NOT DESIGNATED FOR PUBLICATION

No. 96,389

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

JOYCE WEST,
Appellant,

v.

GARY WEST,
Appellee.

MEMORANDUM OPINION

Appeal from Shawnee District Court; EVELYN Z. WILSON, judge. Opinion filed July 27, 2007. Affirmed.

Ardith R. Smith-Woertz, of Topeka, for appellant.

Pantaleon Florez, Jr., of Topeka, for appellee.

Before CAPLINGER, P.J., ELLIOTT, J., and BUKATY, S.J.

Per Curiam: Joyce West (mother) registered a foreign child support judgment in Kansas, seeking to collect arrearages from Gary West (father). Mother appeals from the

trial court's granting of summary judgment in father's favor. We affirm.

Mother registered a Virginia divorce decree in Shawnee County, pursuant to which father was ordered to pay $608 per month in child support for the parties' two children: daughter M.W., born in 1986, and son B.W., born in 1989. This appeal involves mother's efforts to collect arrearages for M.W.'s support of $304 per month beginning in August 2000.

The notice of registration served on father in October 2003 stated that pursuant to *Brady v. Brady*, 225 Kan. 485, 592 P.2d 865 (1979), father's support obligation had been reduced to $304 per month because M.W. began residing with father in August 2000. Father did not challenge the registration, and the trial court confirmed it on November 26, 2003.

A dispute arose when mother claimed the *Brady* rule would not apply to reduce father's child support and because Virginia had no rule similar to *Brady*, father owed arrearages.

Father argued mother's arguments were wrong because Virginia law permitted relief from a child support order under facts similar to *Brady*. The trial court allowed

mother's proposed amendment to the order but reserved all questions of law and fact for further hearings.

Father moved for summary judgment, alleging he and mother agreed that he would assume physical custody of M.W. in August 2000, and he would discontinue support payments for M.W. but would continue paying support for B.W., who remained in mother's custody. Thus, father alleged that under Virginia law, he was entitled to a credit for nonconforming support payments and was, therefore, not in arrears.

In response, mother argued, without reference to supporting evidence, that father was not entitled to a credit because there was no formal written agreement and she denied having agreed to a modification of child support. Mother attached as exhibits to her response a copy of the Virginia divorce decree, some Virginia case law, and a notarized statement of arrears apparently signed by a child support officer in Tennessee.

In reply, father argued that because mother failed to comply with Supreme Court Rule 141(b) (2006 Kan. Ct. R. Annot. 203), she was deemed to have admitted his uncontroverted facts that the parties had agreed to a change in physical custody of M.W. and a reduction in support payments.

In granting father's motion for summary judgment, the trial court noted that arguments of counsel are not evidence and ruled mother had not produced evidence refuting father's factual contentions. Accordingly, the trial court adopted father's uncontroverted facts.

On appeal, mother claims her response to father's summary judgment motion complied with Supreme Court Rule 141. Rule 141(b) requires a party opposing a motion for summary judgment to respond whether each of the moving party's factual contentions is uncontroverted or controverted; provide for each controverted contention "a concise summary of conflicting testimony or evidence . . . with precise references" to transcripts, depositions, discovery documents, exhibits, or other supporting documents contained in the court file and otherwise included in the record; and set forth any additional genuine issues of material fact with precise references that would preclude summary judgment. 2006 Kan. Ct. R. Annot. 204.

Rule 141 specifically directs that where the opposing party fails to comply with subsection (b), he or she "shall be deemed to have admitted the uncontroverted contentions of fact set forth in the memorandum or brief of moving party." 2006 Kan. Ct. R. Annot. 204; see K.S.A. 60-256(e).

To oppose a motion for summary judgment, a party must actively come forward with something of evidentiary value to establish a material dispute of fact. *Slaymaker v. Westgate State Bank*, 241 Kan. 525, 531, 739 P.2d 444 (1987).

In her response, mother denied there was ever a written agreement to change custody, but she cited no evidence in support of her argumentative denials. On appeal, mother acknowledges she did not provide an affidavit in response to father's motion, but claims she provided case law and notarized documents regarding the child support arrearage due.

But as the trial court found, attorney arguments are not evidence. *Evanson Trucking Co. v. Aranda*, 280 Kan. 821, 842, 127 P.3d 292 (2006). Mother does not contend that father's affidavit failed to comply with K.S.A. 60-256(e). As the adverse party, mother could not rest on mere allegations or denials. Rather, she was required to set forth specific facts showing there was a genuine issue of material fact for trial. See K.S.A. 60-256(e).

