

FAMILY FINANCIAL MANAGEMENT MT199901HR, REVISED 07/25

Designating Beneficiaries to Avoid Probate

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Learn about transferring assets by contractual arrangements, such as beneficiary designations commonly found in insurance policies, IRAs, employee benefits, payable on death (POD) checking and savings accounts, and transfer on death (TOD) registrations for stocks, bonds, and mutual funds.

WHEN PEOPLE DIE, THEIR PROPERTY TRANSFERS TO THEIR

beneficiaries by three methods: 1) contracts, 2) Wills*, or 3) Montana intestacy statutes (for those who did not have a Will). This MontGuide focuses on how owners can name a beneficiary in a contract to receive either all or a percentage or fraction of their property after death.

Contracts

Contracts providing for the passing of property to a beneficiary are considered as transfers taking effect at death. The following types of assets allow the naming of beneficiaries through contracts:

- life insurance and annuity policies,
- qualified and non-qualified deferred compensation plans: 401(k), 403(b), 457,
- individual retirement accounts (IRAs), both traditional and Roth,
- employee benefit plans: Simplified Employee Pension Plan (SEPs), Savings Incentive Match Plan for Employes (SIMPLEs), and Keogh retirement accounts,
- revocable and irrevocable trusts,
- payable on death (POD) designations for checking and savings accounts, certificates of deposit, share certificates, US savings bonds,

- <u>transfer on death (TOD) designations</u> for stocks, bonds, and mutual fund accounts,
- <u>transfer on death deeds</u> for real property owned in Montana, and
- <u>beneficiary designations on titles of vehicles and vessels</u> (MV 13 Form).

Definitions

Throughout this MontGuide, the term **financial entity** refers to a bank, credit union, insurance company, pension plan, employee benefit plan or others offering a beneficiary designation. The terms **proceeds** and **assets** refer to real and personal property that passes from an owner to their designated beneficiaries by contract. A **beneficiary designator** is the person who makes a beneficiary designation.

Contracts and probate

Probate, a legal procedure to settle a deceased person's estate, is NOT necessary for assets controlled by contracts. However, their values are still part of the deceased's estate and subject to creditors' claims. There is no federal estate tax on an estate when it is valued at less than \$13,990,000 for a single person; \$27,298,000 for married couples (2025).

Contracts and wills

The Montana Multiple Party Accounts Act allows for **payable on death designations** (POD) on financial accounts at banks and credit unions. The act also allows for **transfer on death registrations** (TOD) for mutual funds, stocks, and bonds. Naming beneficiaries in such contracts takes precedence over a person's Will.

* The word Will is capitalized to emphasize importance.

Topics throughout this guide are further explained in other MSU Extension MontGuides, some are linked within the text, or found online here: montana.edu/estateplanning/eppublications.html

Example: Diana named her son as the beneficiary of her \$100,000 life insurance policy. Diana later wrote a Will leaving the same life insurance proceeds to her daughter. The provision in the Will is ineffective. The life insurance contract has priority – her son receives the life insurance proceeds because Diana named him as beneficiary on the contract, not her daughter. If Diana wants her daughter to receive the \$100,000 from the life insurance policy, she needs to complete a change of beneficiary form available from her insurance company and name her daughter as the primary beneficiary.

The **personal representative** (PR) (the person appointed by the district court to settle your estate) has no power or duty to distribute proceeds in contracts unless the estate is named the beneficiary. Then the personal representative distributes the assets according to the Will. If the deceased did not have a Will, Montana intestacy statutes list the heirs in order of priority as outlined in the MontGuide <u>Dying Without a Will</u> <u>in Montana</u>.

A family member should notify financial entities about the death of the insured, annuitant, or owner of an account. The financial entity distributes the proceeds or assets to the specific beneficiaries listed on the beneficiary designation form. Most financial entities require the submission of a specific claim form and a certified death certificate before the proceeds are transferred to the beneficiaries.

Joint tenancy contracts

While a joint tenancy with right of survivorship title on real property, such as land and the home on which it stands, and personal property, such as checking and savings accounts, the title is not technically a beneficiary designation. However, under Montana law, if one joint tenant dies, the surviving joint tenant(s) automatically receive all.

