

IN THE CHANCERY COURT OF HANCOCK COUNTY, MISSISSIPPI

HANCOCK COUNTY DEPARTMENT OF HUMAN SERVICES, BY
MARGIE SHELTON, AND DALTON EUGENE RICHARDSON, DYLAN
RAY RICHARDSON AND MADISYN REESE RICHARDSON, MINORS,
BY AND THROUGH THEIR NEXT FRIEND, MARGIE SHELTON PETITIONERS

VS. CIVIL ACTION, FILE NO. C2301-13-0053(2)

MICHELLE BLANCHE RICHARDSON AND DONALD EUGENE
RICHARDSON RESPONDENTS

AND

RANDALL SCOTT BROWN AND TAMARA NICOLE BROWN

ORDER GRANTING MICHELLE BLANCHE RICHARDSON'S
THIRD AMENDED COMPLAINT

THIS CAUSE having come on to be heard January 18th and 19th, 2018, on the *Third Amended Complaint* filed by the Respondent, MICHELLE BLANCHE RICHARDSON, and the Court, having reviewed the pleadings, hearing the testimony, and being fully advised in the premises, finds as follows:

1. Following a seven-day trial, on December 12, 2013, this Court entered its *Judgment Terminating Parental Rights* as to Plaintiff/Respondent, MICHELLE BLANCHE RICHARDSON (hereinafter "Michelle") and her ex-husband, DONALD EUGENE RICHARDSON.

2. The three minor children born to Mr. and Ms. Richardson were subsequently adopted by their foster parents, RANDALL SCOTT BROWN and TAMARA NICOLE BROWN (hereinafter "the Browns") in a separate cause of action in the Chancery Court of Pearl River County on August 26, 2014. Tamara Nicole Brown is Michelle Richardson's cousin.

3. On July 1, 2015, nearly nineteen (19) months following the termination of her parental rights, Michelle filed her *Complaint and/or Motion to Set Aside Judgment Terminating*

Parental Rights of Michelle Blanche Richardson. Prior to the filing of any responsive pleading, Michelle filed an Amended Complaint on July 13, 2015.

4. Michelle's *Amended Complaint* sought relief from this Court under M.R.C.P. 60(b)(6) and further requested temporary relief in the form of visitation with the minor children.

5. In its *Order Denying Temporary Relief*, dated December 4, 2015, this Court denied Michelle's request for visitation with the minor children, as she no longer enjoyed standing as a parent to request such relief. Citing M.R.C.P. 82, it further gave the parties leave to amend their pleadings after a proper transfer of venue from Pearl River County Chancery Court if they chose to pursue claims relating to the adoption as a matter ancillary to the termination proceeding.

6. On December 10, 2015, Michelle served the Browns with Combined Discovery Requests. She thereafter filed a *Motion to Deem Requests Admitted* (one for Randy Brown and one for Tamara Brown) and a *Motion to Compel and for Sanctions*. In turn, the Browns filed a *Motion to Dismiss and for Sanctions* and a *Motion for Protective Order and for Sanctions*.

7. On March 16, 2016, Michelle brought her discovery motions for hearing. The Court thereafter entered an order, stating that the Requests for Admission propounded to the Browns were deemed admitted as a matter of law but could be withdrawn upon proper motion. The order further mandated the Browns' remaining discovery responses by March 30, 2016, but noted that those responses could include objections.

8. On April 18, 2016, Attorney Cynthia Dubrow filed her first of two Motions to Withdraw from representation of Randall Scott Brown.

9. On June 8, 2016, Michelle filed her *Second Amended Complaint and/or Motion to Set Aside the Judgment of Termination of Parental Rights of Michelle Blanche Richardson and to Set Aside the Subsequent Adoption of the Minor Children at Issue*. The Complaint was amended

to include a request that the adoption in Pearl River County be set aside pursuant to M.R.C.P. 60(b)(1), (4), and (6).

10. The matter proceeded on January 17, 2017, on the Browns' *Motion to Dismiss and for Sanctions*, *Motion for Protective Order and for Sanctions*, and Ms. Dubrow's *Motion to Withdraw* from representation. The Court subsequently issued an order on January 20, 2017. Specifically, the Court ***vacated*** part of its previous *Order Denying Temporary Relief*;¹ ***denied*** the Browns' motion for dismissal as parties; ***denied*** Michelle's motion for disqualification of the Browns' attorney; ***granted*** the Browns' *Motion to Dismiss* pursuant to M.R.C.P. 12(b) ***in part***, specifically dismissing ***with*** prejudice any claims related to fraud upon the Court by the Department of Human of Services and dismissing ***without*** prejudice the remainder of Michelle's *Second Amended Complaint*; ***denied*** the Browns' *Motion for Protective Order* as it related to the termination of parental rights cause but ***granted*** it in relation to the adoption cause; ***granted*** the motion for withdrawal by the Browns' attorney; and ***reserved ruling*** on any sanctions related to these various motions.

11. On March 2, 2017, Michelle filed a *Motion to Amend Complaint*, which was heard on July 7, 2017, and granted by Order on July 12, 2017. Michelle thereafter filed her *Third Amended Complaint* on July 17, 2017.

12. The matter came before the Court on January 18th and 19th, 2018. Michelle was present and represented by counsel, namely, Thomas W. Teel, Anna Ward Sukmann, and Jeremy Eisler. Kimberly Henry was present on behalf of the Department of Child Protection Services, formerly the Department of Human Services, as was Ann Clark Lazzara, the Guardian *ad litem* for

¹ Namely, the Court vacated its requirement that Michelle seek a transfer of venue from Pearl River County, where the children's adoption occurred. The Court vacated this mandate since Ms. Richardson was not a party to the adoption and therefore lacked standing to make such a request.

the termination proceeding.² The Browns were not present nor represented by an attorney, despite being properly noticed to appear.³

DISCUSSION

13. In her *Third Amended Complaint*, Michelle seeks relief pursuant to M.R.C.P. 60(b)(1), 60(b)(6), and 60(b)(4). Specifically, Michelle alleges that a “combination of actions and omissions at both Youth Court and Chancery Court... misled the trial court and created a fraud on the court.” She further alleges that the termination proceedings were inconsistent with due process of law, rendering the judgment void.

