DIVISION II

CA08-600

April 8, 2009

KATHY TRAVIS GILBOW
APPELLANT

V.

PATRICK TRAVIS
APPELLEE

APPEAL FROM THE BENTON COUNTY CIRCUIT COURT, [E 99-99-5]

HONORABLE XOLLIE DUNCAN, JUDGE

AFFIRMED IN PART; REVERSED IN PART & REMANDED WITH INSTRUCTIONS

This appeal originates in a modification of child support order, as amended. Appellant, Kathy Travis Gilbow, and appellee, Patrick Travis, were divorced by decree entered on December 8, 1999. Two children were born of their marriage. Custody was awarded to Kathy and has never been contested. In 2003 Patrick initiated a post-divorce action in which his support obligation as set forth in the decree was reduced by court order. These events bring us to the present appeal. Kathy sought a modification to increase child support by a petition filed on December 20, 2006. Following a hearing, the trial court entered an order on October 29, 2007, increasing the amount of monthly child support from $6500 to $10,317, and making it effective from the date of the filing of the petition. Patrick timely filed a motion for new trial, and an amended order was entered on November 30, 2007, in which the trial court determined that by making the award retroactive to the date the petition was filed Kathy would receive a windfall of more than

$38,000. In the amended order, the trial court directed that the $38,000 be set aside in an interest bearing account, in Patrick's name, to address any needs of the children that may arise between the date of the order and the time the younger child reaches the age of eighteen. The trial court also ordered Patrick to provide proof to the court and to Kathy that these funds remain in the interest bearing account unless needed by the children. In addition, the trial court ordered Patrick to provide an accounting to Kathy upon request. This appeal followed. We affirm in part; reverse in part; and remand with instructions to modify in accordance with this opinion.

Placement of Funds

For her first point of appeal, Kathy contends that "the trial court erred in ordering that the arrearage of child support created by the increase in support being effective back to the date of the petition be placed in an account to be owned by Patrick and for which no access by Kathy was established." Relying upon *Smith v. Smith*, 341 Ark. 590, 19 S.W.3d 590 (2000), she argues that there is no basis in the statutes or guidelines for the trial judge to direct the establishment of such a fund. She further argues that the establishment of such a fund is contrary to the purposes of the child-support statute and guidelines, which are to provide for the needs of the children.

At the outset, we conclude that *Smith*, *supra*, is distinguishable from the instant case and in no way controlling. In *Smith*, the non-custodial parent appealed from the divorce decree's provision regarding child support, arguing in part that the trial court erred in denying his request to have a trust established for the child, with some of the award for

child support set aside for the child's future needs. The case involved the initial award of future child-support payments, not a retroactive award. Our supreme court affirmed the trial court on that point, explaining:

> Our reading of the statute and the guidelines does not convince us that the [trial judge] had the authority to designate portions of the child-support award for that purpose. Assignments of error presented by counsel in their brief, unsupported by convincing argument or authority, will not be considered on appeal, unless it is apparent without further research that they are well taken. As appellant notes in his brief, child support is not to provide for the accumulation of capital by children, but is to provide for their reasonable needs.

Smith, 341 Ark. at 595-96, 19 S.W.3d at 594-95 (citations omitted). Here, unlike in *Smith*, the interest-bearing account ordered by the trial court is to be funded, not by accumulating funds out of future monthly child-support payments, but instead with the approximate $38,000 retroactive amount that represents the amount of increase between the date the petition was filed and the date the modification was entered.

We note that it was within the trial court's discretion whether to award retroactive support because such an award is not mandatory: "While it is well settled that a [trial judge] may retroactively modify a child-support obligation up to the date a modification petition is filed, such an award is not mandatory." *Stepp v. Gray*, 58 Ark. App. 229, 239, 947 S.W.2d 798, 803 (1997) (citations omitted). We further note that Patrick did not file a cross-appeal concerning the award of this retroactive amount. Still, the fact remains that Kathy did not conclusively demonstrate to the trial judge that any of the children's needs were not met during the period between the filing of the petition and the entry of the support order; she did not offer proof to establish that she went in debt or was forced to

use other sources of money to meet the children's needs during this interim period of time. And the trial court particularly noted that Kathy had a history of making unsound financial decisions; that because of those unsound decisions Kathy had not been able in the past to reimburse Patrick for amounts of child support that he had overpaid; and that the additional child-support monies were ordered to meet the needs of Kathy and Patrick's two children and not to provide support for Kathy, for her new husband, and for their own additional two children so that Kathy and her new husband could choose to be unemployed. Accordingly, we find no abuse of the trial court's discretion so far as ordering the establishment of the account funded with the retroactive support award to be maintained for the Travis children's needs.

We do, however, find error in that part of the trial court's order that the account be established in Patrick's name and under his control instead of in Kathy's name but under the court's control. On our de novo review of this case, we remand the matter to the trial court with instructions to modify its order: (i) to require the funds be set aside in an interest bearing account, in Kathy's name, in a financial institution in Arkansas insured by the Federal Deposit Insurance Corporation; and (ii) to require the chosen financial institution to file with the clerk of the circuit court an agreement not to permit any withdrawal from the account except on authority of the circuit court's order.