Although real property held as joint tenants with right of survivorship passes automatically to the surviving joint tenants without going through the probate process, the Montana legislature has provided a way for public records to reflect the transfer. The surviving joint tenant(s) file an **Affidavit for Termination of Joint Tenancy**. The form is available at the Senior and Long-Term Care Division, Department of Public Health and Human Services (DPHHS) website (<u>dphhs.</u> <u>mt.gov/SLTC/aging/legalservicesdeveloper/disclaimer</u>, users must agree to the disclaimer to proceed to online forms). The surviving joint owner must sign the affidavit in the presence of a notary public. If the asset is real property, the surviving joint owner(s) must also present a completed **Montana Realty Transfer Certificate**, along with a certified copy of the death certificate. The Department of Revenue requires this confidential tax document for any party transferring real property to another party. The Form RTC is available at any Montana county clerk and recorder's office or online <u>revenuefiles.mt.gov/files/</u> <u>Forms/Realty_Transfer_Certificate_Form_RTC.pdf</u> in the category of Property Ownership and Transfer. Be sure to use the most recent form, which at the date of this publication's printing is February 2024.

Joint tenants cannot leave their interests to someone other than the surviving joint tenant in a Will unless the survivor lives beyond 120 hours (5 days) (See page 6 for common disaster clause). Nor do their interests pass to heirs by Montana intestate statutes because the joint tenancy contract has priority. The surviving joint tenant or tenants receive all. A person's decision to place real and personal property in joint tenancy with family members or others should be made only after thoughtful consideration has been given to the consequences of such an arrangement.

Creditors' claims and beneficiary designations

Beneficiaries named in contracts should be aware that the deceased person's assets are subject to creditors' claims. For example, if a person dies owing money to a hospital, the hospital is a creditor. If there are enough assets in the probate estate to cover the hospital bills, then a certificate of deposit with a payable on death designation (POD) would not be used to cover the deceased's hospital expenses. If, however, there are not enough assets in the probate estate to pay creditors' bills, then the certificate of deposit with a POD would be subject to the hospital's claim.

Example: Betty died owing the hospital \$45,000 for expenses incurred during her last illness. Betty had an automobile and other assets with a fair market value of \$100,000. She also had a \$20,000 certificate of deposit payable on death to her daughter. The personal representative could sell the automobile to provide money to pay toward the hospital bill of \$45,000. Betty's beneficiaries receive the remaining amount of \$55,000 (\$100,000 - \$45,000 = \$55,000). The certificate of deposit for \$20,000 would not be needed to pay Betty's hospital bills. The certificate of deposit passes directly to Betty's daughter.

However, if Betty's estate consisted only of an automobile valued at \$15,000 and a \$20,000 certificate of deposit that was POD to her daughter, the certificate of deposit would be subject to the hospital's claim of \$45,000. In this case, Betty's daughter would not receive any money from Betty's estate because all her assets were used to pay the creditor's claim submitted by the hospital.

Medicaid has similar rules. All funds in Betty's name and payable on death to her daughter are **recoverable assets** under Montana's Medicaid estate recovery rules. Because Medicaid (DPHHS) is a creditor, estate recovery can be made from the certificate of deposit that had a POD designation to Betty's daughter.

Montana can also recover from the estate of the surviving spouse if the spouse dies within three years of the spouse receiving Medicaid; <u>dphhs.mt.gov/assets/sltc/ADRC/</u> sltc011mtmedicaidlienestaterecoveryprog.pdf

Wording of beneficiary designations

The wording of beneficiary designations on contracts is important. An improperly completed beneficiary designation form could have unintended results. People could receive assets that the owner did not want to pass to them. A person should contact an attorney to ensure the wording of beneficiary designations achieves their estate planning goals.

Typically, a beneficiary designation form requests the following information about the beneficiary: first name, middle initial or name, and last name; relationship to the beneficiary designator; date of birth; full address; and Social Security number. Some financial entities provide a section on the form for the beneficiary designator to list primary beneficiaries and another section for contingent or successor beneficiaries.

ONE BENEFICIARY

On the beneficiary designation form from a life insurance company, bank, credit union or other entity, a person can list the name of the beneficiary followed by the relationship. Thus, a son who names his mother as his beneficiary could write:

Amanda J. Smith, My Mother.

