[Cite as *State ex rel. Lloyd v. Lovelady*, 2004-Ohio-3617.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 83090

S/O C.S.E.A. EX REL. WILLA LLOYD	:	
	:	JOURNAL ENTRY
Plaintiffs-Appellees	:	
	:	and
-vs-	:	
	:	OPINION
GREGORY LOVELADY	:	
	:	
Defendant-Appellant	:	
	:	

DATE OF ANNOUNCEMENT OF DECISION: JULY 8, 2004

CHARACTER OF PROCEEDING: Civil appeal from
Juvenile Court Division
Common Pleas Court
Case No. 9572567

JUDGMENT: Reversed and Remanded.

DATE OF JOURNALIZATION:

APPEARANCE:

For Plaintiffs-Appellees: WILLA LLOYD
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PATRICIA ANN BLACKMON, P.J.:

{¶1} Appellant Gregory Lovelady appeals from the judgment of the Cuyahoga County Court of Common Pleas Juvenile Division which dismissed his motion to vacate the court's order that established him as the father of D.L. He assigns the following three errors for our review:

{¶2} "I. Whether the trial court committed reversible error by finding as a matter of law R.C. 3119.961 unconstitutional."

{¶3} "II. Whether the trial court committed reversible error by failing to consider relief from judgment under Civil Rule 60 (B)(3),(4),(5)."

{¶4} "III. Whether the trial court committed reversible error by failing to conduct an evidentiary hearing."

{¶5} Having reviewed the record and pertinent law, we reverse the judgment of the trial court and remand for further proceedings consistent with this opinion. The apposite facts follow.

{¶6} On February 25, 1985, Willa Lloyd ("mother") gave birth to a daughter D.L. ("child"). On November 8, 1995, Cuyahoga Support Enforcement Agency ("CSEA") filed an action against Lovelady for paternity. The court found Lovelady to be the father of the child, D.L., and ordered him to pay child support in the amount of $89.37 per week. Furthermore, the court found Lovelady in default and determined that a process server had served upon Lovelady the complaint for paternity; this fact he disputes. On April 28, 1997, the court entered final judgment, although neither party appeared at the hearing.

{¶7} On November 4, 1997, CSEA moved the court to order Lovelady to reimburse the State of Ohio for nonpayment of child support. Lovelady did not appear at the hearing, but later claimed he did not receive notice of the hearing. Consequently, on September 4, 1998, the court ordered him to pay $17,551 in past care and $9,068.48 in maternity expenses to the State of Ohio, Department of Human Services.

{¶8} On June 23, 1999, CSEA filed a motion to show cause against Lovelady for failure to comply with the aforementioned court order. On March 29, 2001, Lovelady filed motions to modify the support order and to stay the support order pending the results of a requested DNA test. However, on May 1, 2001, Lovelady withdrew these motions. The court found Lovelady in contempt and entered judgment for current support arrears to the mother for $20,525 and to the Department of Human Services for past care and maternity expenses for $17,551 and $9,066.48, respectively.

{¶9} On June 28, 2001, Lovelady filed a motion to vacate the decision. At the hearing on the motion, the trial court found the child was in the custody of Cuyahoga County Department of Children and Family Services ("CCDFS"). The court held the motion to modify in abeyance and ruled the motion to vacate and terminate support as moot.

{¶10} On February 11, 2003, Lovelady, pro se, filed a motion to terminate the support order based on genetic test results indicating a zero percentage probability that he fathered the child, D.L.

{¶11} On May 13, 2003, the court held a hearing on his motion and ruled that its order establishing paternity bound Lovelady to the paternity of the child, regardless of the DNA test. The trial court further stated R.C. 3119.961, et. seq, the statutes relative to Lovelady's motion had been

ruled unconstitutional; and the time to have raised the genetic testing was in 1996 when parentage was established.

{¶12} In response, Lovelady stated he never received notification of the paternity hearing. The reason he first appeared in court, was the result of the execution of an arrest warrant. The trial court dismissed the motion and Lovelady now appeals.

{¶13} In his first assigned error, Lovelady argues R.C. 3119.961 et seq. is constitutional and the trial court's reliance on *Van Dusen v. Van Dusen*[1] is misplaced.

{¶14} R.C. 3119.961 provides in pertinent part:

{¶15} "(A) Notwithstanding the provisions to the contrary in Civil Rule 60(B) and in accordance with this section, a person may file a motion for relief from a final judgment, court order, or administrative determination or order that determines that the person or a male minor referred to in division (B) of section 3109.19 of the Revised Code is the father of a child or from a child support order under which the person or male minor is the obligor. Except as otherwise provided in this section, the person shall file the motion in the division of the court of common pleas of the county in which the original judgment, court order, or child support order was made or issued or in the division of the court of common pleas of the county that has jurisdiction involving the administrative determination or order. If the determination of paternity is an acknowledgment of paternity that has become final under section 2151.232 [2151.23.2], 3111.25, or 3111.821 [3111.82.1] of the Revised Code or former section 3111.211 [3111.21.1] or 5101.314 [5101.31.4] of the Revised Code, the person shall file the motion in the juvenile court or other court with jurisdiction of the county in which the person or the child who is the subject of the acknowledgment resides."

