



GEORGIA HEIRS PROPERTY
LAW CENTER

**PRESERVING FAMILY HERITAGE:
LAST WILLS AND TESTAMENTS 2.0**

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WHAT IS HEIRS PROPERTY?

Home or land that has been passed from **generation to generation** in such a way that multiple people own the same piece of real property.

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The Georgia Heirs Property Law Center's mission is to build generational wealth, economic value and community stability by securing and preserving property rights.

- Attorneys, support staff, and a network of pro bono volunteers, and grassroots organizational partners.
- State-wide work with geographic focus and outreach in **Atlanta and South Georgia**.
- Offices in **Atlanta, Athens, Fitzgerald and Valdosta**.

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ROADMAP FOR TODAY



- **What is Estate Planning?**
- **Last Wills and Testaments**
- **Questions**
- **What Happens When Someone Dies?**
- **Preventing Heirs Property Through Estate Planning**
- **Questions**
- **What Decisions Will You Need to Make Before an Attorney Can Prepare Your Estate Plan?**
- **Wrap Up & Questions**

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WHAT IS ESTATE PLANNING

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WHAT IS ESTATE PLANNING?

- An **estate** is all of the real property and other possessions belonging to a deceased individual.
- **Estate planning** is the process of anticipating and planning what will happen to you and your assets when you die or become incapacitated.
 - How will you hold title to real property while you are alive?
 - Who will inherit your assets after you die?
 - Who will make health care decisions for you if you are unable to make them for yourself?
 - Who will manage your assets if you become incapacitated?



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COMPLETE ESTATE PLAN

- A complete estate plan consists of:
 - **Advance Directive for Health Care**
 - **Financial Power of Attorney**
 - **Last Will and Testament (Will)**
- And may also include:
 - **Nominations for Guardians and Conservators**
 - **Trusts**

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WHO NEEDS AN ESTATE PLAN?

Everyone needs an estate plan, because it helps preserve the value of your assets and ensures the right person is making decisions for you in case you become incapacitated.



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LAST WILLS AND TESTAMENTS


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WHAT IS A WILL?



A **Will** leaves instructions for what will happen to your assets and who will care for any minor children or incapacitated adults when you pass away.

- **4 major functions of a Will:**
 1. Allows you to **give your assets to others** upon your death;
 2. Allows you to appoint an **executor** to oversee your estate;
 3. Allows you to **establish a testamentary trust** and appoint a trustee to hold and protect assets passing to a minor child or incapacitated adult; and
 4. Allows you to **appoint a guardian and conservator** to protect the interests of minor children or incapacitated adults.

Always work with a **licensed attorney** to prepare your Will – online forms cannot account for your personal circumstances and needs.

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WHY DO YOU NEED A WILL?

- Having a Will:
 - Ensures the testator's **wishes are carried out** exactly as he or she wants them **by chosen executor**.
 - Allows the testator the **opportunity** to leave their real property in a way that **does not create heirs property**.
 - Allows the testator to **choose someone trustworthy to care for minor children**.
 - Protects the **financial interests of the testator's family**, especially surviving spouses and minor children.
 - Allows **testator's family to be part of the decision-making process** as the Will is prepared.
 - Gives family members **time to grieve** without having to argue with lawyers and each other over what testator would have wanted or who should become guardian of minor children.

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INDIVIDUALS WHO OWN AN INTEREST IN HEIRS PROPERTY

- Individuals who own an interest in heirs property **still benefit** from careful Will drafting.
 - As generations continue to pass away, planning avoids **further compounding the number of heirs** with interests in the real property.
- You **do not need to wait** until heirs property is resolved to begin engaging in estate planning.



- A Will may be a **stop-gap** measure but it is **not a permanent solution**.

- Heirs property owners still need to address the larger problem.
- Wills should be **revisited** as soon as the heir(s) resolves the title problem.

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IMPORTANT TERMS USED IN WILL

- **Decedent**: a person who has died.
- **Estate**: all of the real property and other possessions belonging to a deceased person.
- **Beneficiary**: a person who receives a benefit under a Will.
- **Descendent**: a lineal descendent of a beneficiary.
 - Includes child and grandchild (biological and adopted) but not spouse.
- **Executor**: a person named in Will to handle the estate.
- **Per Stirpes**: distribution of estate when a beneficiary dies before the decedent – the beneficiary's share is distributed among his or her descendants in equal shares.