TWO BENEFICIARIES WITH EQUAL DIVISION

The order in which two beneficiaries are to receive the proceeds and the part each is to receive should be clear. The word "or" should not be written between the names of multiple beneficiaries as "or" creates confusion.

If proceeds are to be equally divided between beneficiaries, the term "equally" is used. Some forms require the listing of a beneficiary percentage. For example: Sam L. Smith, son, 50% and Sally R. Smith, daughter, 50%.

If one of the beneficiaries dies before the person designating beneficiaries or dies in the same accident, and the designator wants the surviving beneficiary to receive all the assets, then wording is added to clarify this goal. A woman designating her husband and son as beneficiaries could write:

John R. Smith, my husband, and Derry A. Smith, my son – equally. If either of these named beneficiaries is not living at my death, then the survivor of them shall take all.

TWO BENEFICIARIES WITH AN UNEQUAL DIVISION

If a person wants to designate two beneficiaries with unequal amounts, the fraction or percentage each beneficiary should receive should be clear. Full names and relationships are listed. The following designation could be written in such cases.

Susan J. Anderson, my daughter, 40% if living, if not living, my granddaughter Sally T. Anderson is to receive Susan J. Anderson's 40%; Ralph R. Anderson, my son 60% if living, if not living, my grandson Roy T. Anderson, is to receive Ralph R. Anderson's 60%.

THREE OR MORE BENEFICIARIES

If the designator wants the proceeds divided equally among three or more named survivor beneficiaries, full names and relationships followed by the term "equally" is used. Thus, a mother wanting an equal division among her three sons as beneficiaries could write:

Jerry B. Smith, Robert P. Smith, and William A. Smith, my sons – equally. If any of these named beneficiaries is not living at my death, then their share shall be divided equally by the remaining named beneficiaries who survive me.

ONE PRIMARY BENEFICIARY AND ONE CONTINGENT BENEFICIARY

Most people name a contingent, secondary, or successor beneficiary in case the primary beneficiary predeceases them or dies in the same accident. The naming of secondary beneficiaries can ensure the intended people receive the assets in families with children from a prior marriage.

Example: John and Mary each had two children from a prior marriage. Each had a life insurance policy of \$100,000, naming the other spouse as the primary beneficiary. Neither parent listed a secondary beneficiary. John and Mary died in an automobile accident. John died first, and Mary died seven days later. Mary's children

received \$200,000 from the life insurance policies. John's estate passed to Mary because she survived John beyond 120 hours (5 days). If John had named his children as secondary beneficiaries, they would have received the \$100,000 from their father's life insurance policy instead of Mary's children.

CHILDREN AS BENEFICIARIES

The wording of beneficiary designations for children often depends upon whether the children are adults or minors (under age 18 in Montana). Parents should list adult children by their full names. A father who wants all three of his adult married daughters to share equally could write:

Donna Kaye Chamberlain, Debbie Raylene Buczinski, Marsha Diane Anderson, my children, equally. If any of these named beneficiaries is not living, then her share shall be divided equally by the remaining named beneficiaries who survive me.

Under Montana law, minor children lack legal capacity to exercise policy rights, sign contracts, or sign for the receipt of proceeds. If minor children (under age 18) are designated as beneficiaries, there are five alternatives for passing on assets to them.

- Montana law requires the district court to appoint a conservator if a minor child inherits more than \$5,000. The proceeds are transferred to the conservator for the minor child's benefit. The conservator is responsible for managing money and property inherited by minor children until they reach the age of 18.
- 2. Another possibility is for the financial entity to hold the assets. For example, the life insurance company could manage the proceeds until the beneficiary reaches the age of majority, which is 18 in Montana. Some financial entities list an age of 21 on their beneficiary designation forms.
- 3. Still another alternative is naming a **trust** as the beneficiary. The trust document lists the name of the trustee and the successor trustee. The purposes for which the money can be spent and when the trust ends, with the assets passing on to the child, should also be listed. This option allows the trustor and/or trustee to decide at what age they believe the "child" can manage the funds. While financial savvy is not decided by age alone, there are parents who believe "adult" children should not receive large sums of money until they reach an age between 25 to 40.