{¶16} Moreover, R.C. 3119.962 provides a court should grant relief when genetic tests support a finding excluding the male as the father. Additionally, the statute is retroactive by allowing a party to seek relief from a paternity determination "regardless of whether the judgment, order, or other determination from which relief is sought was issued prior to, on, or after October 27, 2000."[2] There is no statute of limitation by which a person must move for relief from a final paternity determination. Further, if the court grants the requested relief, R.C. 3119.964 vests the court with discretion to cancel any child support arrears.

{¶17} This is an issue of first impressions for this court. In *Boggs v. Brnjic*,[3] the constitutionality of R.C. 3119.961 as applied in juvenile proceedings was raised but our court did not reach the merits of the arguments; the case was remanded on different grounds.

{¶18} The analysis of the constitutionality of R.C. 3119.961 et seq. begins with the premise that an enactment of the General Assembly is presumed to be constitutional, and before a court may declare it unconstitutional it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompat-ible.[4] Further, the party challenging the statute bears the burden of proving the unconstitutionality of the statute beyond a reasonable doubt.[5]

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[1](2003), 153 Ohio App.3d 494.

[2]R.C. 3119.967.

[3]153 Ohio App.3d 399.

[4]*Wood v.Telb* (2000), 89 Ohio St.3d 504, citing *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, paragraph one of the syllabus; *State v. Thompkins* (1996), 75 Ohio St. 3d 558, 560.

[5]*Thompkins*, supra.

{¶19} A legislative act is presumed in law to be within the constitutional power of the body making it, whether that body be a municipal or a state legislative body.[6] That presumption of validity of such legislative enactment cannot be overcome unless it appears there is a clear conflict between the legislation in question and some particular provision or provisions of the Constitution.[7]

{¶20} Any doubt as to the constitutionality of a statute will be resolved in favor of its validity.[8] Every reasonable presumption will be made in favor of the validity of a statute.[9]

{¶21} It is the duty of the court where constitutional questions are raised to liberally construe a statute to save it from constitutional infirmities.[10] The presumption in favor of the constitutionality of statutes leads to the conclusion that where the validity of an act is assailed, and there are two possible interpretations, one of which would render it valid, and the other invalid, the court should adopt the former so as to bring the act into harmony with the Constitution.[11] It is a well established canon of construction that every reasonable presumption be indulged in favor of the constitutionality of a statute.[12]

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[6]*City of Xenia v. Schmidt* (1920), 101 Ohio St. 437.

[7]Id.

[8]*State, ex rel. Doerfler, Pros. Atty., v. Price, Atty. Genl.* (1920), 101 Ohio St. 50, 128 N.E. 173.

[9]*State v. Parker* (194), 150 Ohio St. 22; *State, ex rel. Mack, Judge, v. Guckenberger, Aud.* (1942), 139 Ohio St. 273.

[10]*Wilson v. Kennedy* (1949), 151 Ohio St., 485, 492.

[11]8 Ohio Jurisprudence, 160, Section 61.

[12]8 Ohio Jurisprudence, 154, Section 58.

{¶22} We disagree with *Van Dusen v. Van Dusen*[13] which held R.C. 3119.961 unconstitutional. We instead adopt the ruling in *Spring v. Bevard.*[14] In *Bevard*, a father moved for relief under R.C 3119.961 et seq., from a divorce order which found him to be a child's natural father. The trial court held R.C. 3119.961 et seq., was substantive rather than procedural and did not unconstitutionally violate the separation of powers doctrine. The mother contended R.C. 3119.961 et seq. violated separation of powers, that res judicata barred the father's claim, and relied on *Van Dusen*, which concluded R.C. 3119.961 was a procedural statute that infringed upon the constitutional powers afforded the judiciary branch, which had exclusive control over procedure in court cases.

{¶23} The *Bevard* court urged us to examine the legislative history. A review of the history reveals R.C. 3119.961 was originally codified as R.C. 3113.2111. R.C. 3113.2111 was created by the legislature in 2000 via amended H.B. No. 242. H.B. No. 242, as amended, was passed on April 11, 2000, and signed into law by the Governor on July 27, 2000. Section 1 of H.B. No. 242 contained the statutory language found in R.C. 3113.2111. Section 3 of the Act provided:

{¶24} "The General Assembly hereby declares that it is a person's or male minor's substantive right to obtain relief from a final judgment, court order, or administrative determination or order that determines that the person or male minor is the father of a child." The same year following the passage of H.B. No. 242, S.B. No. 180 was also passed into law. S.B. No. 180 recodified R.C. 3113.211 into the group of statutes now found under R.C. 3119.96 et seq.

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[13](2003), 153 Ohio App.3d 494.

[14](2003), 126 Ohio Misc.2d 15.