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ASSETS THAT CAN AND CANNOT BE DISTRIBUTED THROUGH WILL

- You can easily distribute **most of your assets** directly through your Will:
 - Home or other real property if sole owner or common;
 - Vehicles;
 - Your personal property (jewelry, furniture,
 - Money from bank and investment accounts.
- Your Will **cannot distribute**:
 - Home or other real estate owned as joint tenants with right
 - Joint bank accounts or payable on death accounts or securities; or
 - Assets held in a living trust.
- Your Will **should not distribute**:
 - Life insurance policies; or
 - Retirement accounts, pension plans, and 401ks.



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EXECUTION REQUIREMENTS FOR A VALID WILL

- Anyone **14 or older** can have a Will.
- **To be valid, a Will must:**
 1. Be a written document;
 2. Be freely and voluntarily signed by testator or a disinterested person in his or her presence and at his or her direction;
 3. Be signed in the presence of 2 disinterested witnesses; and
 4. Transfer assets upon death.
- **No particular form or words** are necessary so long as the document makes the testator's intentions clear.
- Georgia **does not recognize oral or unwitnessed** Wills.
- It is very important that your Will is **properly witnessed and that you have a properly witness and notarized self-proving affidavit**, or else it may be considered invalid or the probate process will be more complicated.

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LAST WILLS AND TESTAMENTS MAY CHANGE OVER TIME

- Wills should be **reviewed annually** and **updated as circumstances change:**
 - Birth or death of family member;
 - Divorce;
 - Illness; or
 - Changes in community or economy.
- **Individuals should never change their Will by writing on them.**
 - Writing on a Will will void the document.
 - Changes can only be made by preparing a new Will or executing a codicil to the existing one.



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SAFEGUARDING YOUR DOCUMENTS

- Original documents should be stored in a **safe and accessible place**.
 - Documents **should not be stored in testator's safety deposit boxes** because they are not easily accessible.
- Executor should **know where to find the Will** upon testator's death.
- **DO NOT** write on your Will, cross out any sections or words, or make any changes in writing on the original document. Doing so may invalidate the entire document.

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QUESTIONS

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WHAT HAPPENS WHEN SOMEONE DIES WITH OR WITHOUT A WILL?

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WHAT HAPPENS WHEN YOU DIE WITH A WILL

- If someone dies with a valid Will providing instructions for the distribution of assets, he or she has **died testate**.
- When you die testate:
 - **You decide** who inherits from your **estate**.
 - **You decide** who becomes the **executor** of your estate.
 - **You decide** who becomes the **guardian** of your minor children or an incapacitated adult heir.
 - If you leave your real property to more than one person, it becomes **heirs property**.
 - The Will must go through the **Probate Court process** to have effect.

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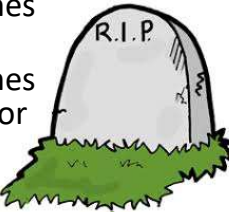
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WHAT HAPPENS WHEN SOMEONE DIES WITHOUT A WILL?


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- If someone dies without a valid Will, he or she has **died intestate**.
- When you die intestate:
 - **The Georgia Code dictates** who inherits from your **estate**.
 - **A probate judge decides** who becomes the **administrator** of your estate.
 - **A probate judge decides** who becomes the **guardian** of your minor children or an incapacitated adult heir.
 - If you own real property and have more than one heir, it becomes **heirs property**.



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WHY IS DYING INTESTATE A PROBLEM?


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- **Georgia law decides** who inherits your assets – and they may not be who you would have chosen.
- Your assets are **divided equally**, without regard for whether an heir wants or needs the assets.
- Intestate succession creates an increased risk of **family discord and disputes**.
- If your real property is inherited more than one person, it becomes **heirs property**.