- 4. Most financial service companies allow **custodial arrangements** under the Montana Uniform Transfers to Minors Act. The beneficiary designation form with the financial entity allows the owner to choose the custodian if the beneficiary is a minor at the time of the owner's death. This designation is valid even if the owner lists a different custodian in a Will.
- 5. If a custodial arrangement has not been signed, assets can be transferred directly by a Will to a Montana Uniform Transfers to Minors Act custodial account or a trust. A designated adult custodian is nominated in a Will or a trustee in a trust to manage the assets. Although the assets placed in the custodial account belong to the child, control over them is not transferred to the child until they reach the age of 21. See MontGuide, <u>Custodial Accounts for Children Under Age 21: Montana Uniform Transfers to Minors Act (UTMA)</u>.

LATER BORN CHILDREN

If a parent names specific children on a beneficiary designation form, later-born children may be left out unless the beneficiary designation is changed. If a parent expects children to be born or adopted after the beneficiary designation is signed, the following types of generic designations could be used:

- the children of John R. Jones.
- the children born during marriage to Sara A. Jones.
- the children born of or legally adopted during marriage with Sara A. Jones.

Typically, the words "children," "issue," "grandchildren," and "children of a deceased child" include adopted children, adopted grandchildren, and adopted children of a deceased child unless otherwise specified in the contract.

CHILDREN OF A DECEASED BENEFICIARY

A person may want a beneficiary's children to receive the beneficiary's share if the beneficiary predeceases them. For example, Harold may want his grandsons to receive the proceeds of his life insurance if his sons Alan and Steven predecease him. Harold could achieve his goal with the following language:

To my children, Steven Ray, and Alan Ray, equally. However, if either one predeceases me, the beneficiary's children living at my death shall take equally the share their deceased parent would have taken if they survived me. Another way to ensure the beneficiaries' children receive shares is to use the terms *per stirpes* or *by representation*. **Per stirpes** is a term used more commonly years ago to express the concept of right of representation, the principle of generational division of shares among surviving descendants of different generations. Today, each term has a precise meaning under Montana law, although the result of using either one of them can be the same in some cases.

When the term **per stirpes** or **by representation** is part of the beneficiary designation, it means that if the named beneficiary dies before the designator, the assets will pass to the beneficiary's children in equal shares. In other words, the beneficiary's children split the share their parent would have received if they had survived the deceased. Thus, a person who wants their grandchildren to receive the share their parent would have received if the parent had died in the same accident or predeceased, the parent could write:

Donna Kaye Chamberlain, Debbie Raylene Buczinski, Marsha Diane Anderson, my children, equally, or per stirpes if any of my children predecease me.

The preceding designation would result in the following divisions. If Donna predeceases her father, her two children receive ¼ each because they split the ¼ that would have passed to Donna if she had survived her father. The remaining ⅔ is equally split between the living sisters, Marsha and Debbie (¼ to each). If Debbie dies before her father, her three children would each receive ⅓ because they split the ⅓ that would have passed to Debbie if she had survived her father.

If a designated beneficiary dies without leaving children, the beneficiary's share of the proceeds is distributed among the remaining designated beneficiaries in equal shares. If Marsha, who does not have children, predeceases her father, her share ($\frac{1}{3}$) is equally split between her two sisters Donna and Debbie. Thus, Donna would receive $\frac{1}{2}$ and Debbie would receive the other $\frac{1}{2}$ of their father's estate, or if one of them also died before their father, her children would divide her $\frac{1}{2}$ share.

Currently in Montana, the term **by representation** is used more often than per stirpes. If the term 'by representation' had been used in the earlier example, the distributions described would have been the same as per stirpes. However, if Marsha, Donna, and Debbie ALL die before their father, under per stirpes, Donna's two children split the one-half Donna would have received (¹/₄ each), and Debbie's three children split the other one-half, or receive ¹/₆ each.

Under Montana's 'by representation' statute, the estate is divided into per capita shares at the first generation where there is a survivor. If anyone in the first generation is deceased and leaves living descendants, these descendants take their deceased parent's share. Under representation, however, if no one in the first generation survives their father, Donna's and Debbie's children would each receive equal shares. Because there are five grandchildren, each receives ¹/₅. Thus, a father who wants his grandchildren to receive equal shares if their parents die in the same accident or predecease him could write:

Donna Kaye Chamberlain, Debbie Raylene Buczinski, Marsha Diane Anderson, my children, equally or their descendants by representation if any of my children predecease me.