The only notarized document offered by mother was a statement of arrearage apparently signed by a child support official in Tennessee. It is unclear what role, if any, Tennessee officials have in the matter. Further, the "affidavit" does not show

affirmatively that it was made on personal knowledge and that the affiant is competent to testify as to the matters stated therein as required by K.S.A. 60-256(e). Further, the "affidavit" does nothing to establish or contribute toward proof of whether mother and father agreed as to custody of and support for M.W.–which is the central issue on this appeal.

We emphasize Rule 141 is not mere fluff–it means what it says and serves a necessary purpose. *McCullough v. Bethany Med. Center*, 235 Kan. 732, 736, 683 P.2d 1258 (1984). Bluntly stated, parties ignore Rule 141 at their peril. *Bus. Opportunities Unlimited, Inc. v. Envirotech Heating & Cooling, Inc.*, 26 Kan. App. 2d 616, Syl. ¶ 1, 992 P.2d 1250 (1999).

Because mother did not comply with Rule 141(b), the trial court did not err in admitting father's factual contentions as uncontroverted.

The issue on appeal thus becomes whether, applying Virginia law to father's uncontroverted facts, summary judgment is appropriate? And where, as here, there is no factual dispute, appellate review of an order granting summary judgment is de novo. *Roy v. Young*, 278 Kan. 244, 247, 93 P.3d 712 (2004).

Since mother is deemed to have admitted father's factual contentions, our task is to determine whether these uncontroverted facts are legally sufficient (under Virginia law) to support the granting of summary judgment in father's favor on the issue of whether he owes arrearages for M.S.'s support.

Father's uncontroverted factual contentions (with citations to his affidavit in support omitted) provided in part:

> "31. [Mother] consented and agreed to [M.W.] living with [Father] in Kansas.
>
> . . . .
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> "33. When [Mother] agreed to [M.W.] living with [Father], [Father] assumed physical custody and total responsibility for her health and welfare.
>
> "34. During the time [M.W.] lived with [Father], he provided 100% of her food, shelter, clothing, medical attention, school supplies, dance dresses, senior photos, automobile, and exercised parental control over her activities and education. [M.W.] began ninth grade at Topeka High School in August of 2000, and graduated from Topeka High School in May of 2004.

. . . .

"36. [Father] agreed to not seek modification of the Virginia support order and to send $304 per month for the parties' other minor child, [B.W.] . . .

"37. At no time when [M.W.] was in custody of her father, did he seek a modification of the Child Support Order then currently in place.

. . . .

"40. December 31, 2002 [M.W.] went to Tennessee and stayed with her mother for five months. When [M.W.] left, she indicated she intended on coming back to live in Kansas.

"41. During this period of time, [Father] resumed sending $608.00 per month child support.

"42. During the first days of June, 2003 [M.W.] returned to live with her father in Kansas. Shortly thereafter, [Father] continued with payments as the parties had previously agreed.

"43. Upon [M.W.'s] return [Mother] indicated to [Father] that he needed to come get [M.W.'s] things because she had no room for them, and if [Father] did not come get them, she would either sell them, give them away, or throw them away."

Mother argues the trial court "clearly believed" there may be an issue of material fact and, therefore, summary judgment was inappropriate. Mother's argument demonstrates a misunderstanding of the effect of her noncompliance with Rule 141, *i.e.*, father alleged, and *mother is deemed to have admitted*, that she agreed to father's assumption of custody of M.W. and corresponding reduction in support payments.

Here, the Virginia decree was registered in Kansas pursuant to the Uniform Interstate Family Support Act, K.S.A. 23-9,101 *et seq.* K.S.A. 23-9,604(a) provides that the law of the issuing state governs the amount of support obligations and the payment of any arrearages under the order. See *Hale v. Hale*, 33 Kan. App. 2d 769, 770-71, 108 P.3d 1012 (2005); Bezek, *Conflict of Laws in Kansas: A Guide to Navigating the Dismal Swamp*, 71 J.K.B.A. 21 (September 2002).

Finally, we reach the issue in applying Virginia law to the admitted facts that pursuant to the parties' agreement, father assumed physical custody of M.W. and reduced his support payments accordingly, was father entitled to summary judgment providing credit for his nonconforming support payments and thus not in arrears?