14. Having reviewed and considered the record, the testimony of witnesses and arguments of counsel, the parties’ post-trial briefs, and applicable law, the Court finds that the specific facts of this case rise to the level of being “extraordinary and compelling” such that justice requires the *Judgment Terminating Parental Rights* be set aside. Michelle’s *Third Amended Complaint* is therefore **GRANTED**, for the reasons more fully stated herein.

Summary of Facts

15. Michelle Richardson’s problems began when she became addicted to prescription painkillers with her now ex-husband, Donald Richardson, in 2009. Up to that point, it is undisputed that Michelle was an involved and loving mother to her three children. Michelle admitted that her addiction escalated quickly, ultimately resulting in her intravenous use of Dilaudid and arrest for shoplifting, possession of narcotics, and embezzlement. As a result of these charges, Michelle served five months in prison and was thereafter sentenced to probation.

² Kimberly Henry did not represent the Department at the original termination of parental rights hearing, as the Court noted on the record.

³ The Browns made no appearance, either in person or via court filing, following withdrawal of their counsel on January 20, 2017.

16. Due to her incarceration, in December 2009, Michelle granted what was supposed to be a temporary guardianship to her parents, Russell and Melanie Thomas, in the Chancery Court of Jackson County in Cause No. 2009-2821-CB. Upon her release in 2010, Michelle moved in with her parents and children and subsequently moved with the children to Diamondhead. Michelle's parents asked their attorney to dissolve the guardianship; however, due to his inaction, it remained in place and was never terminated, unbeknownst to either Michelle or her parents.

17. Despite the severe repercussions of her drug use, Michelle maintains that her addiction spanned only a six-to-eight-month window. Upon moving to Hancock County, she was no longer using drugs and was regularly reporting to her probation officer. Sometime in February or March of 2011, Michelle was contacted by local authorities in relation to a prescription forgery charge. It was at this point that Randy Brown, the husband of Michelle's cousin and a Biloxi Police Department investigator, became involved in Michelle's interactions with her probation officer. Trusting Randy's assurances, as a relative and law enforcement officer, Michelle met with the Hancock County authorities, who insisted that her husband, Donald, was their real target. Michelle was held overnight and released without being charged when Donald turned himself in at her behest. Upon release, Michelle's probation officer warned her that the charges could still be brought against her if she did anything to violate her probation.

18. Despite being released without a charge, Michelle's overnight stay nevertheless triggered action by the Department of Human Services. On the day Michelle went to speak with the authorities, Michelle's mother had the children and was told to bring them to the police station, at which point they were taken into DHS custody. The details as to what spurred DHS's removal of the children are unclear, but drug screens reflect that Michelle and her immediate family were all tested for illegal substances on March 1 and March 2, 2011, and the children thereafter placed with

her parents. **Importantly**, Michelle's urine screen and hair follicle test were negative, and these results were **not** introduced as evidence at Michelle's termination proceeding in 2013.⁴

19. Michelle entered into a Service Agreement with DHS in May, 2011.⁵ As part of their agreements, Donald and Michelle Richardson were to comply with reporting requirements, drug screens, and child support payments.

20. Michelle worked with DHS to visit her children while they were in the physical custody of her parents, eventually doing overnight visitation and then remaining around the clock when her mother, Melanie Thomas, was diagnosed with terminal cancer. In the weeks leading up to her mother's death, Randy and Nicole Brown, who lived near Michelle's parents, often helped out with the Richardson children, allowing them to stay in their home and getting them to school with their own children. Michelle accepted this help from the Browns as benevolence from supportive family members.

21. When Melanie Thomas passed away in November 2011, Randy Brown suggested Michelle check herself into Jacob's Well, a rehabilitation center in Pearl River County to which his family had connections. Michelle reluctantly agreed to go, given the stress and grief she was experiencing, in spite of the fact that she was no longer abusing narcotics. She also agreed to let Randy and Nicole Brown care for her children during this period.

22. Michelle reported having a positive experience at Jacob's Well. Unfortunately, it came to an abrupt end when she was dismissed one evening in March of 2012. Michelle represented that she was due to celebrate her ninety-day awards ceremony with her family in attendance, confirmed to

⁴ See Exhibit 25. These drug screens were discovered in the court file at the 2018 hearing by the attorney now representing DHS. They had not been previously produced to the Court by DHS's former attorney, Bill Rosamond, at Michelle's termination proceeding.

⁵ Exhibit 4. "Discussions of Reasons for Service" listed "Parents were arrested on drug related charges."

her by staff the day before. Instead, however, Michelle was kicked out, left by center employees at a gas station with her belongings stuffed in two garbage bags.⁶ She was picked up there by her sister, with whom she subsequently stayed in a neighboring state.

23. As the result of conversations she had with Randy Brown, some of which occurred in her sister's presence, Michelle voluntarily went to the office of her probation officer two days before she was scheduled to appear in Youth Court. Acting on Randy's promise that her probation officer was aware of the changes in her situation, Michelle presented herself for the purpose of helping the police set up Ronald, as indicated by Randy. Unfortunately, Randy Brown lied to Michelle's probation officer reporting that Michelle was hiding out in Louisiana, doing drugs, and was turning herself in.

24. Michelle was immediately arrested and thereafter appeared in Youth Court, without an attorney, and dressed in a prisoner's jumpsuit. Randy Brown, who was fostering Michelle's children and professed to be helping Michelle throughout her probation, testified against her while wearing his official police badge.

25. By the time Michelle's case arrived in chancery court, her probation had been revoked and she was serving time in prison. Michelle requested and received a continuance at the initial hearing on May 24, 2013. The matter was re-set by order to August 8, 2013, and moved again to September of 2013. Michelle denied receiving copies of various re-set orders and reported receiving last-minute notice for her court appearances. She also claimed that issues with prisoner transport

⁶ Conflicting reasons were provided by Jacob's Well for Michelle's dismissal. DHS presented five "Disciplinary Forms" issued by the center as Exhibit 24 on September 11, 2013. Michelle questioned the legitimacy of these forms. Regardless, the letter dated February 27, 2012, marked as Exhibit 6 on August 8, 2013, stated that Michelle was asked to exit the program due to information obtained from outside sources, namely, Randy Brown and other family members.

between Hancock and Rankin counties interfered with the alcohol and drug treatment program to which she was sentenced, extending the overall length of time she was incarcerated.

