

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
LUCAS COUNTY

In the Matter of: A.L.

Court of Appeals No. L-10-1355

Trial Court No. JC 09193205

**DECISION AND JUDGMENT**

Decided: May 25, 2011

\* \* \* \* \*

Charles S. Rowell, Jr., for appellant.

Julie C. Taylor, for appellee.

\* \* \* \* \*

SINGER, J.

{¶ 1} This is an appeal from a judgment issued by the Lucas County Court of Common Pleas, Juvenile Division, terminating appellant's parental rights and granting permanent custody of the minor child, A.L., to appellee. Because we conclude that the trial court's findings were not against the manifest weight of the evidence, we affirm.

{¶ 2} Appellant, O.L., is the biological father of A.L., born in 2003. In April 2009, appellee, Lucas County Children Services ("LCCS"), filed a complaint against A.L.'s biological mother and appellant ("father"), alleging dependency and neglect. Following an emergency shelter care hearing, the court granted temporary custody of A.L. to LCCS. A guardian ad litem was appointed shortly thereafter.

{¶ 3} On May 19, 2009, the court magistrate held an adjudication hearing. Father was not present. Mother stipulated to the facts alleged in the complaint and findings of dependence and neglect, and the magistrate continued temporary custody to LCCS, pending further investigation. On June 8, 2009, the court adopted the magistrate's decision. On June 12, 2009, a maternal aunt filed a motion to intervene and a motion for custody. Service of the complaint was perfected as to father on June 12, 2009. A second adjudicatory hearing was held on July 9, 2009, and father also stipulated to the facts alleged and findings of neglect and dependency. The court adopted the magistrate's decision and awarded temporary custody of A.L. to LCCS and the parents were ordered to complete services submitted in the approved case plan. Father was specifically ordered to complete a substance abuse and mental health assessments and attend domestic violence counseling.

{¶ 4} In January 2010, LCCS filed a motion for extension of temporary custody which was granted in April 2010. On July 16, 2010, LCCS filed a motion for permanent custody. The maternal aunt withdrew her motion for custody. The trial court conducted a hearing on the motion on October 15, 2010, and November 4, 2010. At the time of the

October hearing, mother arrived two hours late, but was represented by counsel. The following testimony and evidence, relevant to father's appeal, was presented over the two-day hearing.

{¶ 5} Lloyd Letterman, a licensed social worker and expert in chemical dependency and mental health diagnosis and treatment, testified that he is employed by Rescue, Inc. and contracted through the Lucas County Mental Health Board. He provides diagnostic assessments for LCCS and conducted the assessment for both mother and father. Letterman diagnosed father with bipolar disorder, mostly manic, dependency on marijuana, former dependence on cocaine, and a personality disorder. He recommended treatment at Unison, which provided a dual diagnosis program to deal with both substance abuse and mental health issues and was paid for through the Mental Health Board of Ottawa County.

{¶ 6} The next witness, Marye F. Miller, a licensed clinical counselor with Unison, testified that she was father's primary counselor beginning in August 2009. Father attended counseling regularly, missing only for injuries or sickness. Miller said father was a very good client, working on drug and alcohol abuse and mental health issues. After father was evaluated by the clinic psychiatrist, he was prescribed three drugs: one for depression, another as a mood stabilizer, and the third for sleep problems. Father tried to take the medications, but was not very successful because one of the first prescribed drugs made him feel nervous and sick to his stomach. She did not recall, however, him reporting that it gave him thoughts of anger and impulsive acting out.

{¶ 7} Father told Miller that he was continuing to do the services because the agency required them for him to have contact with A.L. Miller stated that father progressed slowly in his treatment, had trust issues, and did not do well in group therapy for that reason. She said that father was often ill with flu and upper respiratory symptoms which prevented him from attending counseling the recommended three times per week. During his sessions, father briefly mentioned domestic violence issues with mother and his criminal history. While in treatment with Miller, all but one of father's drug screens tested positive for THC, indicating continued marijuana use.

