NOT DESIGNATED FOR PUBLICATION

No. 101,324

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE MARRIAGE OF

DAVID FREDERICK ULRICH,

and

TERESA MICHELLE ULRICH.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; ANTHONY J. POWELL, judge. Opinion filed November 20, 2009. Affirmed.

Joseph H. Cassell and *Nicholas R. Grillot*, of Redmond & Nazar, LLP, of Wichita, for appellant.

No brief filed by appellee.

Before HILL, P.J., CAPLINGER and LEBEN, JJ.

CAPLINGER, J.: David Ulrich appeals from the district court's denial of his amended motion for sanctions against his former wife, Teresa Ulrich (now known as Brown), and from the court's summary denial of his subsequent motion to alter or amend the order denying his motion for sanctions. Because we find no abuse of discretion in the denial of either motion, we affirm.

Factual and procedural background

Ulrich and Brown were married in February 2000, and have one child together. Ulrich filed for divorce in December 2002, and both parties sought joint legal and shared residential custody of the child.

The district court granted the parties' divorce in January 2004, but reserved ruling on custody until trial. Following an evidentiary hearing in June 2004, the court granted the parties joint legal custody, granted Brown primary residential custody, and ordered Ulrich to pay $299 per month in child support beginning July 1, 2004.

After the evidentiary hearing but before the journal entry was filed, Ulrich sought the district court's permission to reopen discovery, specifically to require Brown to produce copies of e-mails Ulrich claimed Brown illegally obtained from his private e-

mail accounts, which she then used to influence the court's custody decision. The court denied Ulrich's motion to compel discovery, stating:

> "If you've . . . got a beef with something that was done during the pendency of the case, if you think something was violated, or whatever, you need to file a civil action to do that. This case is over. And I'm not going to let you go back and do more discovery so then you can then complain about the DRC. If you need to reopen the DRC after you've done your stuff in the civil case, then go ahead, try. But I'm not going to let discovery stay open so that we can perpetuate these conflicts, okay?"

In July 2004, Brown filed for bankruptcy. Ulrich filed an adversary proceeding against Brown in the bankruptcy case and obtained evidence, including Brown's admissions, that Brown accessed his private e-mail accounts during the pendency of the divorce and child custody proceedings. The bankruptcy proceedings ended sometime in 2007.

In May 2007, Ulrich filed a motion in this case seeking permission to introduce the evidence he obtained through the bankruptcy proceeding. At that time, the parties were seeking the district court's determination regarding where their child would attend school. The district court granted Ulrich's motion in part, stating the evidence could be shared with the parties and the case manager assigned to the school placement issue.

In March 2008, while the school placement issue was still pending, Ulrich filed a motion for reconsideration of the June 2004 custody order based on Brown's alleged misconduct. The district court heard oral argument on the motion and requested written briefs from both parties. In response, Ulrich filed an amended motion for sanctions in which he clarified that he no longer sought reconsideration of custody or parenting issues, but instead, sought sanctions against Brown. Specifically, Ulrich requested the assessment of various attorney fees and legal costs against Brown based on her accessing of his private e-mail accounts and use of that information to influence the court's 2004 custody decision. Further, Ulrich requested that the trial judge, Eric Yost, conduct an evidentiary hearing on his motion.

Judge Anthony Powell denied Ulrich's amended motion for sanctions and summarily denied his subsequent motion to alter or amend the denial of the motion for sanctions. In denying sanctions, Judge Powell summarized Ulrich's claim as follows: "It appears that [Ulrich's] claims against [Brown] allege that [Brown] violated federal law, prejudiced his custody and parenting time trial, and required him to incur needless litigation costs, all because of her alleged unlawful tinkering with his emails." Construing Ulrich's amended motion for sanctions as a motion for costs and attorney fees under K.S.A. 60-1610(b)(4), the district court found no basis for awarding sanctions because Ulrich failed to establish that he was prejudiced by Brown's alleged misconduct.

Specifically, the court reasoned that even if Ulrich's allegations were true, the court had previously resolved the child custody and parenting time issues that Ulrich now claimed were tainted by Brown's alleged misconduct. Further, the court noted that if Ulrich's claims were true, he could pursue other remedies in an appropriate forum.

Ulrich appeals the denial of both motions.

Denial of Amended Motion for Sanctions

Ulrich first challenges the district court's denial of his amended motion for sanctions, claiming the district court denied his right to due process by failing to conduct an evidentiary hearing on the motion. Further, Ulrich suggests the court abused its discretion in denying sanctions by construing the motion as one for costs and attorney fees under K.S.A. 60-1610(b)(4) and in concluding Ulrich failed to establish prejudice.

1. Violation of due process

Ulrich first suggests, without benefit of authority, that his due process rights were violated when the district court failed to conduct an evidentiary hearing. Whether Ulrich's due process rights were violated is a question of law over which we exercise

unlimited review. See *Hemphill v. Kansas Dept. of Revenue*, 270 Kan. 83, 89, 11 P.3d 1165 (2000).