26. On the date the matter proceeded for trial in chancery court, Michelle again recognized her need for counsel but denied having the funds or ability to obtain a lawyer while in prison. The Court sustained DHS's objection to Michelle's continuance and proceeded with the trial without further inquiry into Michelle's financial position or a *Lassiter* analysis.

27. The trial took place over the days of August 8, September 6, September 9, September 11, September 12, September 13, and September 16, 2013. The bench ruling issued at the trial's conclusion was thereafter reduced to writing in the *Judgment Terminating Parental Rights*, filed December 12, 2013.

28. As set forth in the *Judgment Termination Parental Rights*, Michelle's rights were terminated for the following reasons:

- (i) substantial erosion in the relationship between her and the minor petitioners, pursuant to Miss. Code Ann. § 93-15-103(3)(f);
- (ii) failure to fully implement her service plan with the Department of Human Services such that the child caring agency was unable to return the minor children, pursuant to Miss. Code Ann. § 93-15-103(3)(d)(ii);
- (iii) failure to eliminate ongoing behavior, which prevented placement of the minors with her, in spite of diligent efforts by the Department of Human Services to assist her, pursuant to Miss. Code Ann. § 93-15-103(3)(e)(ii);
- (iv) ongoing behavior as the result of a diagnosable condition, namely, drug addiction, unlikely to change within a reasonable time, which made her unable to

assume minimally acceptable care of the minors, pursuant to Miss. Code Ann. § 93-15-103(3)(e)(i);

(v) an adjudication of neglect by a court of competent jurisdiction, which also determined that reunification would not be in the minors' best interest, pursuant to Miss. Code Ann. § 93-15-103(3)(h).

Findings of Fact and Conclusions of Law

29. While the Court maintains it took many reasonable steps to ensure a fair trial for Michelle, it nevertheless finds a confluence of fraudulent activity, its full extent previously unknown to the Court, resulted in a miscarriage of justice for which the only remedy is to set aside its prior Judgment terminated Michell's parental rights.

30. Rule 60(b) provides as follows:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) fraud, misrepresentation, or other misconduct of an adverse party; (2) accident or mistake; (3) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; (6) any other reason justifying relief from the judgment.

The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than six months after the judgment, order, or proceeding was entered or taken.

As previously stated, Michelle brings her motion under reasons (1), (4), and (6).

31. Specifically, Michelle argues that the Department of Human Services, in a dereliction of duty, failed to inform the Court of the need for a hearing regarding Michelle's indigency and right

to court-appointed counsel pursuant to *Lassiter v. Department of Soc. Servs.*⁷ Michelle claims that DHS's failure in this regard amounted to a fraud upon the Court.

32. Michelle also cites *Lassiter* in her assertion that the judgment is void, pursuant to M.R.C.P. 60(b)(4), owing to the violation of her due process rights. She further claims that a *Lassiter* analysis would have been outcome-determinative in her case; specifically, that an attorney would have more effectively questioned witnesses, conducted discovery, and raised proper objections, all leading to exposure of necessary facts.

33. In response, the Department of Human Services contends that Michelle's claim for relief under M.R.C.P. 60(b) is untimely, with her initial complaint filed nearly nineteen months after entry of the judgment. DHS further challenges the merits of Michelle's claims, disputing any fraud by DHS and contesting the requirement of a *Lassiter* hearing at the time Michelle's case was heard in 2013.

34. Randy and Nicole presented no defense or response to Michelle's allegations.

Fraud Upon the Court

35. "Relief based on 'fraud upon the court' is reserved for only the most egregious misconduct, and requires a showing of 'an unconscionable plan or scheme which is designed to improperly influence the court in its decision.'"⁸ It falls within the "catch-all" provision of Rule 60(b) and may only be utilized under exceptional and compelling circumstances.⁹ Further, a simple failure to disclose essential facts to the adverse party or the court does not rise to the level of fraud.¹⁰ There must be a finding of intent.¹¹ Specifically, "a trial court must find both that a witness

⁷ 452 U.S. 18, 31, 101 S. Ct. 2153 (1981).

⁸ *Trim v. Trim*, 33 So. 3d 471, 477 (Miss. 2010); *Betts v. Betts*, 224 So. 3d 94, 98 (Miss. 2016).

⁹ *Id.* at 475; *In re Guardianship of McClinton*, 157 So. 3d 862, 870 (Miss. 2015).

¹⁰ *Finch v. Finch*, 137 So. 3d 227, 235 (Miss. 2014).

¹¹ *Id.*

intended to misrepresent some fact in order to influence the decision by the finder of fact, and that the finder of fact did rely upon the misrepresentation in its decision.”¹² This misconduct must be proven by clear and convincing evidence.¹³ Furthermore, while a motion for relief from a judgment obtained as the result of fraud by an adverse party must be brought within six months, a substantial misrepresentation of facts upon which a judgment is based is “a fraud on the court, for which there is no limitation of time restricting the court from affording a remedy.”¹⁴

36. The Court finds Michelle’s claims of fraud by DHS for its failure to point out the necessity of a *Lassiter* hearing to be tenuous. In *Lassiter*, the Supreme Court held that the appointment of counsel in termination of parental rights hearings is advisable but not mandatory, and courts should determine the need for court-appointed counsel on a case-by-case basis.¹⁵ For this analysis, the court should consider whether the presence of counsel would make a determinative difference in light of 1) allegations of abuse or neglect upon which criminal charges may be based; 2) expert witness testimony; or 3) specially troublesome points of law, either procedural or substantive.¹⁶

37. Michelle contends that *Lassiter* had been in effect for decades at the time of her hearing, and pursuant to relevant case authority in Mississippi, should have entitled her to a hearing in the interest of safeguarding her due process rights as the natural mother to the three minor children.¹⁷

38. At the time of Michelle’s trial, this Court did in fact grant Michelle a continuance for the purpose of retaining counsel on May 24, 2013. While it was clear to the Court that Michelle was

¹² *Stringfellow v. Stringfellow*, 451 So. 2d 219, 221-2 (Miss. 1984); *Williamson v. Williamson*, 964 So. 2d 524, 528 (Miss. 2007).

