make their own, and to act in loco parentis monitoring the day-to-day care of children.⁴⁷ These families are then referred by courts to progressively more intrusive (and coercive) treatment interventions that wed mental health interventions to the social control mechanisms of the courts—such as therapeutic interventions, custody evaluations, ongoing co-parent counseling, parenting coordination, special masters, and various kinds of supervised access and visitation plans.⁴⁸

The history of the best interests of the child standard in child custody is one of paradigm shifts and pendulum swings.⁴⁹ In the past fifty years, the best interests of the child task has increased in complexity, growing from application of a determinative presumption (i.e., the maternal preference) to development of individualized parenting plans for children and families. Over this same period, the number of cases coming into family courts has skyrocketed, resulting in overburdened courts trying to keep pace with increased caseloads. Legal systems have also evolved to address the growing diversity of modern societies and the plurality of family forms, including debates regarding who is or can be a legal parent.⁵⁰

The past fifty years have seen numerous advances in ways to help children and families, including collaborative law, differentiated case management, mediation, neutral evaluations, parent education, and therapies for children and parents.⁵¹ Each of these interventions has value when applied in the right way and at the right time. Each of these interventions also embraced the view that parental conflict is the enemy of children and noted that conflict reduction and management were a necessary part of any attempt at system reform:

The future will challenge us to reform family law to minimize divisive custody battles and to develop the legal systems that help children and their families through divorce and separation. . . . [W]hatever paradigm shift occurs, whatever direction the pendulum swings, and whatever the prevailing scientific and societal views of children and families that we choose to embrace, if it does not reduce conflict, it will not be in the best interests of children.⁵²

If the HFI can demonstrate an ability to effectively manage, prevent, or reduce conflict, they will be welcome additions to any community team.

THE COURT'S INDISPENSABLE LEADERSHIP ROLE IN PROTECTING CHILDREN IN HIGH CONFLICT FAMILIES

The White Paper proposes that communities faced with the combination of budgetary choices, fiscal uncertainty, and overwhelming caseloads limit the role of the court and develop out-of-court, nonadversarial processes.⁵³ The White Paper suggests that community agencies can relieve the burden on the courts by taking responsibility for delivery of helping services such as financial planning, mediation, and parent education.⁵⁴ The White Paper invites communities to step up and develop cost-effective community-based collaborative efforts (e.g., public- and private-sector partnerships) to “meet the needs of the majority of families who are undergoing reorganization and planning for their future.”⁵⁵

In some ways, the response to these proposals is “been there, done that.” Most current estimates of the actual percentage of divorce cases settled by judges and litigation are quite low—usually less than ten percent. Evolution of the court’s role from that of fault finder to conflict manager has been and continues to be an indispensable element of the “velvet revolution” paradigm shift. These changes reflect support from judges who, as conflict managers, direct cases through a series of processes designed to help the parties resolve their own disputes. Rather than “cabining” the court’s influence,

many reformers believe that “[t]he establishment of a unified family court is the most comprehensive and effective way to deal with high conflict cases.”⁵⁶

While the White Paper downplays the role of the court, the more traditional view is that the role of the family court should be one of leadership in bringing the issues, the parties, and their helpers to the table.⁵⁷ Many of the velvet revolution interventions work because they occur in the “shadow of the law.” The White Paper recognizes that the “authority, credibility, and visibility of mediation and parent education services improve because they are affiliated with the prestige and authority of the court.”⁵⁸ Courts stand in a unique position in communities because they possess the authority to initiate and/or order change mechanisms. They also often have the best access to financial and other resources through which to provide help to individual children and families and to also effect system change.

Those trumpeting the virtues of alternative dispute resolution methods must be careful not to undermine the court’s authority and its role in dispute resolution. Any emphasis on triage or differentiated case management reflects the idea of matching family needs to available resources. Empirical research on how to accomplish this is virtually nonexistent, but courts, judges, and court personnel perform this task every day. Matching the effectiveness of various interventions to the needs of families must be done carefully. The same party who may have been told that mediation was “better suited” to manage their case may end up with a court-ordered parenting plan after choosing or needing to litigate. The expectations of compliance with this parenting plan do not differ in accordance with how (and by whom) it was constructed.

It is an “inconvenient truth” that aging populations, debt crises, and the fragility of family life in Western societies have come to limit government capacity to absorb the costs of fragile families and what are perceived as private lifestyle choices.⁵⁹ While the role of government in ameliorating the adverse impacts of divorce and parental separation, both clinical and economic, is a vitally important function, funding for domestic relation–related initiatives in the United States is uncertain at best.⁶⁰ Family law in the United States is local law with enormous variations in resource and service availability.

Unfortunately, while well-intended, the HFI position about funding new community-based initiatives with monies from those other than the service recipients might be wishful thinking. It is “the high-conflict custody cases that drain court, family, and mental health resources, take additional time and create anxiety for all involved[.]”⁶¹ Unless community-based initiatives serve elements of these high-demand and high-maintenance high-conflict families, continuously identifying program funding may prove elusive. Community-based partnerships will be encouraged and welcomed as supplementing and providing some relief for overburdened programs, but until they can also effectively address families of conflict and violence, courts must continue to function as the figurative and literal head of each community’s interdisciplinary team.