In *Acree v. Acree*, 2 Va. App. 151, 342 S.E.2d 68 (1986), the court considered the status of a father's obligation where there was an unequivocal agreement that permanently

altered a child's custody and provided that child support need not be paid to mother any longer. The agreement had been fully performed when mother petitioned the court for arrearages.

The *Acree* court reversed the trial court's denial of credit to the father for the nonconforming support, explaining that the cases applying an inflexible rule denying credit for unconforming payments involve expenditures made during short visits or vacations and the like. 2 Va. App. at 157.

The *Acree* court further reasoned that when the parents had agreed to change custody on a permanent basis, and the agreement had been fully performed, the purpose of the inflexible rule denying credit is outweighed by the equities involved. The purpose of the support decree had been fulfilled.

> "By assuming physical custody and total responsibility for the support of the child, the [father] fulfilled his obligation under the decree. He did not stop support payments unilaterally to suit his convenience. To enforce the letter of the decree after its purpose has been served and the parties' agreement fully performed would unjustly enrich the [mother] and shock the conscience of the average person. Most important, failure to enforce the letter of [the] decree under these circumstances will not work to the detriment of the child, for whose benefit the support was to be paid. The

agreement of the parties as carried out worked to the benefit of the child to the same degree that absolute conformity with the terms of the decree would have. No beneficial purpose would now be served by awarding arrearages for the support of [the parties' child]." 2 Va. App. at 158.

And in *Carver v. Carver*, 1998 WL 218217 (Va. App., unpublished opinion filed May 5, 1998), the issue was whether the trial court had the authority to terminate father's support obligations prior to the filing of a petition seeking modification of support. Relying on the rationale of *Acree*, the court ruled that despite mother's arguments to the contrary, a "court may, when equitable and under limited circumstances, allow a party credit for nonconforming support payments, provided that the nonconforming payment substantially satisfies the purpose and function of the support award and to do so does not vary the support award." 1998 WL 218217 at *3.

The *Carver* court ruled that

"while mother dispute[d] the existence of an agreement for a permanent change, the parties fully complied with the change in physical custody for the time at issue–a period at the time of the hearing in excess of fifteen months. The resulting arrangement, that the father 'assum[ed] physical custody and total responsibility for the support of the child,' fulfilled his obligation under the decree. [Citation omitted.]" (Emphasis added.) 1998 WL 218217 at *3.

In other words, the *Carver* court implicitly found the parties' actions demonstrated there was an agreement as claimed by father.

We feel the present case turns on the question of: What effect, if any, did the 5-month period in which M.W. returned to mother's custody, during which time father resumed paying mother $304 per month for M.W.'s support, have in applying the equitable principles recognized in *Acree* to the admitted facts in this case?

In this regard, mother's reliance on *Gallagher v. Gallagher*, 35 Va. App. 470, 546 S.E.2d 222 (2001), is misplaced. *Gallagher* did not involve a complete change in custody; it involved an agreement to change the percentage split of physical custody from 60/40 to 50/50, with a corresponding reduction of father's child support obligation. See 35 Va. App. at 473-75. The court held the reduction in support payments and the greater burden assumed as a result of increased custodial time was not "'easily susceptible of proof.'" 35 Va. App. at 478.

Despite mother's arguments to the contrary, we hold the intervening 5-month period of M.W.'s return to mother's custody does not automatically vitiate a finding of a "permanent" change of custody as contemplated by *Acree*. Rather, it is reasonable to

conclude from the admitted, undisputed facts of the present case that the only effect the intervening 5-month period had was to effectively create two separate time periods of an agreed-upon permanent change in M.W.'s custody from mother to father with a corresponding cessation in father's payments for M.W.'s support.

For each time period there was a total change of custody. Each period of the complete change in custody and cessation of support payments by the parties' agreement is analogous to *Acree*, and its equitable reasoning and rationale should apply here to allow father credit for nonconforming support during each period. No trouble or turmoil of the type found in *Gallagher* is present here.

Applying the holding in *Acree* to the present case, "failure to enforce the letter of this decree under these circumstances will not work to the detriment of [M.W.], for whose benefit the support was to be paid . . . . No beneficial purpose would now be served by awarding arrearages for the support of [M.W.]." See *Acree*, 2 Va. App. at 158.

Under the facts of this case, summary judgment in father's favor was appropriate under Virginia law.

Affirmed.