¹³ *Moore v. Jacobs*, 752 So. 2d 1013, 1018 (Miss. 1999); *Washington v. Patlis*, 916 F. 2d 1036, 1039 (5th Cir. 1990); *Winner v. CSX Transp., Inc.* 100 So. 3d 478, 484 (Miss. Ct. App. 2012).

¹⁴ *Roberts v. Lopez*, 148 So. 3d 393, 399 (Miss. 2014), citing *Trim v. Trim*, 33 So. 3d 471, 473 (Miss. 2010).

¹⁵ *Lassiter v. Lassiter*, 452 U.S. 18, 31, 101 S. Ct. 2153 (1981).

¹⁶ *Id.*

¹⁷ Michelle cites the case of *Pritchett v. Pritchett*, 161 So. 3d 1106 (Miss. Ct. App. 2015), as well as a number of extrajurisdictional cases.

incarcerated, she nevertheless did not cite indigency as the driving force behind her request for a continuance, stating that she “just need[ed] more time” to finish her alcohol and drug treatment program and was hopeful she would be released on probation.¹⁸ The Court granted Michelle a continuance for sixty days for the purpose of retaining counsel.

39. Roughly four months elapsed before the parties were again in court, well beyond the sixty days initially allotted to Michelle. When she requested another continuance, again citing her incarceration, and only then noting insufficient funds to retain an attorney, the Court weighed Michelle’s indefinite period of incarceration against the children’s need for permanency and denied her request. While the Court will address this decision more fully *infra*, it does not find that DHS committed a fraud upon the Court in not insisting that a full hearing be conducted. This was a decision within the Court’s discretion.¹⁹

40. The Court does find, however, that third-party interference from Randy Brown tainted the proceedings on a much deeper level than it previously addressed in its bench ruling and subsequent *Judgment Terminating Parental Rights*. Notwithstanding other extraordinary circumstances, Michelle would not have been before this Court without Randy Brown’s manipulation, campaign of misinformation, and influence, all ultimately construed to perpetrate a fraud upon this Court, carried out to its conclusion by the Department of Human Services.

41. In its bench ruling concluding Michelle’s termination hearing, the Court addressed these issues as follows:

And I found that third-party interference did play a part in that, and that the Richardsons may feel, and may feel rightly so, that they were wronged by family members or deceived by family members in this regard, but I do not find that the actions of third-parties actually caused the erosion in the relationship between the parents and the children here. Again, that erosion had already begun due to the

¹⁸ Excerpt of proceedings, May 24, 2013.

¹⁹ *K.D.G.L.B.P. v. Hinds County Department of Human Services*, 771 So. 2d 907, 910 (Miss. 2000).

circumstances that led the children to be taken into the Department of Human Service's custody in the first place and to go through the Youth Court proceedings, which required the involvement of family members, etc. So this was already ongoing before Mr. Brown ever came into the picture. And that erosion in the relationship between the parents and the children started, at least at that time, if not before, but it was due to the drug use that was going on heavily in the home, especially in 2010, if not before. So Mr. Brown's actions in 2012, while there is maybe a legitimate question about whether or not his actions were self-serving or could be seen to be that way in the eyes of Mr. and Mrs. Richardson, they nevertheless were not the cause of the erosion that had begun to take place already between the parents and the children.

Further, there was no evidence that even if the Court took all the allegations that the Richardsons made between them as true regarding not only Randy Brown, but possibly other family members through telephone calls to probation officers or whatnot in orchestrating the revocation of Ms. Richardson's probation or the arrest of Donald Richardson...nevertheless, those things did not establish that the Richardson's had successfully eliminated their ongoing drug addiction.

So let me explain that a little bit more. It's true that Ms. Richardson had tested clean on drug screens while she was at Jacob's Well, that Donald Richardson also had clean drug screens. And this is true, witnesses testified to that, however, I think we all know sitting here today, and maybe the Richardsons better than any of us do, that just testing clean on those few drug screens in those few months, while that is progress, it does not establish that the ...drug addiction had been eliminated.

So although Ms. Richardson's probation was revoked, let's say, a month after she was discharged from the Jacob's Well program, even if that probation was somehow orchestrated by other people, nevertheless, there was no evidence that her addiction was eliminated at that point in time.²⁰

42. What the Court was unaware of at the time, however, and what Michelle did not have in her possession, were additional clean drug screens, including one taken *on the day CPS removed the children from her custody*.²¹ In fact, these drug screens were not discovered until January 18, 2018, when the attorney representing DHS found them in the case file. They had not been introduced, marked, or considered as evidence during Michelle's termination hearing.

²⁰ Transcript of proceedings held September 16, 2012, pp. 10-12.

²¹ Exhibits 20-24, January 19, 2018.

43. The only drug screens produced at Michelle's termination hearing spanned a seven-month period in 2011, with one administered in April, two in September, and one in November.²² All of the results reflect a "non-negative" result for opiates.²³ Importantly, however, as noted on the results and confirmed by her pharmacy records, these opiates were prescribed to Michelle as the result of medical procedures she was undergoing during this time.²⁴

44. The newly-produced drug screens reflect that Michelle had a negative urine screen on March 1, 2011; a negative hair follicle test on March 2, 2011; a non-negative for Opana ER on June 20, 2011; was a no-show on October 28, 2011; and had a negative urine screen on November 8, 2011.²⁵ The Court also notes that Michelle had no positive drug screens during her time at Jacob's Well.²⁶

45. These results have a profound effect on the Court's analysis of Michelle's right to relief. First, they call into question the Court's previous findings regarding Michelle's length of sobriety, a crucial aspect of the Court's decision to terminate her parental rights. Her negative hair follicle test on March 2, 2011 corroborates Michelle's testimony that she was no longer using drugs at the time her children were taken and had not for some time prior. This means there was evidence that Michelle had not been abusing illegal drugs for roughly two and a half years prior to the termination of parental rights.

46. On a larger scale, the March 2011 drug screens call into question why Michelle's children were taken into DHS's custody at all. This is a situation for which there is still no clear answer, as evidenced by Michelle's response to the Court's questioning at her most recent hearing:

²² Exhibit 5, August 8, 2013.

²³ Except for the test administered September 30, 2011, for which Michelle "could not provide a sample." *Id.*

²⁴ Exhibit 18, September 9, 2013. Transcript of proceedings held January 19, 2018, pp. 72-74.

