RENDERED: SEPTEMBER 13, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002201-MR

KEVIN GORDON — APPELLANT

v.

APPEAL FROM CAMPBELL FAMILY COURT
HONORABLE DANIEL T. GUIDUGLI, JUDGE
ACTION NO. 92-CI-00452

CHRISTIANNE R. GORDON — APPELLEE

NO. 2010-CA-001722-MR

KEVIN GORDON — APPELLANT

v.

APPEAL FROM CAMPBELL FAMILY COURT
HONORABLE M. GAYLE HOFFMAN, JUDGE
ACTION NO. 92-CI-00452

CHRISTIANNE R. GORDON — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; MAZE AND NICKELL, JUDGES.

ACREE, CHIEF JUDGE: Kevin J. Gordon appeals from two orders of the Campbell Family Court concerning his financial obligations to his ex-wife, Christianne Gordon. We affirm.

I. Background

The parties were divorced by a decree of dissolution issued January 12, 1995. The decree adopted the report of the Domestic Relations Commissioner (DRC), who issued the following pertinent recommendations: (1) that Kevin bear sole responsibility for an outstanding 1990 federal tax liability and hold Christianne harmless thereupon; (2) that Kevin and Christianne split equally the extraordinary medical and dental expenses of the parties' minor children; and (3) that Kevin's child support arrearage, based on a previous order, be established at $8,217.02, and that his weekly obligation be set at $175 per week.

Following dissolution, the parties returned to the family court many times to further dispute these and other matters.

In March of 2009, Christianne filed a motion seeking an order of contempt against Kevin for his failure to hold her harmless for the federal tax lien

and for one-half of the children's extraordinary medical expenses. The motion was granted in an order dated September 11, 2009.

Kevin also filed a series of motions challenging the local child support office's current assessment of his child support arrearage. The family court calculated his current arrearage at $11,329.53 in an order dated May 5, 2010.

Kevin timely appealed both orders, and the two matters were consolidated for our review. Sadly, Christianne passed away during the pendency of the appeals, and the executor of her estate was substituted as a party.

On appeal, Kevin has attacked the circuit court's order that he reimburse Christianne for his federal tax obligation and one-half of the children's extraordinary medical expenses. He also challenges the family court's award of a lump sum payment for his child support arrearage to Christianne.

More facts will be recounted as they become relevant to our discussion.

II. Discussion

a. Kevin's brief exceeds the page limit of CR[1] 76.12

The rules of appellate procedure permit the appellant only twenty-five pages for the body of his brief unless the Court grants permission for a longer one. CR 76.12(4)(b)(i) ("In the Court of Appeals, unless otherwise ordered by that

[1] Kentucky Rules of Civil Procedure.

court, the appellant's brief … shall be limited to 25 pages …, excluding the introduction, statement of points and authorities, exhibits and appendices."). No such permission was granted to Kevin. Nevertheless, the body of his brief takes up twenty-seven pages, two pages beyond the limit. We will ignore the contents of those two pages, although we are permitted to take more punitive action. CR 76.12(8); *Elwell v. Stone*, 799 S.W.2d 46, 48 (Ky. App. 1990).

b. Tax reimbursement

After the family court in its decree deemed Kevin solely responsible for the 1990 tax liability and ordered him to hold Christianne harmless for it, Kevin paid only $731.53 toward the debt. As a result, the Internal Revenue Service seized certain of Christianne's assets, for a period beginning in 1994 and ending in 2003, to satisfy the 1990 tax liability. In September of 2009, Christianne secured an order of the family court holding Kevin in contempt and ordering reimbursement of the total amount she had paid on his behalf, $7,767.05.

Kevin asserts a variety of theories in support of his argument that the family court's ruling was erroneous. None is persuasive.

A number of Kevin's arguments concern the validity of the family court's recognition that he was responsible for the tax debt at all. However, the family court correctly declined to disturb the assignment of debt to Kevin. That obligation was established in the 1995 decree, which incorporated the DRC's

recommendations concerning property distribution and assignment of the parties' debt. It was a final and appealable order. *See* CR 54.01. The decree was not disturbed by appeal, by post-judgment amendment, or otherwise, and as a result, the family court lost jurisdiction to disturb its contents ten days after its entry.[2] CR 52.02.

Kevin does raise one argument which we may properly consider, that the family court erred when it declined to apply the doctrine of laches to bar Christianne's request for compensation. Kevin claims the doctrine should have applied to Christianne's claim due to the delay between the IRS's collection efforts and Christianne's motion to compel reimbursement.