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IT'S COMPLICATED:
RULES OF INTESTATE SUCCESSION

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1. If you are **married with no children**, your entire estate goes to your **spouse**. This is true even if you are separated or have a divorce action that is pending but not yet final.
2. If you are **married and have children**, your estate is shared equally among your **spouse and your children**, with your spouse never receiving less than 1/3 of your estate. If one of your children dies before you, the child's decedents take *per stirpes* the share he or she would have received if alive.
3. If you have **children but are not married**, your estate is shared equally among your **children**. If one of your children dies before you, the child's decedents take *per stirpes* the share he or she would have received if alive.
4. If you are not survived by a spouse, child or other decedents, your estate is shared equally among your **surviving parents**.
5. If you have no surviving parents, then your estate is shared equally by your **siblings**. If one of your siblings dies before you, his or her descendants take *per stirpes* the share he or she would have received if alive.



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IT'S STILL COMPLICATED:
RULES OF INTESTATE SUCCESSION


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6. If you have no surviving siblings, then your estate is shared equally by your **nieces and nephews**. If one of your nieces or nephews has predeceased you, his or her decedents take *per stirpes* the share he or she would have received if alive.
7. If you have no surviving siblings, nieces, nephews or closer relatives, your estate is shared equally between your **surviving grandparents**.
8. If you have no surviving grandparents or closer relatives, then your estate is shared equally by your **aunts and uncles**. If one of your aunts or uncles dies before you, his or her descendants take *per stirpes* the share he or she would have received if alive.
9. If you have no surviving aunts, uncles or closer relatives, then your estate is shared equally by your **first cousins**. If one of your first cousins dies before you, his or her descendants take *per stirpes* the share he or she would have received if alive.
10. If you have **no surviving relatives**, then your estate becomes the property of the **State of Georgia**.



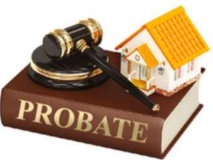
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PROBATING AN ESTATE




- **Probate** is the process of:
 - Proving the validity of a Will (if applicable);
 - Appointing a personal representative (Executor or Administrator) to represent the estate;
 - Paying estate debts; and
 - Distributing estate assets.
- Probate should be initiated as soon as practicable after one passes.

- **If there is a Will:**
 - File the Will and the appropriate petition in the Probate Court in the County where the decedent lived.
 - A Will **must be probated** before it goes into effect or transfers title.

- **If there is not a Will:**
 - File the appropriate petition in the Probate Court in the County where the decedent lived.

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PREVENTING HEIRS PROPERTY THROUGH ESTATE PLANNING

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OPTIONS FOR PREVENTING HEIRS PROPERTY DURING YOUR LIFETIME

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CHANGING THE TITLE TO PROPERTY WHILE YOU ARE LIVING

- Own real property as **joint tenants with right of survivorship**.
 - 2 or more people own undivided interests in the entire real property and each co-tenant's interest **automatically transfers upon his or her death to the surviving co-tenant(s)**.
 - Only became legal by statute in Georgia in 1977, but prior to that time, could be effectively created through specific language in deed.
 - Available to all co-owners, not just spouses – still, most appropriate for spouses and other closely related family members
 - Contrast with **Tenancy in Common**
 - Default form of joint ownership in Georgia.
 - If a co-tenant dies, his or her undivided interest becomes part of his or her estate and generally must be probated.
 - Ownership subject to terms of Will or intestate succession.
- Place real property into **limited liability company** or **trust**.
 - Usually appropriate with **larger or potentially income-generating real properties**.
 - Current owner(s) can usually continue to manage/control the LLC or trust until death.
 - If real property contains a home, placing real property into an LLC or trust could place **homestead exemptions** or other benefits in jeopardy.
 - You must **consider the impact** of transferring the real property on:
 - Grants and other funding sources (i.e. participation in USDA programs, home rehab programs),
 - Property conservation status, and
 - Mortgages/security deeds.