²⁵ Exhibits 20-24, January 18-19, 2018. Michelle explained in her testimony that the no-show was excused by DHS as a result of her mother's decline in health. See Transcript of Proceedings, January 19, 2018, p. 93.

²⁶ Exhibit 6, August 8, 2013.

Q: Are you saying that DHS placed the children in custody on March 1st?

A: I honestly don't know. Because he kept me in jail.

Q: So you were released on March 2nd, you said?

A: Yes ma'am.

...

Q: Where were the children on March the 2nd?

A: With my mother.

Q: Why weren't they with you?

A: Heather told me that I would have to go to court to get them back.²⁷

Q: Okay. So they were in custody and placed with your mother, is what you were told by DHS?

A: I guess. I don't know if those were the exact words because I really didn't understand. I knew they were with my mom because at first I didn't know that they were in the custody of the state, I just thought they were with my mom. And they were, you know, we would have to go to court. I didn't understand the process.

...

Q: And when did you go to court, youth court?

...

A: I think the same month, but I honestly don't know. I've been in court so many times I honestly don't know.

Q: **But this is the first time the children had been taken into custody?**

A: **Yes.**

...

Q: Okay. So at that time did they tell you that you had tested positive?

A: No. I didn't test positive.

Q: I know. But why did they take the children into custody then?

A: I honestly do not know. I came out and asked Heather the same thing standing right there in between the two FEMA trailers. I said I did not get arrested, can I have my kids, and she said no, you can't, we'll see you in court. And I'm like okay.

Q: So you went to court?

A: Yes. But not right then.

Q: What happened in court?

A: They said we had to go through this whole big ordeal with getting the kids back, that I couldn't have them, I had to have visitation at DHS, and that's what I had to do.²⁸

²⁷ Michelle identified "Heather" as a DHS employee. Based upon the *Supplemental Guardian Ad Litem Report*, Exhibit 36, September 16, 2013, it is believed to be Youth Court GAL Heather Jackson.

²⁸ Transcript of proceedings, January 19, 2018, pp. 82-85.

47. Now, having again reviewed the evidence presented at Michelle's termination hearing without the benefit of newly-discovered exculpatory evidence, it is clear this Court's 2013 ruling was predicated on the mistaken belief that DHS became involved with the Richardsons *during, and as the direct result of*, their drug use. This was *not* the case. Acknowledging that Michelle's arrest and release would not have occurred without her prior drug use and criminal record, DHS's involvement was nevertheless an *indirect* result of Michelle's *former* drug use. This involvement was subject to manipulation by outside actors, particularly Randy Brown, and eventually culminated with the termination of Michelle's parental rights.

48. In fact, the full scope of Randy Brown's influence is only evident in hindsight. Not only did he manipulate Michelle by pretending to advocate on her behalf to her probation officers, he misled Michelle's family members, namely, her father and sister, regarding Michelle's drug use and made promises that her children would not be alienated from her or her family so long as they all cooperated with him.²⁹ As a consequence of Randy's influence with her family, Michelle was dismissed from Jacob's Well, as indicated in its letter of February 27, 2012: "Michelle was asked to exit our program after we conformed [sic] (on several different occasions) information given to us from her sister, father, and Randy Brown (who has her children)."³⁰ This dismissal from Jacob's Well was then incorrectly cited in Michelle's Violation Report Form as a voluntary check-out for not wanting to follow the rules.³¹ The next sentence of this report form states, "Offender's family member called and stated that she is hiding out in Louisiana and back using drugs."³² The direct

²⁹ Transcript of proceedings, January 19, 2019, pp. 99-11.

³⁰ Exhibit 6, August 8, 2013.

³¹ Exhibit 21, September 11, 2013.

³² *Id.*

result of this report by Randy Brown was the revocation of Michelle's probation, leading to her arrest and incarceration immediately leading up to her first hearing in Youth Court.

49. Randy Brown went on to testify against Michelle in Youth Court and in chancery court, as did Michelle's father and sister, who both now admit obtaining their information as to Michelle's drug use from Randy, never having witnessed it themselves. As previously noted, Randy and his wife, Nicole, also gave information to DHS, Jacob's Well, Michelle's probation officer, and the Guardian *ad litem*.

50. Bearing this in mind, the Court recognizes that motions brought pursuant to M.R.C.P. 60(b) should not be utilized as tools to re-litigate a case.³³ The Court has considered the previous reports and testimony by the Guardian *ad litem*. With the exception of statements from Michelle's oldest child, Dalton, it appears the information supplied by and regarding the other two minor children was obtained through the Browns, who were fostering the children at the time of two (2) meetings with the Guardian *ad litem* in 2013. Dalton, now 18, has since left the Browns' care to return to his mother and, based upon the testimony of others, disputes his prior testimony to the Guardian *ad litem*. Witness statements further indicate that little to no background information was obtained regarding the Browns and their suitability to serve as foster parents. When considered as a whole, the Court cannot ignore that the majority of the information obtained by the Guardian *ad litem* was supplied by the Browns, either directly or indirectly through their Youth Court involvement. This acknowledgment, however, does not discount the credibility of the Guardian *ad litem*. She was truthful with the information she was given.

³³ A movant under Rule 60(b)(1) must "establish by clear and convincing evidence (1) that the adverse party engaged in fraud or other misconduct and (2) that this misconduct prevented the moving party from fully and fairly presenting his case." *Washington v. Patlis*, 916 F. 2d 1036, 1039 (5th Cir. 1990).

51. Likewise, the Court's new findings do not absolve Michelle of responsibility for her own actions. It is undisputed that she abused drugs, committed certain crimes, and failed to properly report to her probation officer. These were poor decisions on her part. Regardless, the newly-discovered drug screens serve to corroborate Michelle's testimony regarding her drug use, discredit the accusations against her, and bolster her assertion that a fraud was committed upon this Court.³⁴ Furthermore, courts are tasked with considering "'all the evidence' when determining whether termination of parental rights is warranted."³⁵ It is clear that neither this court nor the Youth Court of Hancock County were provided with *all* of the evidence and that both proceedings were tainted from their onsets.