In support of his due process claim, Ulrich cites *Larson Operating Co. v. Petroleum, Inc.*, 32 Kan. App. 2d 460, 472, 84 P.3d 626 (2004)—a case which did not discuss due process. However, the court in *Larson* held: "Sanctions pursuant to inherent powers must be exercised with restraint and caution and imposed only after proper notice and an opportunity for a hearing on the record." 32 Kan. App. 2d at 472.

Ulrich's reliance on *Larson* is misplaced. *Larson* requires the district court to conduct a hearing before imposing sanctions, not before denying sanctions. See also *Knutson Mortgage Corp. v. Coleman*, 24 Kan. App. 2d 650, 654, 951 P.2d 548 (1997) ("before a court exercises its inherent power to sanction an attorney, it must provide fair notice and an opportunity for a hearing on the record").

Further, even if Ulrich was entitled to an evidentiary hearing on his motion, he did not have a protected property interest in that entitlement. *Landmark Nat'l. Bank v. Kesler*, 289 Kan. ___, ___, 216 P.3d 158, 2009 WL 2633640, at *12 (August 28, 2009) (no protected property interest in entitlement to a procedure). Thus, the failure to grant an evidentiary hearing could not have violated his due process rights.

Finally, we note that Ulrich also appears to allege the district court violated his due process right by conferring with the judge who presided over an evidentiary hearing on the school placement issue.

Ulrich's argument lacks factual and legal merit. Ulrich's factual allegation is based upon an inference that the two judges discussed his motion--an inference he derives from a footnote in Judge Powell's order denying sanctions. The footnote recited that the parties had settled all custody issues except for the child's school placement and that the trial judge in that matter—Judge Goering—permitted Ulrich to present evidence regarding Brown's allegedly illegal acts before deciding the child would attend the school chosen by Brown.

We cannot conclude from this footnote that Judge Powell conferred with Judge Goering about this matter, as opposed to obtaining the information through the district court record. For instance, the appearance docket indicates Judge Goering conducted an evidentiary hearing on the school placement issue on August 8, 2008, and ordered Brown's attorney to prepare a journal entry. The record is unclear when the journal entry was filed. However, Ulrich refers to Judge Goering's decision in his motion to alter or amend which was filed on September 16, 2008.

Moreover, even assuming the two judges consulted about the matter, Ulrich fails to cite any legal basis for his claim that this constitutes a due process violation.

Instead, Ulrich cites Rule 601B of the Kansas Code of Judicial Conduct (2009 Kan. Ct. R. Annot. 663) as support for his assertion that the judges were not permitted to confer. However, that rule became effective March 1, 2009—after the district court denied both of Ulrich's motions in this case. See Supreme Court Order 2009 SC 6 (adopting Kansas Code of Judicial Conduct, Rule 601B). Any alleged violations of the Kansas Code of Judicial Conduct occurring before March 1, 2009, were governed by Rule 601A (2008 Kan. Ct. R. Annot. 645), which permitted judges to confer with one another. See Code of Judicial Conduct, Rule 601A, Canon 3 B. (7)(c) (2008 Kan. Ct. R. Annot. 653).

Accordingly, we conclude Ulrich's due process claim is neither factually or legally sound.

2. Nature of motion

Next, Ulrich contends the district court erred in treating his amended motion for sanctions as one for costs and attorney fees under K.S.A. 60-1610(b)(4).

Under that statute, the district court has authority to award costs and attorney fees in divorce and maintenance actions to either party "as justice and equity require." K.S.A. 60-1610(b)(4). Additionally, courts have inherent power to impose sanctions, including the assessment of attorney fees, for bad faith conduct in the course of litigation. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46, 115 L. Ed. 2d 27, 111 S. Ct. 2123 (1991); *Alpha Med. Clinic v. Anderson*, 280 Kan. 903, 926, 128 P.3d 364 (2006).

Sanctions imposed under a court's inherent powers "must be exercised with restraint and discretion." *Chambers*, 501 U.S. at 44; *Larson*, 32 Kan. App. 2d at 472. A trial court's decision on whether to impose sanctions in a particular case is reviewed for an abuse of discretion. *Wilkinson v. Shoney's, Inc.*, 269 Kan. 194, 226, 4 P.3d 1149 (2000); *Richards v. Bryan*, 19 Kan. App. 2d 950, 967, 879 P.2d 638 (1994).

Here, the district court's reference to K.S.A. 60-1610 was not material to the outcome of the motion. Regardless of whether the district court considered the motion as one brought pursuant to the statute or as a motion for sanctions under the court's inherent powers, as discussed below, the court's determination that sanctions were not warranted was reasonable under the circumstances.

3. Failure to prove prejudice

As the district court noted, because Ulrich abandoned his untimely challenge to the underlying custody determination, he could not establish prejudice as a result of Brown's alleged misconduct even if his factual allegations were true.