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OPTIONS FOR PREVENTING HEIRS PROPERTY THROUGH YOUR LAST WILL AND TESTAMENT

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OPTION #1: BEQUEST TO SINGLE PERSON OR ENTITY

- The simplest way to avoid heirs property is to leave real property to a **single family member**.
- Owners often **assume** that all family members want to keep the real property and choosing between them might cause **hurt feelings**.
- Speak with your family members to determine their interests in and wishes for the real property.
 - If only one person expresses an interest in keeping the real property, choice becomes easier.
- Owners also have the option to leave the real property to a **nonprofit, community land trust, house of worship or other organization**.



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OPTION #2: BEQUEST TO TESTAMENTARY TRUST

- Create a **testamentary trust** to own the real property after you pass away.
 - Title to the real property vests in the **trustee(s)**, who will manage the real property for the benefit of the Will's beneficiaries.
 - Trust can continue almost indefinitely (360 years +)
 - **Preferable to provision instructing executor to create trust:**
 - Title immediately passes to trustee(s) and never held by heirs.
 - Testator controls terms of trust.
- Will should include language about **distributions** of income and principal, when **real property can be sold**, how **taxes and other expenses** are paid, and what happens to **beneficiary's interest in trust** when he or she dies.

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OPTION #3: EXECUTOR PHYSICALLY DIVIDES REAL PROPERTY BETWEEN FAMILY MEMBERS

- Equitably **divide the property between family members**, with each family member receiving a share.
 - Only possible for **larger tracts** of land or houses surrounded by land.
 - You can get a **survey** before you pass away and state in your Will who will receive what portion or **leave instructions** in your Will for how the real property should be divided.
 - *Note that most equitable (or fair) division may not be an equal division.*
 - If house on part of land, **identify who will receive tract containing house.**
- Division of real property must **comply with local county and city ordinances.**



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OPTION #4: SELL REAL PROPERTY TO FAMILY MEMBERS OR OTHERS

- You can leave instructions for the **sale of the real property**.
 - Consider leaving instructions that give **family members the option** to keep the real property in the family by **purchasing** it.
 - If none of the chosen family members are able or willing to purchase the real property, consider leaving instructions that give **non-family members or entities the option** to purchase it.
 - If no one else is able or willing to purchase the real property and you still want the real property to be sold, you can leave instructions to sell the real property on **the open market**.
- Make sure to leave instructions about **who** will have the option to purchase and **how the price** will be determined.
- If the real property is to be sold, provide instructions about **who will receive the net proceeds**.



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IT'S YOUR CHOICE

- Real property is often most valuable source of **generational wealth** for families.
- Estate planning decisions are ultimately about what is **right for your family**.



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QUESTIONS

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**WHAT DECISIONS WILL YOU NEED TO
MAKE BEFORE AN ATTORNEY CAN
PREPARE YOUR WILL?**

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PREPARING TO MEET WITH AN ESTATE PLANNING ATTORNEY

- While language and method of distribution of estate assets may differ from Will to Will, most **Wills contain standard information**.
- It is **recommended** that you utilize the Statutory Advance Directive for Health Care and the Statutory Financial Power of Attorney.
- To save time when meeting with an attorney, there are **several decisions** you can be considering beforehand.

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STANDARD PROVISIONS OF A WILL

- ✓ Identification of **spouse and/or children**;
- ✓ Instructions for disposition of **your body** (burial or cremation);
- ✓ Instructions for dealing with your **debts and expenses**;
- ✓ Instructions for distributing your **home or land**;
- ✓ Instructions for distributing your **personal possessions and vehicle**;
- ✓ Instructions for distributing your **cash, stocks, bonds and other investments**;
- ✓ Instructions for distributing any **other assets**;
- ✓ Identification of **executor** and executor's powers;
- ✓ Creation of **testamentary trust** for minor children or incapacitated adults; and
- ✓ Identification of **guardians and conservators** for minor children.



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DECISION #1: YOUR REMAINS

- You can state in your Will whether you desire **burial or cremation**.
- You can also state **where** you want to be buried or **what** you want done with your ashes.
- Your Will might not be read until after your funeral, so **make sure your loved ones know** your desires while you are still living.

