COURT OF APPEALS
THIRD APPELLATE DISTRICT
HARDIN COUNTY

KAREN SUE LIGHTNER

PLAINTIFF-APPELLEE **CASE NO. 6-99-11**

v.

ANTHONY ALLAN PERKINS **O P I N I O N**

DEFENDANT-APPELLANT

CHARACTER OF PROCEEDINGS: Civil appeal from Common Pleas Court

JUDGMENT: Judgment reversed and cause remanded

DATE OF JUDGMENT ENTRY: June 27, 2000

ATTORNEYS:

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SHAW, J. This appeal, having been heretofore placed on the accelerated calendar, is being considered pursuant to App.R. 11.1(E) and Loc.R. 12. Pursuant to Loc.R. 12(5), we elect to render our decision in a full opinion. Defendant-appellant Anthony Allan Perkins appeals the judgment of the Hardin County Court of Common Pleas, Juvenile Division, denying his motion for genetic testing and vacation of initial determination of parentage.

On December 2, 1992, a complaint was filed alleging that defendant was the father of Anthony Perkins, Jr., born July 5, 1992. Defendant claims that he has no recollection of ever being served with a summons and a copy of the complaint in this matter. However, the record reveals that the Hardin County Sheriff personally served the defendant with both the summons and the complaint. The record also indicates that defendant was notified of the pre-trial and trial dates by U.S. Mail. Again, the defendant claims to have no recollection of receiving these notices, and was not present at either proceeding. A trial was held on February 17, 1993, and on February 25, 1993 the trial court filed a judgment entry finding that the defendant to be the natural father of the child.

On March 15, 1999, the defendant filed a motion for genetic testing and vacation of the initial determination of parentage in the Hardin County Court of Common Pleas, Juvenile Division. On October 29, 1999, the trial court denied the

defendant's motion. It is from this judgment that the defendant now appeals, asserting two assignments of error.

> **The trial court failed to grant appellant's motion for genetic testing.**
>
> **The trial court failed to grant an evidentiary hearing on appellant's motion for genetic testing.**

As defendant's two assigned errors raise similar issues for our review, we will address them together. Defendant argues that under the Supreme Court's recent decision in *Cuyahoga Support Enforcement Agency v. Guthrie* (1999), 84 Ohio St.3d 437, he is entitled to genetic testing to ensure his paternity of Anthony Perkins, Jr. In *Guthrie*, the Court held that that under R.C. 3111.16, juvenile courts have continuing jurisdiction over judgments and orders that concern the duty of support or involve the welfare of a minor child, and that authority extends to allow a juvenile court to vacate a prior order of paternity where there is a "zero percent chance" of paternity pursuant to genetic testing.

We first note that the situation addressed in *Guthrie* is factually distinguishable from the case before us. *Guthrie* found that the trial court had not abused its discretion in vacating a prior finding of paternity where previously ordered genetic tests established that the putative father was in fact not the child's parent. In this case, the trial court refused to order genetic testing that was requested some six years after its initial finding of paternity. The Supreme Court's

decision in *Strack v. Pelton* (1994), 70 Ohio St.3d 172, is also factually distinguishable, for the same reason. In *Strack*, the Court held that on the facts of that case, the results of genetic testing were "newly discovered evidence" under Civ.R. 60(B)(2). Thus, neither *Guthrie* nor *Strack* directly answers the question posed by this case: whether six years after an initial finding of paternity, it is erroneous for the juvenile court to deny a motion for genetic testing without a hearing. R.C. 3111.09(A)(1) provides in part:

> **In any action instituted under sections 3111.01 to 3111.19 of the Revised Code, the court, upon its own motion, may order and, *upon the motion of any party to the action, shall order the child's mother, the child, the alleged father, and any other person who is a defendant in the action to submit to genetic tests*.**

Id. (emphasis added). In a parentage action, R.C. 3111.09(A)(1) requires trial courts to order genetic testing upon the motion of either party. Defendant argues that taken together with the Court's decision in *Guthrie*, it also applies to mandate a court to order genetic testing when paternity has already been established by other means. While the syllabus of *Guthrie* opinion did not address the extent of a juvenile court's authority over its previous judgments, the outcome of that case rested upon the Court's interpretation of R.C. 3111.16:

> **[T]he question then becomes what authority, if any, did the juvenile court have in vacating the prior determination of parentage and in ordering interim child support. We believe that the juvenile court had the authority to vacate the initial finding of paternity under R.C. 3111.16. * * * * *Pursuant to R.C. 3111.16, a juvenile court has continuing jurisdiction over all***

> ***judgments or orders issued in accordance with R.C. 3111.01 to 3111.19,*** **which includes judgments or orders that concern the duty of support or involve the welfare of a minor child. Here, the juvenile court exercised its continuing jurisdiction upon a finding that there was a zero percent chance that appellee was Jason's biological father.**

Guthrie, 84 Ohio St.3d at 443-44 (emphasis added). Based on this rationale, it is clear that the trial court had the jurisdictional authority to hear defendant's petition for genetic testing.

As Justice Cook points out in her *Guthrie* dissent, the majority's reading of R.C. 3111.16 is quite broad:

> **[T]he majority concludes that [R.C. 3111.16] provides continuing jurisdiction to vacate paternity judgments. I believe this conclusion is wrong. * * * * R.C. 3111.16 allows courts that order support, custody, or visitation as part of a paternity determination, continuing jurisdiction to modify those aspects of the order. It does not provide the court with continuing jurisdiction to vacate the paternity judgment itself.**

Id. at 445. The majority's broad reading of the continuing jurisdictional authority of trial courts extends to all decisions rendered "under sections 3111.01 *to* 3111.19 of the Revised Code." R.C. 3111.16 (emphasis added). Clearly, both *Guthrie* and R.C. 3111.16 confer continuing jurisdiction upon the trial court over the matters addressed in R.C. 3111.09(A)(1). We conclude, based upon the Supreme Court's reading of R.C. 3111.16 in *Guthrie*, that juvenile courts have essentially unfettered authority to revisit all prior judgments dealing with issues controlled by R.C. 3111.01 to 3111.19. Cf. *Guthrie*, 84 Ohio St.3d at 444. The question therefore

becomes how the broad continuing authority conferred upon juvenile courts under *Guthrie* interacts with the mandatory genetic testing provisions of R.C. 3111.09(A)(1).

We again observe that R.C. 3111.09(A)(1) mandates that the court order genetic testing "upon the motion of any party to the action." R.C. 3111.09(A)(1). It is clear that under the rule announced in *Guthrie*, the juvenile court retains the jurisdiction to hear and the authority to rule on such a motion, even after a finding of paternity has already been made. Compare *Guthrie*, 84 Ohio St.3d at 444, with *id.* at 445-46 (Cook, J., dissenting). Moreover, R.C. 3111.09(A)(1) contains no language limiting its mandatory application to the proceedings prior to an initial finding of paternity. Accordingly, we conclude that the plain language of R.C. 3111.09(A)(1), when read in light of the Supreme Court's opinion in *Guthrie*, mandates a trial court to grant a postjudgment motion for genetic testing and conduct an evidentiary hearing thereon, when such a motion is properly made by any party to the action. Here, not only did the trial court deny defendant's motion, it did so without a hearing. Because we have held that courts have no discretion to deny such a motion, the trial court's ruling was erroneous.

We note, however, that the results of genetic tests are by no means the only evidence that the trial court may consider when it revisits its initial finding of paternity. See R.C. 3111.10(E); R.C. 3111.13. On the contrary, our ruling is

based upon the mandatory language contained in R.C. 3111.09(A)(1) pertaining to the test itself, and should not be construed as necessarily requiring trial courts to vacate a prior finding of paternity based solely on the results of a newly obtained genetic test. Cf. *Strack*, 70 Ohio St.3d at 172. Moreover, we observe that in *Guthrie*, the Supreme Court concluded that the defendant remained responsible for all support payments made up to the point at which the trial court vacated its prior finding of paternity:

> **We agree that the situation here warrants prospective relief of support payments. On the other hand, we do not believe that appellee should be permitted to avoid any arrearage that presently exists as a result of his own inexcusable conduct. Appellee voluntarily and deliberately disregarded initial parentage proceedings, thereby causing a delay of the finding of nonpaternity. * * * * [We therefore reject] the findings of the juvenile court and court of appeals that appellee is not responsible for any support payments.**

Guthrie, 84 Ohio St.3d at 444. For these reasons, defendant's two assigned errors are sustained. It is the order of this Court that the judgment of the Juvenile Division of the Court of Common Pleas of Hardin County be, and hereby is, reversed. This case is remanded to the trial court for further proceedings consistent with this opinion.

Judgment reversed and cause remanded.

BRYANT, J., concurs.

WALTERS, J., dissents.

WALTERS, J. While I concede that the decision of the majority accurately reflects how the law will most likely evolve on this issue, I must respectfully dissent because I do not believe that the language of R.C. 3111.09(A)(1), when read in conjunction with the recent opinion expressed in *Cuyahoga Support Enforcement Agency v. Guthrie* (1999), 84 Ohio St.3d 437, requires a trial court to grant a post-judgment motion for genetic testing or conduct a hearing on the issues asserted therein, nor am I comfortable with such an extension of the law other than by the legislature.

While it is clear that the *Guthrie* court engaged in a broad interpretation of the continuing jurisdictional authority contained in R.C. 3111.16 so as to conclude that trial courts are vested with the power to modify or revoke a previous judgment of paternity, I will not presume that the Court intended the opinion to have any more far reaching effect that that expressly stated therein. Indeed, since in *Guthrie*, the motion for genetic testing was granted without objection, the Court was not called upon to answer the precise question raised herein. The *existing genetic evidence* that Denver Guthrie could not possibly be the child's father merely prompted the Court to declare that it was "not prepared to say that the [trial] court erred in vacating the prior finding of paternity." Thus, while I understand the majority view, I am uncomfortable with this extension of *Guthrie*, which now requires a court to sanction a party's inexcusable delay, perhaps by

many years, in ensuring whether a true, natural parent-child relationship exists. I fear the result of this decision will be to flood the trial courts with requests for genetic testing where paternity was long ago determined and perhaps even admitted.

In support of my position, I turn to both the *Guthrie* opinion and the Ohio Revised Code. First, although *Guthrie* is considerably broad in its interpretation of the law, the court took obvious pains to include cautionary language in the opinion. For instance, the court states that: "[f]inality requires that there be some end to every lawsuit, thus producing certainty in the law and public confidence in the system's ability to resolve disputes. Perfection requires that every case be litigated until a perfect result is achieved. For obvious reasons, courts have typically placed finality above perfection in the hierarchy of values. *Finality is particularly compelling in a case involving determinations of [parentage], visitation and support of a minor child.*" *Guthrie* at 441, quoting *Strack v. Pelton* (1994), 70 Ohio St.3d 172, 175. Furthermore, in determining that Denver Guthrie was only relieved of *prospective* support payments, the Court purposely made mention of his "inexcusable conduct" by deliberately failing to attend the initial proceedings and causing a two year delay in the finding of nonpaternity.

Second, I am compelled to point to the language contained in Chapter 3111. Although R.C. 3111.09(A)(1) mandates the court to order genetic testing upon the

motion of any party to the action, I find it significant that the term "alleged father" is used throughout this section. This suggests to me that the legislature did not intend for genetic testing to be mandated at any time post-judgment. This is particularly evident to me since later sections abandon this term and refer only to "the father." See R.C. 3111.13 relating to the custody and visitation rights of "the father," and R.C. 3111.15 entitled "Enforcement of father's obligation." Thus, I find that the difference in language used throughout Chapter 3111 more accurately suggests the intention of the General Assembly that testing was to be mandated only upon the institution of parentage proceedings, and prior to a final judgment finding such parentage.

For these reasons, I must respectfully dissent from the majority opinion.

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