Nevertheless, Ulrich contends he was not required to show prejudice for a court to exercise its inherent authority to impose sanctions against a party. In support, he cites *Wilson v. American Fidelity Ins. Co.*, 229 Kan. 416, 625 P.2d 1117 (1981) and *Knutson Mortgage Corp. v. Coleman*, 24 Kan. App. 2d 650, 951 P.2d 548 (1997). Yet neither *Wilson* nor *Knutson* specifically discuss whether prejudice is required to support imposition of sanctions against an opposing party.

However, case law suggests that prejudice to the opposing party and the judicial process are salient factors to be considered in determining whether to impose sanctions for litigation misconduct. See, *e.g.*, *Chambers*, 501 U.S. at 44-45 ("primary aspect" of a court's discretion to exercise inherent sanctioning powers "is the ability to fashion an appropriate sanction for conduct which abuses the judicial process"); *Alpha Med. Clinic*, 280 Kan. at 929 (declining to hold attorney general in contempt where the proceedings were not prejudiced by his conduct).

Alternatively, Ulrich argues that if prejudice is required, he was prejudiced because he paid child support based on the court's custody decision and incurred time and expense as a result of Brown's improper actions.

Yet, in light of Ulrich's abandonment of his motion to reconsider the court's custody decision, he has no ground to complain about prejudice arising from his child support obligation based on the custody order or from his voluntary decision to investigate Brown's conduct.

4. Judicial assignment of posttrial motions

Finally, Ulrich claims the district court violated Sedgwick County District Court Rule 210 by failing to assign his posttrial motions to the trial judge, Judge Yost. That rule provides: "All post-trial motions in civil cases will be heard at a time and date set by the Judge who tried the case."

Interpretation and application of local rules by a trial court is reviewed de novo. *In re Marriage of Galvin*, 32 Kan. App. 2d 410, 414-15, 83 P.3d 805 (2004).

Ulrich's argument lacks merit as he fails to cite any authority suggesting that a violation of the local rule regarding assignment of posttrial motions constitutes a per se abuse of discretion and we are aware of no such authority. Additionally, Ulrich's argument ignores the more specific local rules that apply to family law matters in Sedgwick County. For instance, Rule 406 governs the assignment of motions filed in the family law department and provides in relevant part:

> "1. Hearing Officer: Motions involving child support, past due or unreimbursed medical expenses, parenting time or paternity shall be heard by the Hearing Officer on Monday or Tuesday mornings at 9:00 am.
>
> "2. Court Trustee: Motions to stay income withholding orders issued by the Court Trustee shall be heard by the Hearing Officer on the docket attended by the Court Trustee assigned to the particular case.
>
> "3. Self-Represented Litigants: All motions filed in cases where both parties are self-represented shall be heard on Mondays at 9:30 am by a district judge, except as provided above in Section 1.
>
> "4. District Judges: *All other motions in Family Law cases shall be heard* on Mondays at 1:30 pm, or Tuesdays at 9:30 am or 1:30 pm, *by a district judge.*" (Emphasis added.) 18th Judicial District Local Rules, Rule 406.

Here, Ulrich's original motion for reconsideration and amended motion for sanctions were both filed in the family law department. Because the motions did not fall into any of the first three categories in Rule 406, the motions were required to be heard "by a district judge," but not necessarily the trial judge. Accordingly, the district court did not err by failing to assign the motions to Judge Yost.

In summary, we conclude the district court did not abuse its discretion in denying Ulrich's amended motion for sanctions.

Summary denial of motion to alter or amend

Finally, Ulrich claims the district court violated Supreme Court Rule 133(c) (2008 Kan. Ct. R. Annot. 216) by denying Ulrich's motion to alter or amend its denial of his motion for sanctions without conducting a hearing on the motion or specifically finding a hearing was unnecessary. Ulrich claims the violation deprived him of his ability to prove fraud upon the court.

The district court's interpretation and application of Supreme Court Rule 133(c) is reviewed de novo. See *In re Marriage of Galvin*, 32 Kan. App. 2d at 414-15.

Supreme Court Rule 133 (c) provides in relevant part:

> "*Oral argument.* If the motion also contains a request for oral argument, or if within five days of the service of the motion an adverse party serves and files a request for oral argument, no ruling shall be made on the motion without opportunity being given to counsel to present such arguments. . . . Notwithstanding a timely request for oral argument the court may deny such request by stating in the ruling or by separate communication that oral argument would not materially aid the court." Rule 133(c) (2008 Kan Ct. R. Annot. 216).

Ulrich is correct that the district court failed to comply with Rule 133(c) in light of Ulrich's specific request for oral argument in his motion to alter or amend. Notwithstanding that request, the district court summarily denied the motion "for the reasons set forth in the court's previous memorandum decision and order" and failed to state that oral arguments would not materially aid the court.

Once again, Ulrich fails to refer us to any authority supporting his assertion that a violation of this rule constitutes a per se abuse of discretion, and we are aware of none. Moreover, Ulrich fails to specify how the court's failure to include a sentence explaining its refusal to grant oral argument on his motion to alter or amend prejudiced his ability to

present his case. Therefore, we reject Ulrich's claim that the district court abused its discretion in summarily denying his motion to alter or amend.

Affirmed.