Laches is an equitable doctrine which serves to bar a claim in which a party has committed "an unreasonable delay in asserting a right . . . that results in injury or works a disadvantage to the adverse party." *City of Paducah v. Gillispie*, 273 Ky. 101, 115 S.W.2d 574, 575 (1938). The ordinary standard of review of a trial court's refusal to apply the doctrine of laches is abuse of discretion. *Chenault v. Eastern Kentucky Timber & Lumber Co.*, 119 Ky. 170, 83 S.W. 552, 554 (1904).

We will not apply the ordinary standard here, however, because the argument appears to be unpreserved. CR 76.12(4)(c)(v) requires that appellants'

[2] There are, obviously, exceptions to the rule concerning the finality decrees of dissolution, notably when the parties return to court to resolve ongoing matters of child custody and visitation, modification of child support, and spousal maintenance. None of these is at issue in the present appeal.

briefs include, "at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." Kevin made no such statement of preservation regarding his laches argument, and our review of the record[3] did not reveal that Kevin presented a laches argument in the motions filed or the hearing conducted prior to entry of the September 2009 order. We will review this argument for palpable error only. CR 61.02.

We agree with Kevin that there was a delay between the collection efforts of the IRS and Christianne's motion seeking to enforce the 1995 decree. But we cannot conclude the family court committed palpable error by finding he had suffered no prejudice as a result of the delay. He has asserted no prejudice in his appellant's brief, and we can perceive none. Kevin did not demonstrate that application of the doctrine of laches was appropriate to bar Christianne's claim, and so we affirm on this matter.

c. Medical expenses

Kevin's next argument is that the September 2009 order of the family court erroneously instructed him to pay one-half of the extraordinary medical expenses incurred for the parties' minor children for the years 2000 to 2007, as

[3] "It is not the job of the appellate courts to scour the record in support of an appellant or cross-appellant's argument." *Dennis v. Fulkerson*, 343 S.W.3d 633, 637 (Ky. App. 2011) (citations omitted).

required by the 1995 decree. He maintains the amounts which reflect copayments and deductibles should not have been included in the calculation of extraordinary medical expenses. Because the argument addresses the amount of reimbursement to which Christianne was entitled, a matter not resolved until the September 2009 order, rather than Kevin's obligation to pay one-half of extraordinary medical expenses, a matter finalized in the 1995 decree, we will consider it.[4] Our review is *de novo* because resolution of the issue turns on interpretation of a statute. *Wheeler & Clevenger Oil Co., Inc. v. Washburn,* 127 S.W.3d 609, 612 (Ky. 2004).

KRS 403.211 has always concerned the establishment and enforcement of child support orders. In its present version, the statute directs the family court to allocate the payment of health care costs between the parents as follows:

> The court shall order the cost of health care of the child to be paid by either or both parents of the child regardless of who has physical custody. The court order shall include:
>
> 1. A judicial directive designating which parent shall have financial responsibility for providing health care for

[4] What we will not consider is evidence which was not placed in the record before the family court. In support of his argument concerning the children's extraordinary medical expenses, Kevin identifies in his appellant's brief information purportedly copied from the website of Christianne's insurance provider. Christianne's estate alleges, and our review confirms, that this evidence was not made part of the trial record. Its inclusion in the appellant's brief constitutes "an improper attempt to introduce evidence outside the record." *White v. White,* 883 S.W.2d 502, 505 (Ky. App. 1994). Consequently, "since our review is limited to the pleadings and evidence considered by the circuit court, we decline to consider the [evidence] in reaching our decision[.]" *Id.*

> the dependent child, *which shall include* but not be limited to private health care insurance coverage, *payments of necessary health care deductibles or copayments*[.]

KRS 403.211(7)(c) (2012) (amended 2009) (emphasis added).

The version of the statute in effect at the time the decree was entered did not require that the family court designate primary parental responsibility for copayments or deductibles:

> The court shall order the cost of health care insurance coverage of the child to be paid by either or both parents of the child regardless of who has physical custody, if reasonable and available under all the circumstances. If health care insurance coverage is not reasonable and available at the time the request for the coverage is made, the court order shall provide for health care insurance coverage at the time it becomes reasonable and available.

KRS 403.211(7) (1995) (amended 1994). Reference to copayments and deductibles first arose following amendments which became effective July 15, 1996. KRS 403.211(7) (amended 1996).

Both versions of the statute address extraordinary medical expenses identically:

> The cost of extraordinary medical expenses shall be allocated between the parties in proportion to their combined monthly adjusted parental gross incomes. "Extraordinary medical expenses" means uninsured expenses in excess of one hundred dollars ($100) per child per calendar year. "Extraordinary medical expenses" includes but is not limited to the costs that are reasonably necessary for medical, surgical, dental,

> orthodontal, optometric, nursing, and hospital services; for professional counseling or psychiatric therapy for diagnosed medical disorders; and for drugs and medical supplies, appliances, laboratory, diagnostic, and therapeutic services.