52. The Court notes here that it previously dismissed with prejudice any claims regarding a fraud on the Court perpetrated by DHS. It further recognizes that the Browns were not parties to Michelle's termination proceeding.³⁶ The Court nevertheless finds that Randy Brown's actions were carried out with the intent of influencing both the Youth Court and Chancery Court tribunals and that both courts relied on his misrepresentations in their decision-making.³⁷ Going even further, there is no indication there would have been any DHS or court involvement *but for* Randy Brown's actions.

53. The Court would like to limit its allegations of fraud to Randy Brown and his misdeeds, believing that DHS largely acted in what seemed to be the Richardson children's best interests.

³⁴ See *Betts v. Betts*, 224 So. 3d 94, 98 (Miss. 2016) (quoting *Tirouda v. State*, 919 So. 2d 211, 216 (Miss. Ct. App. 2005): "[T]he trial court is best able to determine whether a fraud has been perpetrated upon it. As a result, the chancellor's determination of the issue is entitled to great weight." See also *Trim v. Trim*, 33 So. 3d at 479 (Miss. 2010): "The credibility of the witnesses and the weight of their testimony, as well as the interpretation of evidence where it is capable of more than one reasonable interpretation, are primarily for the chancellor as the trier of fact.")

³⁵ *A.B. v. Lauderdale Co. Dept. of Human Services*, 13, So. 3d 1263, 1268 (Miss. 2009) (citing Miss. Code Ann. 93-15-109, now codified as Miss. Code Ann. 93-15-119).

³⁶ The Court found that the Browns were necessary parties to this action in its *Order on Motion to Dismiss and for Sanctions, Motion for Protective Order and for Sanctions and Motion to Withdraw* on January 20, 2017.

³⁷ See *Williamson v. Williamson*, 964 So. 2d 524, 528 (Miss. 2007), citing *Stringfellow v. Stringfellow*, 451 So. 2d 219, 221-22 (Miss. 1984).

Nevertheless, the Court cannot ignore the fact that DHS failed to disclose exculpatory evidence which would have been detrimental, if not fatal, to its case against Michelle. For this reason, the Court VACATES its prior ruling dismissing claims of fraud perpetrated by DHS and finds that DHS was instrumental in carrying out the fraud orchestrated by Randy Brown. It did so by excluding the aforementioned evidence and failing to independently verify numerous facts, including Michelle's drug abuse history, Nicole Brown's personal and familial criminal history, and the validity of an in-tact guardianship.³⁸ As a result, the misrepresentations intentionally promulgated by Randy Brown were utilized by the Department of Human Services in its case against Michelle, and the Court unfortunately relied upon this set of facts to terminate her parental rights.³⁹

Due Process Violations Pursuant to *Lassiter*

54. All of these findings bring the Court to Michelle's due process claims under *Lassiter*. While Michelle points to more recent developments in Mississippi law which have extended the requirement of chancellors to conduct indigency hearings in termination of parental rights cases, there continues to be no absolute right to appointed counsel in termination cases.⁴⁰ Rather, courts must weigh, on a case-by-case basis, the litigant's indigency and whether (1) there are allegations of abuse or neglect upon which criminal charges could be based; (2) there is expert witness

³⁸ A trial court's decision to terminate parental rights must be supported by substantial, *credible* evidence. *In re V.M.S.*, 938 So. 2d 829, 837 (Miss. 2006), citing *G.Q.A v. Harrison Co. Dept. of Human Services.*, 771 So. 2d 331, 335 (Miss. 2000).

³⁹ See *Williamson v. Williamson*, 964 So. 2d 524, 528 (Miss. 2007) (citing *Stringfellow v. Stringfellow*, 451 So. 2d 219, 221-22 (Miss. 1984)).

⁴⁰ Michelle relies on the case of *Pritchett v. Prtichett*, a decision rendered in 2015. *But see Green v. Mississippi Dept. of Human Services*, 40 So. 3d 660, 664 (Miss. 2010) (citing *K.D.G.L.B.P. v. Hinds County Department of Human Services*, 771 So. 2d 907, 910 (Miss. 2000)); *Blakeney v. McRee*, 188 So. 3d 1154, 1161 (Miss. 2016).

testimony; (3) there are specially troublesome points of law; and (4) if the presence of counsel would make a determinative difference for the litigant.⁴¹

55. Bearing these factors in mind, “a judgment is void only if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law.”⁴² If a judgment is void, there is no discretion in the trial court, and the judgment must be vacated.⁴³ Even so, “a due process violation so gross as to make the judgment void is extremely rare.”⁴⁴ Due process is satisfied where there is notice and an opportunity to be heard.⁴⁵

56. The Court notes again that Michelle was initially afforded an opportunity to retain counsel, following her request for a continuance on May 24, 2013. At that juncture, Michelle mentioned only needing additional time, without any reference to her finances. When the parties reconvened on September 5, 2013, the following exchange occurred between Michelle and the Court:

Q: And you are still here without counsel?

A: Yes, ma’am.

Q: And you’re willing to go forward today?

A: I guess I’d have to.

Q: Are you requesting that this Court grant you a continuance?

A: I mean I’m just going to tell you, I graduate A&D on the 18th, and I’ll – I can – yeah, I would like to.

Q: On what grounds?

A: Just so I can get out and get an attorney to fight for these children. I would be finished, but every time I keep having to come down here, and I mean –

Q: What has prevented you from getting an attorney at this point?

A: Just being in prison and not having the funds while in prison to do it.

Q: All right. I’m going to deny that motion. And I want you to understand, as I explained last time, that this Court cannot give you or any party here any legal advice whatsoever. Do you understand that?

A: Yes ma’am.

⁴¹ *Lassiter*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981).

⁴² *See Overbey v. Murray*, 569 So. 2d 303 (Miss. 1990) (quoting *Bryant, Inc. v. Walters*, 493 So. 2d 933 (Miss. 1986)).

⁴³ *Bryant, Inc. v. Walters*, 493 So. 3d 933, 937 (Miss. 1986).

⁴⁴ *Id.* at 938.

⁴⁵ *Harvey v. Stone County school Dist.*, 982 So. 2d 463, 468 (Miss. 2008) (quoting *State v. Blenden*, 748 So. 2d 77, 90 (Miss. 1999) (citing *Mississippi Power Co. v. Goudy*, 459 So. 2d 257, 271 (Miss. 1984)).