{¶ 8} Miller initially worked with father on mental health issues and had just begun to work on substance abuse issues when, in March 2010, he was incarcerated for felonious assault charges against his adult sister and mother. Miller said that at the time of his incarceration, father had just begun his individual counseling program and was scheduled to begin intensive outpatient treatment in a group setting. Although father anticipated being released from the Correctional Treatment Facility in December 2010 and put on an ankle monitor, Miller was unsure that Unison would resume treatment with him.

{¶ 9} The next witness, Sylvia Snyder, testified that she was employed at Rescue Incorporated through Central Access, to perform mental health, drug and alcohol assessments. Snyder stated that she did an assessment on mother in August 2010. Mother reported having a substance abuse problem with alcohol, with a pending charge for operation of a motor vehicle while intoxicated. Mother said she had been attending

AA meetings and had not had any alcohol for eight months. Snyder's primary diagnosis was major depression recurrent, along with alcohol abuse, but said that mother had also been previously diagnosed at her agency with intermittent explosive disorder. Snyder said that although she had not seen any behaviors to indicate the intermittent explosive disorder on the particular day mother was assessed, it did not negate the prior diagnosis.

{¶ 10} Nancy Bain, another substance abuse and mental health assessor at Central Access, testified she had performed an update assessment on mother in January 2010. During the assessment, Bain brought her supervisor into the room because mother was upset and angry with the questions being asked. Bain's notes from that day indicated that when asked about her two driving under the influence charges, mother became angry, began yelling, and walked out of the assessment. Efforts to calm mother were unsuccessful. Bain's diagnosis was abuse of alcohol with recommendations of education for substance abuse and to follow through with Snyder's recommendation regarding the intermittent explosive disorder diagnosis.

{¶ 11} The next witness, Vicky Jones, testified that she is employed by Lutheran Social Services of Northwest Ohio at their community outreach center, Crossroads Human Resource Center ("CHRC"). CHRC provides, among other services, group therapy for domestic violence, anger management for women, a mentor program, batterers program, with individual and family or couples counseling. Jones testified as to mother's involvement with services provided by CHRC and information mother disclosed regarding domestic violence incidents with father.

{¶ 12} Jones said mother related many incidents involving physical violence with father. On one occasion when father came to mother's home to visit A.L., he did not have transportation to leave. Mother said she agreed to let him stay overnight on the couch, as long as he left the next morning when she went to work. Mother said that when she woke father the next morning, he became physically violent, choking her. When she was able to call police, father ran off. Mother said she had continued to have a relationship with father, despite many violent incidents.

{¶ 13} Beginning in late summer 2009, Jones initially worked with mother alone because no other people had yet joined the two group sessions. Jones established goals for mother for both domestic violence issues and anger management. Initially mother's attendance was good, but became sporadic toward the end of the program, when the group's size increased from one to seven. While attending the program, mother also showed aggression and became verbally abusive toward a caseworker at a case plan review at LCCS, storming out of the room. On another occasion, mother became angry and confrontational when asked to leave an anger management group program.

{¶ 14} According to Jones, mother struggled with being able to apply what she had learned in order to change her behavior and to break off the abusive relationship with father. Although mother had completed the required 12 weeks of the domestic violence group, LCCS wanted her to continue with an additional four weeks because she had not been able to maintain her separation from father in order to eliminate the potentially unsafe conditions for A.L.

{¶ 15} Next, father's sister, S.L., testified that, during the ten years of their relationship, father and mother had both been violent and threatening to each other at times. She stated that father's current incarceration resulted from a domestic violence incident at their own mother's (A.L.'s paternal grandmother) home. Father, who was intoxicated, struck S.L. and threatened and pushed down the grandmother, who hit her head and was injured. S.L. stated that although she had previously requested custody of A.L., she now wanted to withdraw that motion. S.L. had observed that A.L. was doing well with the foster mother, who allowed her and the paternal grandmother to have contact with A.L. and would continue that contact if the foster mother adopted A.L. Father's sister also described a recent incident with mother involving taking prescription medications from the paternal grandmother, claiming the drugs were for "other people." S.L. testified that she believed it would not be in A.L.'s best interest to be in either parent's custody, and that placement with the foster mother was best.