Deviation from Chart

For her second point of appeal, Kathy contends that the trial court abused its discretion in awarding an amount of child support that was smaller than the amount set

out in the child-support chart. Kathy specifically acknowledges that the trial court considered the chart, her affidavit of financial means, and her list of items that she wanted to provide for the children. She also acknowledges that the trial court gave due consideration to the evidence. Then, narrowing her focus, she argues that the trial court discounted the chart amount "largely due to a determination that Kathy's allowance in her proposed budget for what she described as 'mom care' ($3,000 a month) was inappropriate." We find no abuse of discretion by the trial court.

In support of adjusting downward from the chart the amount of child support to be awarded, the trial court explained in pertinent part:

> 5. Based upon what the Court finds to be the credible evidence presented to the Court, the testimony, the exhibits, the needs of the children, the Court believes that presumption has been rebutted. Based upon the $35,719.65 figure as a biweekly income, the child support would be $16,252.00 a month, and the Court simply believes that this amount is far greater than what is needed to meet the children's needs. However, the Court does believe that the child support should be increased.
>
> 6. The Court has taken in to account all of these things. In addition, the Court is worried about a bidding war for the children, because children are going to lose out if a bidding war is started. That is just not going to be good [for] them. The Court further took into account that the Plaintiff has made some bad financial decisions. The Court realizes that the situation has been such that the Plaintiff's husband has contributed nothing up to the last two months to the household income. The Court understands this is a tough situation to be in, but does not believe that it is the Defendant's place to take up the slack, so to speak. In addition, the Court understands they have gotten this gigantic car payment because of the trade in of an SUV, and as a result have been unable to save any money. On the other hand, the Defendant had made a persuasive plea to this Court the last time they appeared, partially based on his intent to set up a trust fund for the children, and he did that. Now lately, the Court understands there has been a change of plans regarding contributions to that based upon sound advice from his financial adviser, but based upon the testimony, the Court does not believe that

that contribution will be made any longer. As a result, the Court believes there is additional discretionary funds that the Defendant will have.

7. According to the figures calculated by the Court, it appears that Dr. Travis' income since the last hearing has increased about 59 percent. In the event the Court increased the Plaintiff's child support by that amount, it would be $11,016.19 monthly. The Court still believes that is somewhat greater than what is needed to meet the needs of the children. The Court looked then at the Plaintiff's Exhibit 7, which is basically the Plaintiff's wish list in order to place her in a position to provide for the children and her home, those things that are more in line with is provided to them in Dr. Travis' home. The Court deducted the $3,000.00 the Plaintiff had on there for mom care, because the Court doesn't think that is appropriate, that would be more in the nature of an alimony payment. In addition, the Court deducted the $1,000.00 a month for the desire to put in a family pool, because the Court does not feel that is appropriate. The Court believes the Plaintiff's idea is a good one, that is to do what she can to attract the kids to the Plaintiff's own house so she knows what the children are doing, as opposed to letting them to run out and have to trust they are using good judgment. However, the Court does not believe that the Defendant should have to pay for that. In addition, the Court reduced the wish list by $500.00 a month that she pays on a rental house that the Court is having difficulty justifying. After all calculations, the Court determined an appropriate amount of child support would be $10,317.00 per month, resulting in an increase substantially from the $6,500.00 per month presently in place.

As noted by Patrick, if the trial court had not adjusted by reducing the child-support chart amount, the amount awarded would have totaled $195,029.31 annually, or $16,252.44 monthly. Instead, the trial court awarded $10,317 a month. In arriving at the reduced amount, the trial court explained that it started with Kathy's budget, which included both actual expenses and her wish list of things that she would like to provide, totaling $14,817. From that list, the trial court excluded the $1000/month sum earmarked for installation of a swimming pool, the $3,000/month sum for "mom care" (to allow Kathy to work part-time and stay home more), and the $500/month sum that represented the loss on certain

rental property owned by Kathy and her new husband. Those exclusions totaled $4,500; deducting the total excluded sums from Kathy's requested $14,817 monthly sum equaled the awarded amount of $10,317 per month, or $123,804 annually.

Kathy attempts to distinguish *Davis v. Bland*, 367 Ark. 210, 238 S.W.3d 924 (2006), but a basic rationale of that case is applicable here. There the court cited with approval Administrative Order Number 10, noting that although the trial court must consider the chart, it does not have to use the chart amount if the circumstances of the parties indicate another amount would be more appropriate. *Bland*, *supra*. Thus, the court may grant more or less support if the evidence shows that the needs of the child require a different level of support. Kathy has not convinced us that the trial court's exclusion of $3000 per month for "mom care," which she challenges in her second point, amounted to an abuse of discretion.

Affirmed in part; reversed in part and remanded with instructions.

HART and HENRY, JJ., agree.