57. Citing the case of *Blakeney v. McRee*, the Court finds that it erred in not making an on-the-record determination under *Lassiter* on whether Michelle was entitled to court-appointed counsel before allowing her to proceed *pro se*.⁴⁶ Regardless, this omission on its own is insufficient to find that Michelle's due process rights were violated.⁴⁷ The Court must consider all of the factors under *Lassiter* before making such a determination.

58. The Court does not find the first two considerations to be persuasive in Michelle's favor. Any allegations regarding abuse or neglect of the minor children were in relation to Michelle's drug abuse, for which she was already incarcerated. Therefore, there was no risk of exposure to criminal liability. There was also no expert testimony.

59. Of course, the most important factor, which overlaps to some degree with whether there were any specially troublesome points of law, is whether the presence of counsel would have made an outcome determinative difference.⁴⁸ Given the compelling set of facts surrounding Michelle's situation with her children, as outlined above, the Court finds that it would have.

60. The Court examined a number of cases for guidance on this issue, with the vast majority affirming the trial court's termination of parental rights over *Lassiter*-related assignments of error. Factually, there are portions of these cases that are similar to Michelle's, but the Court finds them more notable for facts which are distinguishable.⁴⁹ When considering the factor of whether the presence of counsel would have made a determinative difference, the appellate courts repeatedly

⁴⁶ 188 So. 3d 1154, 1160 (Miss. 2016).

⁴⁷ *Id.* The *Blakeney* court found that this failure by the chancellor was harmless error, as it was clear from the record that the appellant was given a fair and adequate hearing, and the presence of an attorney would not have made a difference. John Blakeney, like Michelle, was incarcerated at the time of his TPR hearing; however, Mr. Blakeney was charged with the murder of his children's great-grandparents.

⁴⁸ *Lassiter*, *supra*.

⁴⁹ *J.C.N.F. v. Stone County Dept. of Human Services*, 996 So. 2d 762 (Miss. 2008); *Green v. Mississippi Dept. of Human Services*, 40 So. 3d 660 (Miss. 2010); *Williams v. Williams*, 69 So. 3d 782 (Miss. 2011).

found overwhelming evidence supporting the termination of parental rights, particularly prior adjudications by the youth court.⁵⁰ In conjunction with the other factors, the appellate courts found no due process violations under *Lassiter*, finding that an attorney at the chancery court trial would be unable to change the factual history of the case, namely, prior adjudications by the youth court which served as the bases for termination.⁵¹

61. Similarly, this Court relied on the adjudications and recommendations by the Hancock County Youth Court as one ground for termination of Michelle's parental rights. While it is true that an attorney appointed in chancery could not have changed the procedural posture of the case, there is no question that his or her participation could have produced a different outcome for Michelle. With the aid of an attorney since her release, Michelle has been able to effectively file petitions, conduct discovery, and examine witnesses to set forth her allegations of fraud. Had she benefited from this assistance during her trial, the Court may have rightly called into question much of the evidence on which it previously based its decision to terminate her parental rights.⁵² Additionally, an attorney would have ensured that Michelle received proper notice of her court dates and likely would have streamlined the issues with prisoner transport, which caused delays in the completion of Michelle's court-ordered alcohol and drug treatment program and her subsequent release.

⁵⁰ *Id.*

⁵¹ *J.C.N.F. v. Stone County Dept. of Human Services*, 996 So. 2d 762 (Miss. 2008); *Williams v. Williams*, 69 So. 3d 782 (Miss. 2011).

⁵² Additionally, in the cases reviewed by the Court, there were no allegations or pieces of new evidence which undermined the credibility of the evidence presented at trial. Instead, there were parents who never requested a continuance or an attorney and continued to use drugs (*Green v. Miss. Dept. of Human Services*, 40 So. 3d 660, 2010); parents who sexually abused their children and whose finances were examined by the chancellor (*Williams v. Williams*, 69 So. 3d 782 (Miss. 2011)); and a mother who proceeded through youth court and chancery court without counsel but was not incarcerated (*J.C.N.F. v. Stone County Dept. of Human Services*, 996 So. 2d 762 (Miss. 2008)). The Court finds all of these facts to be distinguishable from those of Michelle's case.

62. The Court further finds that the details specific to Michelle’s case created troublesome points of law. In spite of the Court’s assistance in calling witnesses and eliciting testimony, Michelle could not effectively question or impeach witnesses without evidence collected prior to commencement of her trial, procedures in which she was obviously unversed.

63. In crafting its analysis of these factors, this Court is mindful of the Supreme Court’s guidance in *Lassiter*:

For all its consequence, “due process” has never been, and perhaps can never be, precisely defined. “[U]nlike some legal rules,” this Court has said, due process “is not a technical conception with a fixed content unrelated to time, place and circumstances.” *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 81 S. Ct. 1743, 1748, 6 L.Ed.2d 1230. Rather, the phrase expresses the requirement of “fundamental fairness,” a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what “fundamental fairness” consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.⁵³

Nevertheless, *Lassiter* does not create a blanket right, “it merely gives each indigent parent the right to have a determination made as to the need for counsel under the balancing test set forth in *Eldridge*.”⁵⁴

64. Using all of the guideposts as set forth above, this Court finds that its failure to conduct a hearing under *Lassiter* violated Michelle’s due process rights. The need for such a hearing should have been triggered when Michelle appeared before the Court and referenced having insufficient funds to retain an attorney while incarcerated. Rather than conducting any analysis into Michelle’s finances or possible deprivation of liberty, the Court proceeded with the hearing, believing that finality would be in the best interest of the children. It was error to do so.

⁵³ *Lassiter* at 24-25.

⁵⁴ *Rhoades v. Penfold*, 694 F. 2d 1043, 1050 (5th Cir. 1983).

65. While the Court considered whether this was an error which should have been taken on appeal as opposed to pursuing via Mississippi Rule of Civil Procedure 60(b), the Court's finding that it acted in "a manner inconsistent with due process of law" renders its *Judgment Terminating Parental Rights* void, as opposed to voidable.⁵⁵ This Court therefore has no discretion and must set the judgment aside as to Michelle.⁵⁶

66. Again, the Court finds Michelle's particular circumstances to be highly distinguishable from other Mississippi cases which have involved *Lassiter*-related challenges, namely for its deep level of third-party interference, questionable prosecution tactics by the Department of Human Services, and Michelle's persistence in regaining custody of her children. This judgment is therefore not intended to open the floodgates for every parent who takes issue with a court's decision to terminate his or her parental rights. This Court is in the unique position of re-examining an extraordinary set of facts and has not taken lightly its duty to do so fairly, bearing in mind the potential effects for each and every party involved.