CONCLUSION: DON’T FORGET THE CHILDREN

The more time we spend talking about the child’s perspective, the more we can expect the process and decisions to be informed by the child’s voice. The more information a judge has about the child, the child’s family, and what placement can best protect this child and help this child thrive, the better the long term outcomes for children. The child’s perspective is only one part of the picture that should be given to the judge, but an essential part.⁶²

Even under the best of circumstances, the specter of family court and “the shadow of the law” stir a mixture of feelings in parties facing divorce or separation. This ambivalence reflects the needs and wishes to trust the legal institutions because of the safety or protection they provide versus fears that the court’s authority will be wielded arbitrarily or unfairly. It is true that adversary procedures “do not meet the needs of many reorganizing families,”⁶³ but it is also often true that the needs of these families far exceed what courts, mediators, and numerous other professionals can realistically do. When judging new approaches, we need to ask: if we are not listening to the child’s voice and

perspective, if numerous children remain exposed to the toxic effect of unmanaged conflict, and if the court is forced to or chooses to abdicate its role as conflict manager and protector of children in high-conflict families, are we really helping children?

NOTES

1. Ford v. Ford, 371 U.S. 187, 193 (1962).
2. Rebecca L. Kourlis et al., *IAALS' Honoring Families Initiative: Courts and Communities Helping Families in Transition Arising from Separation or Divorce*, 54 FAM. CT. REV. 351, 362 (2013).
3. *Id.*
4. *Id.*
5. LAWRENCE FRIEDMAN, MENNINGER: THE FAMILY AND THE CLINIC 92 (1990) (quoting Karl Menninger who started the Menninger Children's Hospital and attributed the phrase to his mentor, Dr. Elmer Southard).
6. *In re Marriage of Osborn*, 135 P.3d 199 (Kan. App. 2006).
7. Katherine Hunt Federle, *On the Road to Reconceiving Rights for Juveniles: A Postfeminist Analysis of the Capacity Principle*, 42 DEPAUL L. REV. 983, 985–87 (1993) (noting that, “. . . when discussing the concept of children's rights, the debate invariably returns to the capacity of children” with capacity seen as a prerequisite to having rights).
8. Nicolas Bala et al., *Children's Voices in Family Court: Guidelines for Judges Meeting Children*, 47 FAM. L.Q. 379 (2013).
9. See MARTIN GUGGENHEIM, *WHAT'S WRONG WITH CHILDREN'S RIGHTS* (2005); Elizabeth S. Scott, *Parental Autonomy and Children's Welfare*, 11 WM. & MARY BILL OF RTS. J. 1071, 1072–73 (2003) (claiming that parental autonomy serves the child's welfare by encouraging greater parental involvement in child rearing); see also *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (“The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions”).
10. Megan M. Gallop et al., *Children's Involvement in Custody and Access Arrangements After Parental Separation*, 12 CHILD & FAM. L.Q. 383 (2000); see also Richard A. Warshak, *Payoffs and Pitfalls of Listening to Children*, 52 FAM. REL. 373 (2003).
11. JUDITH S. WALLERSTEIN & JOAN B. KELLY, *SURVIVING THE BREAKUP* (1980).
12. CARLA B. GARRITY & MITCHELL A. BARIS, *CAUGHT IN THE MIDDLE: PROTECTING THE CHILDREN OF HIGH-CONFLICT DIVORCE* (1994).
13. Leslie M. Drozd & Nancy W. Olesen, *Is It Abuse, Alienation, and/or Estrangement? A Decision Tree*, 1(3) J. CHILD CUSTODY 65 (2004).
14. Gallop et al., *supra* note 10, at 383.
15. Linda D. Elrod, *Client-Directed Lawyers for Children: It is the “Right” Thing to Do*, 27 PACE L. REV. 869 (2007).
16. *Id.* at 892–94.
17. The United Nations Convention on the Rights of the Child, 28. L.M. 1448 (Nov. 20, 1989).
18. Judy Cashmore & Patrick Parkinson, *Children's and Parents' Perceptions on Children's Participation in Decision Making After Parental Separation and Divorce*, 46 FAM. CT. REV. 91 (2008).
19. Patrick Parkinson et al., *Adolescents' Views on the Fairness of Parenting and Financial Arrangements After Separation*, 43 FAM. CT. REV. 429 (2005).
20. Ellen Greenberg Garrison, *Children's Competence to Participate in Divorce Custody Decisionmaking*, 20 J. CLIN. CHILD PSYCHOL. 78 (1991).
21. Judy Cashmore & Patrick Parkinson, *Children's Participation in Family Law Disputes: The Views of Children, Parents, Lawyers and Counsellors*, 82 FAM. MATTERS 15 (2009).
22. Bala et al., *supra* note 8.
23. Cashmore & Parkinson, *supra* note 18, at 101.
24. See L. MOLONEY & JENNIFER MCINTOSH, *CREATING CHILD FOCUSED DIALOGUES WITH SEPARATED PARENTS* (2006); B. NEALE & CAROL SMART, *GOOD TO TALK: CONVERSATIONS WITH CHILDREN AFTER DIVORCE* (2001); Nicola J. Taylor, *What Do We Know About Involving Children and Young People in Family Law Decision Making? A Research Update*, 20 AUSTR. J. FAM. L. 154 (2006).
25. Michelle Fernando, *Family Law Proceedings the Child's Right to Be Heard in Australia, the United Kingdom, New Zealand, and Canada*, 52 FAM. CT. REV. 46 (2014).
26. Elrod, *supra* note 15.
27. Jennifer McIntosh, *Child-Inclusive Divorce Mediation: Report on a Qualitative Research Study*, 18 MEDIATION Q. 55 (2000).
28. Warshak, *supra* note 10.
29. *Id.*
30. Sol R. Rappaport, *Deconstructing the Impact of Divorce on Children*, 47 FAM. L.Q. 353 (2013).
31. Wingspread Conferees, *High-Conflict Custody Cases: Reforming the System for Children—Conference Report and Action Plan*, 34 FAM. L.Q. 589 (2001); see also JANET R. JOHNSTON ET AL., *IN THE NAME OF THE CHILD* (2d ed. 2009) (outlining the multiple impacts of parental conflict on the psychology and well-being of children).