ESTATE AS THE BENEFICIARY

The estate is a beneficiary of last resort. Most people prefer to name family, friends, or charities or non-profits as beneficiaries. Probate can be avoided if the estate is not named as a beneficiary. However, a person may wish to name their estate if all other beneficiaries do not survive. If the proceeds are to be a part of the estate to be distributed either by a Will or under Montana intestate (without a Will) statutes, then the following could be used:

My Estate.

CHARITABLE BENEFICIARIES

To name a charity as a beneficiary, contact the organization to ask for the official legal title and the address of the organization. Determine whether it is a 501(c)(3) charitable organization. Include all pertinent information, including the federal taxpayer identification number of the charity. This helps the financial entity find the correct charity at the time of the distribution. A person who wants to leave a bequest to the Montana 4-H Foundation could write:

The Montana 4-H Foundation P. O. Box 173580 Montana State University, Bozeman, MT 59717-3580 Federal Taxpayer Identification Number 23-7051460

TRUSTS

A trust is a legal arrangement where a person transfers property from personal ownership into the legal ownership of a trust. For example, Joe and Debbie Morton would transfer the home presently in their names as joint tenants with right of survivorship, to the name Joe and Debbie Morton Trust.

Two general types of trusts are **revocable trusts** and **testamentary trusts**. A revocable trust is just what the name implies – one created during a person's life. A person can change the trust or end it at any time up until death. If a settlor wants to name the trustee of a revocable trust as beneficiary, they should use the full name of the trustee. If a bank or trust company is the named trustee, use the full, correct name, as well as the address. A beneficiary designation for the John F. Smith Family Trust could read:

John F. Smith, trustee, of the John F. Smith Family Trust, his successor, or successors in trust, under agreement executed by John F. Smith on August 20, 2024, as amended, 205 Cutting, Bozeman, Montana 59715.

A **testamentary trust** is one created by a person's written Will or within a revocable trust. It does not become effective until the person who created it dies, and the Will goes through the probate process. A person could use the following language as a beneficiary designation in a testamentary trust:

Gayle Y. Smith, trustee of the testamentary trust created by my Will, her successor, or successors in trust. If the financial entity receives evidence that no trustee can qualify or if the financial entity has not been given satisfactory evidence a trustee has qualified, then to my estate.

UNEQUAL SHARES

A person may request the financial entity to pay the proceeds in unequal shares to multiple beneficiaries. Because the value of the assets may differ from the amount when the beneficiary designation was made and the time the person dies, the proceeds could be divided into fractions or percentages rather than dollar amounts.

Example: Bruce Smith has a universal life insurance policy with a value of \$100,000. If he passed away today, he wants \$75,000 to pass to his wife and the remaining \$25,000 to pass to his daughter. Bruce should decide how he wants the proceeds to be divided, if the value of the policy would grow, for example, to \$120,000 by the time of his passing. Instead of using dollar amounts, Bruce could use percentages or fractions in his beneficiary designation:

75% to Carol A. Smith, my wife, and 25% to Jennifer L. Smith, my daughter. If either beneficiary predeceases me, the beneficiary's share shall be paid to the surviving beneficiary. If both beneficiaries predecease me, the proceeds shall be paid to the Montana 4-H Foundation. P. O. Box 173580, Montana State University, Bozeman, MT 59717-3580, Federal Taxpayer Identification Number 23-7051460.

COMMON DISASTER CLAUSE

Montanans who are concerned about the possibility that they and a beneficiary may die simultaneously or because of a common accident often include a common disaster clause in the contract. If there is a common disaster clause, it will apply if the individual and the beneficiary die within a period specified in the clause, regardless of the cause of death.

Montana law imposes a 120-hour (5-day) survival requirement. If a common disaster clause does not mention a survival time and a beneficiary dies within 120 hours of the decedent, the beneficiary will be presumed to have died before the deceased.

1. **Regular common disaster clause.** This clause keeps the proceeds (e.g., life insurance policy) from being subject to federal estate taxation in two estates, first in the insured's and then in the beneficiary's, when both die because of a common accident:

If any beneficiary dies simultaneously with the insured, or within (any number of days, typically 180) days thereafter, but before due proof of the insured's death is received at the financial entity's home office, the proceeds shall be paid as though the beneficiary had predeceased the insured.