Conclusion

67. For all of the foregoing reasons, the Court finds that its *Judgment Terminating Parental Rights* must be set aside as to Michelle Richardson. While the Court finds that Michelle has satisfied her burden of proving fraud upon the Court and nullity of the judgment pursuant to *Lassiter*, the totality of the situation would further entitle Michelle to relief under M.R.C.P.

⁵⁵ "The treatment of a 'void' judgment differs from that of a 'voidable' judgment. A void judgment is subject to both direct and collateral attack, while a judgment that is merely voidable must be corrected through ordinary appellate or other direct procedures....All errors other than jurisdictional defects render the judgment voidable rather than void and must be corrected on direct appeal." *Matter of Gober*, 100 F. 3d 1195, 1202-3 (5th Cir. 1996) (citing *Browning v. Placke*, 698 S.W. 2d 362, 363 (Tex. 1985)). *But see Bryant, Inc. v. Walters*, 493 So. 2d 933, 938 (Miss. 1986): "A judgments (sic) is void if 'the court that rendered it lacked jurisdiction of the subject matter of the parties, or if it acted in a manner inconsistent with due process of law.'"

⁵⁶ *Bryant, Inc. v. Walters*, 493 So. 2d 933, 937 (Miss. 1986).

60(b)(6).⁵⁷ The Court recognizes Michelle’s significant missteps as a parent; however, it cannot ignore the forces working against her as she tried to remedy her mistakes. In trusting the wrong people, Michelle positioned herself in an unfortunate situation where the cards were stacked against her. Without the safeguards afforded by *Lassiter*, Michelle could not establish the fraud which permeated her proceedings and ultimately resulted in the termination of her parental rights. The Court’s ruling herein, however, does not affect the termination of parental rights of Donald Richardson, who ultimately surrendered his parental rights at trial and did not join in Michelle’s instant motion.

68. Again, this Court acknowledges the gravity of its decision herein, ever mindful that “[n]ature gives to parents that right to the custody of their children which the law merely recognizes and enforces. It is scarcely less sacred than the right to life and liberty, and can never be denied save by showing the bad character of the parent, or some exceptional circumstances which render its enforcement inimical to the best interests of the child.”⁵⁸

69. Notwithstanding its decision to set aside its *Judgment Terminating Parental Rights*, the Court must still consider the best interest of the three minor children hereto. These children have been adopted and have been in the custody of third parties for roughly six years.⁵⁹ Although this judgment will effectively render the adoption judgment void, at least as to Michelle Richardson, this does not mean that custody will automatically vest with Michelle Richardson, nor does this Court have jurisdiction to explicitly void the adoption judgment. A question remains, because of

⁵⁷ See *Roberts v. Lopez*, 148 So. 3d 393, 399 (Miss. 2014): “[T]he totality of David’s actions justifies consideration of Liza’s motion under the broader umbrella of subsection (6) of Rule 60(b): ‘[A]ny other reason justifying relief from the judgment.’ While it is clear that David’s actions perpetrated a fraud upon the court, there is substantial evidence that he also manipulated and intimidated Liza throughout the process of obtaining the orders and judgments that Liza sought to set aside.”

⁵⁸ *Moore v. Christian*, 56 Miss. 408, 410 (1879).

⁵⁹ Evidence presented reflected that the children’s birth certificates had *not* been updated to reflect adoption with the Mississippi Department of Vital Statistics.

the termination of Donald Richardson's parental rights, as to the validity of the adoption, which this Court does not address at this time and may not in fact have jurisdiction to address.

69. In the sole interest of maintaining the stability of their environment, the Court temporarily awards joint physical and legal custody of the minor children, Dylan Ray Richardson, Madisyn Reese Richardson and Dalton Eugene Richardson to Michelle Richardson, Randy Brown and Nicole Brown. Absent agreement by the parties otherwise, Michelle Richardson shall exercise care and control of Dylan Ray Richardson and Madisyn Reese Richardson each and every Monday and Tuesday beginning at the time school commences on Monday mornings and ending at the time school commences on Wednesday mornings. Michelle shall exercise care and control of said children on alternating weekends beginning on Friday afternoons at the time school recesses. Michelle's weekend visitations shall begin on Friday, August 24, 2018. Nicole and Randy Brown shall exercise care and control of said children each and every Wednesday and Thursday beginning at the time school commences on Wednesday mornings and ending at the time school commences on Friday mornings. The Browns shall exercise weekend custody on alternating weekends in the same manner and time period in which Michelle is granted. However, the oldest child, Dalton Eugene Richardson, is currently in the physical care and control of Michelle Richardson by agreement of the parties. Due to his advanced age, 18 years, the Court does not award specific custodial time periods of Dalton to Nicole and Randy Brown. The Court reserves ruling on all other matters pertaining to custody and visitation until further hearing. Because this order contains these temporary awards and features, it is not final and appealable under MRCP 54(b) as a final judgment. It is therefore

ORDERED AND ADJUDGED that Michelle Richardson's Third Amended Complaint is hereby GRANTED, and therefore vacates the *Judgment Terminating Parental Rights* entered

December 12, 2013, as it pertains to the termination of parental rights of Michelle Richardson pursuant to Mississippi Rules of Civil Procedure 60(b)(1), (4), and (6). It is further

ORDERED AND ADJUDGED that Michelle Richardson, Nicole Brown and Randy Brown are hereby awarded TEMPORARY joint legal and physical custody of the minor children, Dalton Eugene Richardson, Dylan Ray Richardson and Madisyn Reese Richardson in accordance with the schedule provided herein. It is further

ORDERED AND ADJUDGED that all issues pertaining to custody of the children are hereby RESERVED pending further judgment of the Court. These matters shall be addressed with all parties in attendance at a hearing at 9:30 a.m. on the 6th day of November, 2018, at the Harrison County Courthouse in Gulfport, Mississippi.

SO ORDERED, ADJUDGED AND DECREED this the 17th day of August, 2018.


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