KRS 403.211(8) (1995) (amended 1994); KRS 403.211(9) (2012) (amended 2009).

The 1995 order, by incorporation of the DRC's recommendation, ordered that Christianne:

> continue to maintain health insurance in full force and effect for the parties' minor children which she has available to her through her place of employment and that each of the parties pay one-half (1/2) of any extraordinary medical/dental expenses not paid for by [Christianne's] group health plan per KRS 403.211(8)[(1995) (amended 1994)].

(Trial record, p. 147). It made no mention of copayments or deductibles, presumably because there was no statutory impetus to do so.

Based on the changes visited upon KRS 403.211 over the years, it is apparent that prior to the 1996 amendments, which obligated family courts to allocate responsibility for copayments and deductibles in addition to provision of health insurance, copayments and deductibles were included in the definition of *extraordinary medical expenses.* Certainly, these payments were "reasonably necessary" to secure even the most basic health care.

In arguing that copayments and deductibles should not be included in the statutory definition of *extraordinary medical expenses*, Kevin has implicitly

urged application of the current version of KRS 403.211 rather than the version in effect upon dissolution. We decline to do so for a number of reasons. First, it is impossible that the family court or the parties contemplated in 1995 that copayments and deductibles would be Christianne's sole responsibility rather than the joint responsibility of both parents. There was no statutory basis to do so; indeed, interpretation of the statute as it then existed has led us to the opposite conclusion.

Additionally, the statute's application to the *establishment* of child support rather than the *modification* of child support anchors the 1995 decree. The decree initially established the parties' support obligations in accordance with the version of KRS 403.211 then in effect. Had Kevin desired to take advantage of the new provisions governing responsibility for payment of the children's ordinary health care expenses, he could have done so by filing a motion to modify the support provision of the decree.

Kevin has not persuaded us, furthermore, that the legislature intended that the 1996 modifications of KRS 403.211 apply to support orders which predated the changes. *See Beckham v. Board of Educ. of Jefferson County*, 873 S.W.2d 575, 577 (Ky. 1994) ("As with any case involving statutory interpretation, our duty is to ascertain and give effect to the intent of the General Assembly.").

The legislature could easily have expressed such intent if it so desired. *See* KRS 446.080. It did not.

We will not invalidate the family court's order that Kevin pay $3,221.98 in extraordinary medical expenses, one-half of the total paid by Christianne, because the amount includes copayments and deductibles.

d. Child support

Kevin's last argument is a challenge to the family court's May 5, 2010 ruling that his current child support arrearage totaled $11,329.53.[5]

This argument contains both an attack on the validity of a final order and a challenge to the factual accuracy of the family court's calculation. We lack jurisdiction to consider the former argument, as did the family court, although we may consider the latter argument.

In calculating Kevin's child support arrearage, the family court relied in part upon an order of March 22, 1995, which determined that Kevin's arrearage at that time was $16,840.82. The family court considered that figure the "original arrearage" and deducted therefrom credits for payments Kevin had made and added thereto the payments he had failed to make over the ensuing years.

Kevin now claims the family court's 2010 reliance upon the 1995 order was erroneous because the 1995 assessment of his arrearage was inaccurate.

[5] Kevin refers to the August 23, 2010 denial of his motion to alter, amend, or vacate as the order from which he appeals, but that order merely declined to alter the order entered May 5, 2010.

Like the January 1995 decree of dissolution, the March 1995 assessment of arrearage was a final order; it awarded Christianne a lump sum in the amount of Kevin's unpaid child support obligation. *See* CR 54.01. As with the decree, the family court lost jurisdiction to disturb the arrearage assessment ten days after its entry. CR 52.02. We cannot reverse the order of May 2010 on this basis.

We turn now to the question of fact Kevin has presented, namely, whether the family court correctly calculated his obligation. The calculation is subject to reversal only if the family court committed clear error. *Miller v. Eldridge*, 146 S.W.3d 909, 915 (Ky. 2004). The assessment of child support arrears is a matter of simple arithmetic, whose figures are based upon the previous orders of the family court and Kevin's own representations of the payments he has made. We perceive no error.

III. Conclusion

Kevin has presented no argument that would persuade us the Campbell Family Court's orders of September 11, 2009, or May 5, 2010, warrant reversal. The orders are accordingly affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
Mark Harris Woloshin Newport, Kentucky	Glen E. Hazen, Jr. Cincinnati, Ohio