32. Wingspread Conferees, *supra* note 31, at 589 (stating, “The goal of this interdisciplinary, international conference was to develop recommendations for changes in the legal and mental health systems to reduce the impact of high conflict cases on children”).

33. *Finlay v. Finlay*, 148 N.E. 624, 636 (N.Y. 1925) (Cardozo, J) (“[A judge] acts as *parens patriae* to do what is best for the interest of the child. He is to put himself in the position of a ‘wise, affectionate and careful parent’ and make provision for the child accordingly . . .”).

34. Andrew I. Schepard, *The Evolving Judicial Role in Child Custody Disputes from Fault Finder to Conflict Manager to Differential Case Management*, 22 U. ARK. LITTLE ROCK L. REV. 395 (2000).

35. Linda D. Elrod & Milfred D. Dale, *Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance*, 42 FAM. L.Q. 381 (2008).

36. Barbara A. Babb, *An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective*, 72 INDIANA L.J. 775 (1997).

37. Kourlis et al., *supra* note 2, at 368 (“We assume that the core functions of the court are protection, enforcement, and fact-findings”).

38. *Id.* at 359–60.

39. Janet R. Johnston, *Building Multidisciplinary Professional Partnerships with the Court on Behalf of High-Conflict Divorcing Families and Their Children: Who Needs What Kind of Help?*, 22 U. ARK. LITTLE ROCK L. REV. 453 (2000).

40. Kourlis et al., *supra* note 2, at 359–60.

41. Rappaport, *supra* note 31.

42. Alan Book & Paul R. Amato, *Parental Predivorce Relations and Offspring Postdivorce Well-Being*, 63 J. MARRIAGE & FAM. 197, 210 (2006); Marsha Kline Pruett et al., *The Long Shadow of Marital Conflict: A Model of Children’s Postdivorce Adjustment*, 53 J. MARRIAGE & FAM. 297, 305 (1991).

43. Peter Jaffe, *A Presumption Against Shared Parenting for Family Court Litigants*, 52 FAM. CT. REV. 187 (2014).

44. Wingspread Conference, *supra* note 31, at 590 (report and action plan of an international conference of lawyers, judges, child advocates, mediators, court services personnel and mental health professionals targeting resources that protect children and help conflicted parents).

45. See JOHNSTON ET AL. *supra* note 31.

46. *Id.* at 4.

47. Johnston, *supra* note 39.

48. *Id.*

49. Elrod & Dale, *supra* note 35.

50. Mary Ann Mason, *The Roller Coaster of Child Custody Law Over the Last Half Century*, 24 J. AM. ACAD. MATRI-MONIAL LAWYERS 451 (2012).

51. Elrod & Dale, *supra* note 35.

52. *Id.* at 418.

53. Kourlis et al., *supra* note 2, at 354.

54. *Id.* at 355.

55. *Id.*

56. Linda D. Elrod, *Reforming the System to Protect Children in High Conflict Custody Cases*, 28 WM. MITCHELL L. REV. 495 (2002).

57. Johnston, *supra* note 39.

58. Kourlis et al., *supra* note 2, at 362.

59. Patrick Parkinson, *Another Inconvenient Truth: Fragile Families and the Looming Financial Crisis for the Welfare State*, 45 FAM. L.Q. 329 (2011).

60. Peter Salem, *The Challenges of Family Court Service Reform*, 52 FAM. CT. REV. XXX (2014).

61. Wingspread Conferees, *supra* note 31, at 589.

62. Elrod, *supra* note 15.

63. Kourlis et al., *supra* note 2, at 362.

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