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DECISION #2: YOUR EXECUTOR

- An **executor** is a person who will carry out the instructions in your Will, present the Will for probate, and administer your estate.
 - Your executor should be **honest, trustworthy, responsible**, be willing to see the administration through to completion, and be willing to ask professionals for help if needed.
 - Your executor can be a **spouse, family member, friend, lawyer or financial institution** (usually for a fee).
 - Your executor does not have to live in Georgia.
- Co-executors are not recommended as they can slow down the distribution of the estate.
- Before selecting your executor(s), talk to your choices to **make sure they are willing** to serve.
- Plan to have **1 or 2 backup executors** in case your original choice is unable or unwilling to serve.

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DECISION #3: WHO WILL RECEIVE YOUR ASSETS

- **Types of assets** you can distribute through your Will:
 - Home or land;
 - Personal property – personal effects, furniture, clothes, cars, collections, jewelry, electronics, etc.; and
 - Bank accounts, bonds, CDs, money market funds, and investments.
- For your home or land, be sure to select an **option that prevents heirs property!**
- Rather than listing out all of your personal property in your Will, consider clipping a **tangible personal property list** to your Will – you can change it over time without having to change your Will.

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DECISION #4: WHETHER YOU NEED A TRUST

- You can establish a **testamentary trust for children, grandchildren, or other family members** under 18 years old or adults who are unable to manage their own affairs who might receive money or real estate through your Will.
 - The trust allows an adult **trustee** to hold the assets until the beneficiary reaches a certain age.
 - If any minors or adult beneficiaries suffer from any medical decision for which they are receiving government benefits, it may be necessary to create a **special needs trust**.
 - Special needs trusts can help ensure these individuals are not disqualified from government programs.
 - Special needs trusts are complicated and beyond the scope of the clinic.
- You can also establish a **family trust** through your Will.
 - Instruct your executor to create a family trust after your passing.
 - You can provide general directions for the trust, but the trustee will be responsible for formulating the trust agreement and conveying the assets to be held in trust.

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DECISION #5 YOUR TRUSTEE (IF YOU NEED A TRUST)

- An **trustee** is a person who will be responsible for the assets held by the trust until it is distributed.
 - The trustee can be a **spouse, family member, friend, lawyer or financial institution** (usually for a fee).
 - The trustee can be the same person as your executor.
 - The trustee should also be **honest, trustworthy, and responsible**.
- The trustee is responsible for decisions about **when and in what amount the assets and income from the trust can be distributed** to the beneficiaries.
- Before selecting your trustees(s), talk to your choices to **make sure they are willing** to serve.
- Plan to have **1 or 2 backup trustees** in case your original choice is unable or unwilling to serve.

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DECISION #6: REPORTS AND BONDS

- Georgia law requires your executor to file **reports and inventories** with the probate court unless you state in your Will that reports are not necessary.
- Georgia also requires the executor to **post a bond** (type of insurance) to protect the estate from theft or mismanagement unless you state in your Will that a bond is not necessary.
- Reports and bonds provide **extra protection** against a dishonest executor but also increase the executor's workload.
 - If you trust your executor, **waiving reports and bonds** will save the executor time and expenses.

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GETTING STARTED: TALK TO YOUR FAMILY

- As you are making your decisions, be sure to **talk to your family!**
- Inform them of **your wishes.**
- Gauge whether they are on board with the **legacy** you want to leave them.
- Get their feedback, but **make the decision that is right for you.**

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WRAP UP

- Having a Will **does not mean** you will not create heirs property upon your death.
- **BUT having a Will** that does not leave real property to more than one person is the **best way to prevent heirs property.**
- Who needs to consider heirs property when drafting their Will?
 - **EVERYONE** –
 - Especially if you own real property;
 - But even if you don't currently own real property or know that you own real property;
 - And even if you own just a fractional interest in real property.

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RESOURCES

- The Center's website houses resources for Community Leaders and Residents:
 - **Georgia Estate Planning Handbook for Communities**
 - **Myths and Facts**
 - **Webinars**
- Communities contract with the Center for:
 - **Educational Outreach**
 - **Assess Condition of Titles**
 - **Provide Title Clearing and Estate Planning Services**

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QUESTIONS?

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These slides and the appendix we did not cover during this presentation are available as a pdf on our website at: www.gaheirsproperty.org/publications.

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