{¶ 16} Rebecca Theis, LCCS caseworker, testified that she was assigned to the case at the end of February 2010, when the previous caseworker left the agency. She confirmed the service providers' testimony regarding the services that the parents had been required to complete under the current case plan. Theis testified as to her concerns about mother's failure to comply with recommended case plan services, failure to submit to requested drug screens, a recent conviction for a DUI committed in 2009, and recent criminal charge related to drug paraphernalia in February 2010.

{¶ 17} This stated that, prior to his incarceration in early March 2010, father had engaged somewhat in recommended case plan services for substance abuse, mental health, domestic violence, and parenting. Father was not due to be released from the Correctional Treatment Facility until February 2011. This noted that after his release, father would need to be reassessed and then would require further treatment, including attending the batterers intervention program. This also stated that A.L. had expressed a desire to have contact with her father. The caseworker said mother had expressed her willingness to permit contact of some sort, if it is in A.L.'s best interest and under safe circumstances.

{¶ 18} The foster mother then testified that A.L. has been in her home for 18 months and that she had adjusted well. Initially, A.L. had a hard time going to sleep at night, experiencing scary nightmares and night terrors with screaming and crying. After a couple months and counseling, the nightmares had subsided and she was better. A.L. continued, however, to ask the foster mother each night, whether she would be left alone in the house and where the foster mother would be. The foster mother stated that she would adopt A.L. if LCCS was granted permanent custody, and was open to contact with birth family members, including mother and father, presuming stability in those relationships and under safe circumstances.

{¶ 19} Mother testified regarding her attendance at anger management and other classes, her criminal history, and her completion of the case plan. Father then testified regarding his conviction for attempted felonious assault and his incarceration at CCNO

and subsequent move to the Correctional Treatment Facility, ("CTF") where he was then receiving treatment. According to father, he was participating in the following programs: chemical dependency group, anger management, relationship building group, "Thinking for a Change," healthy living and sober living. Father was spending one hour per day attending these programs. Father acknowledged that he still needed to attend a domestic violence program as recommended by LCCS, but that class was not offered at CTF. Father requested the court to give him more time to finish the services required, so that he could get custody of A.L.

{¶ 20} Father said he had tried several prescribed medications, but continued to have side effects from them. He said he had been attending services at Unison, but had been removed from the drug and alcohol rehabilitation group. He then attended one-on-one counseling with Marye Miller. Father was to start domestic violence classes when he was arrested in March 2010 for the assaults. He acknowledged that he had stopped taking his medications and had been drinking alcohol. Father also had been smoking marijuana. He then stated that he believed that stopping the medications that day made him have impulsive, angry thoughts of harming people. Along with the marijuana and consumption of alcohol, he thought he had suffered a black out when he harmed his sister.

{¶ 21} Father said that, since he had been incarcerated at CCNO, he had not taken any more prescription medications and felt normal. He agreed, however, with Lloyd Letterman's diagnosis that he is bipolar and has ADHD. He confirmed that in high

school, he was placed in a severe behaviorally handicapped class. Father acknowledged he still has some mental health issues to address and that his attempts to address his substance abuse issues had not been successful. Father said that he had a long-standing use of marijuana which allows him to sit still and think better. He also acknowledged that between 2000 and 2009, he had been arrested 34 times, with most charges involving physical violence, threats or drugs.

{¶ 22} Father stated that he was often incarcerated, but that mother was often physically abusive to him. He described mother as always being angry and that he had been battered by her. Father claimed that he had ended his relationship with mother, because of the domestic violence incidents. He also contended that he had been wrongly labeled as the aggressor, and that mother had actually been the instigator in most of the incidents. Father said that during the incidents between mother and him, A.L. was in another room and did not observe the violent behavior. He asked the court for more time after he is released from incarceration to complete the necessary case plan services so that he could gain custody of his daughter