2. Reverse common disaster clause. This clause is often used on life insurance beneficiary designations. The clause reverses the presumption created by Montana statute that the insured survived the beneficiary if their deaths were, in fact, simultaneous. The reverse common disaster clause is often used when the insured and the beneficiary are married and only if the insured's estate is in a federal estate tax bracket (up to \$13,990,000 in 2025).

To save on federal estate taxes, the insured cannot be the owner of the life insurance policy. For example, a wife could be the owner of an insurance policy on her husband's life. She can also be the beneficiary. The husband is the insured. Typical wording in a reverse common disaster clause could be:

If the beneficiary and the insured die and there is no sufficient evidence that they died other than simultaneously or within 120 hours of one another, then it shall be presumed that the beneficiary survived the insured, and the proceeds shall be payable as if the beneficiary had survived the insured but died before receiving payment.

MARRIED COUPLES

The Employee Retirement Income Security Act (ERISA) has special rules for beneficiary designations on pension plans for married couples. These rules, however, do not apply to Individual Retirement Accounts (IRAs) or to Montana Medical Savings Accounts.

If an employee dies before receiving pension benefits, the surviving spouse is automatically presumed to be the beneficiary. If the employee wishes to select a beneficiary other than a spouse, the spouse must consent in writing and have their signature witnessed by a notary or plan representative.

DIVORCED COUPLES

Montana law (Mont. Code Ann. §72-2-814) says a divorce revokes any revocable disposition to a former spouse in a **governing instrument** executed before the divorce. Examples of governing instruments include life insurance policies, annuity policies, and retirement benefit forms.

Couples should examine their beneficiary designations on their contracts before and after the divorce to ensure the individuals they want to receive the assets are named as beneficiaries. A person can expressly provide for a former spouse to receive the assets if noted in a contract or beneficiary designation signed and dated AFTER the marriage dissolution decree.

Example: Montana residents Donna and Ron were divorced on April 1, 2024. In January 2025, Ron still had Donna listed as the beneficiary on his life insurance policy. If Ron were to die, the proceeds would pass as though Donna had refused the proceeds. In other words, the treatment would be the same as if Donna had predeceased Ron, and the life insurance proceeds would then pass to his successor beneficiaries, Ron's two children. If Ron wants his former wife, Donna, to receive the life insurance proceeds, he must complete a new beneficiary designation form. The form should be dated and signed after the marriage dissolution decree, which in his case was April 1, 2024.

Tax deferred accounts: Traditional IRA, 401(k), 403(b), 457(b) Plan

The rules for taxable distributions from these types of accounts are complex. Owners should discuss with their financial and legal advisors alternate distribution options for beneficiaries wanting to spread taxable distributions over several years. Such action would save state and federal income taxes for the beneficiary.

Settlement methods

Life insurance and annuity contracts allow owners to choose the settlement method in which the beneficiary can collect proceeds. For example, the owner of a deferred annuity contract may say the beneficiary's only way is to claim the proceeds in the form of an annuity over a period of no less than five or 10 years. This can have the benefit of spreading the income to the beneficiary over time.

Summary

Montanans should review their beneficiary designations before and during their marriage, upon divorce, upon the death of a spouse or beneficiary, upon the birth of a child, or if a beneficiary's name changes. When a person dies, a beneficiary living at the time has a right to the proceeds covered by the contract. For example, a grandson named as a POD on his grandmother's certificate of deposit cannot cash it in while she is still living. The grandson receives the money only after his grandmother dies.

A person who wants to change a beneficiary designation must make a request to the financial entity for a beneficiary designation change form. After completing the form, the beneficiary change is effective. Most forms say the change revokes any beneficiary designations made previously under their contract.

People can choose the wording for their beneficiary designations on most contractual arrangements. Tax planning for qualified pension and profit-sharing plans is complicated, so the advice from competent professionals, such as an insurance agent, a certified public accountant, a certified financial planner, or an attorney, may be useful.

Acknowledgments

Representatives from the following organizations and agencies have reviewed this MontGuide. They recommend its reading by those who want to know more about beneficiary designations.

- State Bar of Montana Business, Estates, Trusts, Tax, and Real Property Section
- Montana Credit Union Network
- National Association of Insurance and Financial Advisors Montana Chapter

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