{¶25} The *Bevard* court concluded the mere recodification of R.C. 3113.211 does not destroy the legislative intent to create a substantive right. Therefore, based upon the legislative history of R.C. 3119.96, et seq., the wife did not carry her burden to show, for the purposes of challenging the constitutionality of a statute, that the statute was unconstitutional beyond a reasonable doubt.[15]

{¶26} Because R.C. 3119.961 et seq. provides a substantive right and not a procedural right, we deem no tension exists between Article IV, Section 5(B) of the Ohio Constitution which provides:

{¶27} "The Supreme Court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. Proposed rules shall be filed by the court, not later than the fifteenth day of January, with the clerk of each house of the general assembly during a regular session thereof, and amendments to any such proposed rules may be so filed not later than the first day of May in that session. Such rules shall take effect on the following first day of July, unless prior to such day the general assembly adopts a concurrent resolution of disapproval. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. ***"

{¶28} In our view, this statute does not purport to govern procedural matters**,** therefore, the separation of powers ensured by Article IV, Section 5(B) is left intact.

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[15]Id.

{¶29} We also find guidance in the Ohio Supreme Court's ruling *Cuyahoga Support Enforcement Agency v. Guthrie.*[16] In *Guthrie*, the trial court vacated a paternity determination after the putative father presented DNA evidence approximately two years later that he was not the father. Although the Ohio Supreme Court found Civ.R. 60(B)(2)or(4) was not the proper grounds to vacate the paternity determination, it concluded the juvenile court had authority pursuant to its "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 the child."[17]

{¶30} Today, we hold R.C. 3119.961 et seq constitutional. However, we adopt the reasoning in *Guthrie* as to prospective relief. We consequently return the matter to the trial court for a hearing on Lovelady's arrearages. Lovelady's inexcusable conduct is compar-able to that in *Guthrie*, in that he voluntarily and deliberately disregarded proceedings wherein he could have addressed his grievance. Lovelady's first assigned error is sustained.

{¶31} Lovelady argues in his second and third assigned error, the trial court erred by failing to grant the motion to vacate under either Civ.R. 60(B)(3),(4)or (5), and by failing to hold an

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[16]84 Ohio St.3d 437, 1999-Ohio-362.

[17]Id. at 444.

evidentiary hearing. The record reflects, however, Lovelady never filed a Civ.R. (60)(B) motion. His failure to file said motion operates as a waiver of this argument on appeal.

Judgment reversed and remanded.

KENNETH A. ROCCO, J., CONCUR;

COLLEEN CONWAY COONEY, J., DISSENTING:

{¶32} I must respectfully dissent because I disagree with the majority's decision to find R.C. 3119.961 constitutional. I would affirm the trial court's decision to follow *Van Dusen v. Van Dusen,* 151 Ohio App.3d 494, 2003-Ohio-350, finding the statute unconstitutional. R.C. 3119.961 is clearly a procedural rule, directing where to file a motion for relief from a paternity finding and attempting to give an unlimited time to file such a motion. Furthermore, the right to seek such relief was already provided by Civ.R. 60(B) and R.C. 3111.16. Therefore, I fail to see how R.C. 3119.961 created the substantive right to seek such relief.

{¶33} I also would affirm the trial court's decision denying Lovelady's motion to terminate support as untimely, following *Cuyahoga Support Enforcement Agency v. Guthrie* (1999), 84 Ohio St.3d 437. Like Guthrie, Lovelady should not be "permitted to avoid any arrearage that presently exists as a result of his own inexcusable conduct." Id. at 444.

{¶34} The record reflects that the initial paternity complaint was left at Lovelady's apartment with a friend in December 1995. The court mailed its decision to Lovelady in June 1996. Mail sent by the court was not returned until April 1998 when the post office indicated the forwarding order had expired. Lovelady accepted service in August 1999 at a new address, appeared

for a show cause hearing in September 1999, and requested counsel. Court-appointed counsel appeared for a November 1999 hearing, but Lovelady failed to appear. The matter was continued to February 2000 and when he again failed to appear, his counsel asked to withdraw because Lovelady had not contacted him.

{¶35} Lovelady finally appeared after posting bond in September 2000. Again, he requested counsel and the matter was continued. In March 2001, his new counsel filed a motion for DNA testing, but withdrew the motion at the hearing on May 1, 2001. Lovelady was found to be in arrears and a wage order was issued. It was not until February 2003 that Lovelady filed his motion to terminate support, two weeks before the child turned eighteen. His motion included the DNA test results from October 2002 but only sought relief from the support order. It contained no reference to Civ.R. 60(B) or even a request to vacate the paternity finding.

{¶36} The court held a hearing on Lovelady's motion and told him he should have raised the issue of paternity years earlier. Lovelady bears some responsibility to assert timely his new evidence. See *Strack v. Pelton* (1994), 70 Ohio St.33d 172, 174-175. The Ohio Supreme Court found a nine-year delay in producing scientific evidence disputing paternity to be untimely. Id. In *Guthrie*, supra, the Ohio Supreme Court allowed Guthrie's challenge to the paternity determination which was brought within two years of the initial determination.

{¶37} In the instant case, Lovelady waited almost seven years to challenge the court's order with the DNA test results. He deliberately disregarded initial parentage proceedings, thereby waiving any right to challenge the court's order. Accordingly, I would affirm.