{¶ 23} Finally, the guardian ad litem, Julie Hoffman, testified regarding her report which recommended permanent custody be granted to LCCS. She was concerned that mother's mental health and explosive temper created an unstable placement for A.L. Hoffman said that A.L. misses her mother, father, and aunt, but wants to stay where she is. A.L. seemed well-bonded with the aunt, but fears mother, who was "mad a lot." Hoffman said that, although father had completed some treatment and programs and was

willing to continue in treatment on release, it did not change her recommendation. She cited the on again, off again 14 year relationship between mother and father as likely to continue. Hoffman noted that father also continues to have mental health issues which would interfere with the stability and security that A.L. has experienced with the foster mother. The guardian ad litem agreed that the testimony presented and the history of violence indicated that both parents have severe and chronic mental health disorders. She further agreed that both parents required extensive mental health treatment, medication to stabilize their personality disorders, and substance abuse treatment. The guardian ad litem opined that A.L. would be at risk of harm if returned to either parent's care.

{¶ 24} The court ruled that sufficient clear and convincing evidence had been presented that it is in A.L.'s best interest to award permanent custody of A.L. to LCCS. Pursuant to R.C. 2151.414(B)(1)(d), the court found that A.L. had been in the temporary custody of LCCS for 12 out of a consecutive 22 month period. Alternatively, the court found, pursuant to R.C. 2151.414(B)(1)(a), that A.L. cannot be placed with either parent within a reasonable period of time, which was supported by R.C. 2151.414(E)(1), that following her placement outside the home and despite reasonable case planning and diligent efforts by the agency to assist the parents, neither were able to remedy the problems that initially caused her removal from the home.

{¶ 25} The court found that, pursuant to R.C. 2151.414(E)(2), the chronic mental illness and/or emotional illness of both parents is so severe that it makes them unable to provide an adequate permanent home for A.L. at the present time, and, as anticipated,

within one year after the court held its hearing. The court further found that father's repeated incarcerations have prevented him from providing care for A.L.

{¶ 26} The court also found that LCCS made reasonable efforts to reunite the family, provided services designed to remedy the problems causing the child's removal from the family home, and to prevent the continued need for removal of the child from her home. These efforts included case plan services for substance abuse treatment, mental health services, domestic violence counseling, and agency casework services and support. Such efforts were unsuccessful in that both parents continued the same violent and inappropriate behavior for a number of years.

{¶ 27} Finally, the court noted it had considered all the factors under R.C. 2151.414(D)(1)-(5), in finding that A.L. is in need of a legally secure placement and, further, that an award of permanent custody is in her best interest. The parental rights of mother and father were terminated.

{¶ 28} Father now appeals from that judgment, arguing the following two assignments of error:

{¶ 29} "First Assignment of Error

{¶ 30} "The award of permanent custody is against the manifest weight of the evidence.

{¶ 31} "Second Assignment of Error

{¶ 32} "The court abused its discretion by relying on clear hearsay contained in the report of the guardian ad litem."

## I.

{¶ 33} We will address appellant's assignments of error in reverse order. In his second assignment of error, appellant claims that the trial court erred in considering inadmissible hearsay which was contained in the guardian ad litem's report.

{¶ 34} A guardian ad litem is an investigator for the court within the meaning of R.C. 3109.04(C). *In re Sherman*, 3d Dist. Nos. 05-04-47, 05-04-48, 05-04-49, 2005-Ohio-5888, ¶ 28; *Webb v. Lane* (Mar. 15, 2000), 4th Dist. No. 99CA12. Thus, a guardian ad litem in permanent custody proceedings must investigate the child's situation and then make a report and recommendation as to what disposition is in the child's best interests. *In re Ridenour*, 11th Dist. Nos. 203-L-146, 203-L-147, and 203-L-148, 2004-Ohio-1958; *In the matter of Maloney* (May 18, 1999), 7th Dist. No. 95 CO 74, citing *In re Baby Girl Baxter* (1985), 17 Ohio St.3d 229. See, also, R.C. 2151.414(C) (guardian ad litem's recommendation in a written report, "shall be submitted to the court \* \* \* but shall not be submitted under oath").

{¶ 35} Generally, a guardian ad litem's report is not considered evidence, but is merely submitted as additional information for the court's consideration. Ohio courts have held that a "trial court may consider the report of a court-appointed investigator without the oral testimony of the investigator and despite the hearsay inherent in such a report." *Webb*, supra, citing *Corrigan v. Corrigan* (Dec. 30, 1986), 4th Dist. No. 1300. To protect the parties' due process rights, however, the trial court must make the guardian

ad litem available for direct and cross-examination. *Webb, supra; In re Hoffman* (Nov. 28, 2001), 5th Dist. No.2001CA 00207, citing *In re Duncan /Walker Children* (1996), 109 Ohio App.3d 845. See, also, *Martin v. Martin*, 9th Dist. No. 20567, 2002-Ohio-1110 (guardian need not testify, but must be available for cross-examination by the parties). Additionally, even if inadmissible hearsay is included in the report, when a trial judge acts as the finder of fact, he or she is presumed capable of disregarding improper testimony. See *In the matter of Sypher*, 7th Dist. No. 01-BA-36, 2002-Ohio-1026; *In re M.H.*, 8th Dist. No. 80620, 2002-Ohio-2968, ¶ 79; *In re Sims* (1983), 13 Ohio App.3d 37, 41.

{¶ 36} In the instant case, the guardian ad litem testified at the hearing and was examined by counsel for both parties as well as the court. Therefore, the trial court was permitted to consider the contents of the report irrespective of the hearsay contained within it. Moreover, as the trier of fact, the court is presumed to have disregarded any inadmissible hearsay contained in the report. Accordingly, we find that the trial court did not abuse its discretion in considering the GAL report because the guardian was available for cross-examination by both parties.

{¶ 37} Accordingly, appellant's second assignment of error is not well-taken.

## II.

{¶ 38} In his first assignment of error, appellant contends that the trial court's decision to award permanent custody of A. L. to LCCS was against the manifest weight of the evidence. We disagree.

{¶ 39} A trial court's determination in a permanent custody case will not be reversed on appeal unless it is against the manifest weight of the evidence. *In re Andy-Jones*, 10th Dist. No. 03AP-1167, 2004-Ohio-3312, ¶ 28. The factual findings of a trial court are presumed correct since, as the trier of fact, it is in the best position to weigh the evidence and evaluate the testimony. *In re Brown* (1994), 98 Ohio App.3d 337, 342. Moreover, "[e]very reasonable presumption must be made in favor of the judgment and the findings of facts [of the trial court]." *Karches v. Cincinnati* (1988), 38 Ohio St.3d 12, 19. Thus, judgments supported by some competent, credible evidence going to all essential elements of the case are not against the manifest weight of the evidence. *Id.*; *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus.

{¶ 40} A juvenile court may grant permanent custody of a child to a public services agency if the court finds, by clear and convincing evidence, two statutory prongs: (1) the existence of at least one of the four factors enumerated in R.C. 2151.414(B)(1) and (2) that the child's best interest is served by a grant of permanent custody to the children's services agency. *In re M.B.*, 10th Dist. No. 04AP-755, 2005-Ohio-986, ¶ 6. Clear and convincing evidence requires that the proof "produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *In the Matter of Coffman* (Sept. 7, 2000), 10th Dist. No. 99AP-1376, citing *Cross v. Ledford* (1954), 161 Ohio St. 469, paragraph three of the syllabus.

{¶ 41} Under the first prong, the four factors under R.C. 2151.414(B)(1) are, in pertinent part, as follows:

{¶ 42} "(a) The child is not abandoned or orphaned, has not been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two-month period \* \* \* and the child cannot be placed with either of the child's parents within a reasonable time or should not be placed with the child's parents.

{¶ 43} "(b) The child is abandoned.

{¶ 44} "(c) The child is orphaned, and there are no relatives of the child who are able to take permanent custody.

{¶ 45} "(d) The child has been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two-month period \* \* \*."

{¶ 46} We note that the trial court's finding under R.C. 2151.414(1)(d), that A.L. was in LCCS' temporary custody for twelve out of a consecutive twenty-two month period, was supported by the record and was not against the manifest weight of the evidence. We will now address the court's alternative finding under R.C. 2151.414(1)(a).

{¶ 47} In making a finding under R.C. 2151.414(B)(1)(a), that the child cannot be placed with his parents within a reasonable time or should not be placed with his parents, the court need find, by clear and convincing evidence, that only one of the eight factors enumerated in R.C. 2151.414(E) exists. In this case, the three pertinent factors under that section state that:

**{¶ 48}** "(1) Following the placement of the child outside the child's home and notwithstanding reasonable case planning and diligent efforts by the agency to assist the parents to remedy the problems that initially caused the child to be placed outside the home, the parent has failed continuously and repeatedly to substantially remedy the conditions causing the child to be placed outside the child's home. In determining whether the parents have substantially remedied those conditions, the court shall consider parental utilization of medical, psychiatric, psychological, and other social and rehabilitative services and material resources that were made available to the parents for the purpose of changing parental conduct to allow them to resume and maintain parental duties.

**{¶ 49}** "(2) Chronic mental illness, chronic emotional illness, mental retardation, physical disability, or chemical dependency of the parent that is so severe that it makes the parent unable to provide an adequate permanent home for the child at the present time and, as anticipated, within one year after the court holds the hearing pursuant to division (A) of this section or for the purposes of division (A)(4) of section 2151.353 of the Revised Code; \* \* \*.

**{¶ 50}** "\* \* \*

**{¶ 51}** "(13) The parent is repeatedly incarcerated, and the repeated incarceration prevents the parent from providing care for the child."

**{¶ 52}** Once a finding is made by the court satisfying one of the factors enumerated in R.C. 2151.414(B)(1), its analysis turns to the second prong, the best

interest of the child. In making this determination, R.C. 2151.414(D)(1) provides that the court "shall consider all relevant factors, including, but not limited to, the following:

{¶ 53} "(a) The interaction and interrelationship of the child with the child's parents, siblings, relatives, foster caregivers and out-of-home providers, and any other person who may significantly affect the child;

{¶ 54} "(b) The wishes of the child, as expressed directly by the child or through the child's guardian ad litem, with due regard for the maturity of the child;

{¶ 55} "(c) The custodial history of the child, including whether the child has been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two month period ending on or after March 18, 1999;

{¶ 56} "(d) The child's need for a legally secure permanent placement and whether that type of placement can be achieved without a grant of permanent custody to the agency;

"(e) Whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child."

{¶ 57} The factors set forth in R.C. 2151.414(E)(7) through (11) include:

- (1) whether the parents have been convicted of or pled guilty to various crimes,
- (2) whether medical treatment or food has been withheld from the child, (3) whether the parent has placed the child at a substantial risk of harm due to alcohol or drug abuse,

(4) whether the parent has abandoned the child, and (5) whether the parent has had parental rights terminated with respect to a sibling of the child.

{¶ 58} In the present case, evidence was presented that both parents suffer from mental health and substance abuse issues. Although father may have made some efforts to address those concerns, he continued to deny certain problems and, even with continued therapy, would not be ready to parent A.L. within a reasonable time. This case rests squarely on the credibility of the witnesses and father's own admission that he has been incarcerated a number of times. A.L., who was almost seven at the time of the disposition hearing, had been in foster placement for the current case for over a third of her young life. Like every child, she is entitled to be secure in a loving, healthy, permanent placement which has been provided by the foster mother. Therefore, we conclude that the trial court's findings that father failed to remedy the issues that caused the initial removal, that the child could not be placed with father within a reasonable time or should not be placed with him, and that granting permanent custody of A.L. to LCCS was in the child's best interest were not against the manifest weight of the evidence.

{¶ 59} Accordingly, appellant's first assignment of error is not well-taken.

{¶ 60} The judgment of the Lucas County Court of Common Pleas, Juvenile Division, is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

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JUDGE

Arlene Singer, J.

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JUDGE

Stephen A. Yarbrough, J.  
CONCUR.

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JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:  
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