

NOT DESIGNATED FOR PUBLICATION

No. 110,966

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

CARRIE E. SINKS,
Appellee,

and

LAWRENCE W. SINKS,
Appellant.

MEMORANDUM OPINION

Appeal from Douglas District Court; BARBARA KAY HUFF, judge. Opinion filed September 12, 2014. Reversed and remanded.

Robert E. Keeshan, of Scott, Quinlan, Willard, Barnes & Keeshan, LLC, of Topeka, for appellant

Shaye L. Downing, of Sloan, Eisenbarth, Glassman, McEntire & Jarboe, L.L.C., of Lawrence, for appellee.

Before ATCHESON, P.J., HILL and ARNOLD-BURGER, JJ.

Per Curiam: A district court may modify maintenance and child support at any time. Lawrence W. Sinks (Larry) filed a motion to modify child support, but the district court refused to rule on his motion. The judge found that she did not have jurisdiction because of a pending appeal in the case. The parties agree this was error. Accordingly, we reverse the district court's decision and remand the matter to the district court to consider Larry's motion. In addition, we grant Larry's request for attorney fees and costs in this case in the amount of \$4,636.40.

FACTUAL AND PROCEDURAL HISTORY

In February 2013, Carrie E. and Larry Sinks were granted a divorce. After over 4 days of bench trial, in May 2013, the district court decided all financial, property, maintenance, child support, child custody, and parenting time issues. Shortly thereafter, Larry filed a motion to modify child support in the Pro-tem Division, but the Pro-tem judge refused to rule on the motion and did not file an order. So Larry filed a motion to modify maintenance and child support in the district court, arguing that a material change in circumstances occurred since the filing of his 2010 tax return, which was the only one considered in his trial.

Although in June 2013 the district court filed a journal entry that modified its original decision, Larry's motion to modify maintenance and child support was not decided by the district court. The parties filed appeals and cross-appeals from the court's June 2013 decision. See *In re Marriage of Sinks*, No. 110,316, unpublished opinion filed September 12, 2014 (*Sinks I*).

Subsequently, the district court held a hearing on Larry's motion to modify maintenance and child support. Larry and his accountant testified regarding Larry's 2012 tax returns and current income. At the hearing, the district court took the modification request under advisement.

On November 4, 2013, the district court dismissed Larry's motion to modify child support and maintenance, determining that the appeals in *Sinks I* divested the district court of jurisdiction over questions pertaining to the divorce decree, maintenance, and property. Larry timely appealed the district court's decision.

ANALYSIS

Larry contends that the district court erroneously determined that it did not have jurisdiction to decide his motion to modify child support and maintenance and Carrie concedes this point. However, she asserts that the error was harmless because Larry failed to show that there was a material change in circumstances. Carrie also argues that Larry's appeal fails because he did not follow the Douglas County local rules and go through the Pro-tem Division first.

Whether jurisdiction exists is a question of law over which this court's scope of review is unlimited. *Frazier v. Goudschaal*, 296 Kan. 730, 743, 295 P.3d 542 (2013).

K.S.A. 2013 Supp. 23-2903 and K.S.A. 2013 Supp. 23-3005 allow a district court to modify maintenance and child support at any time. See also *Martin v. Martin*, 5 Kan. App. 2d 670, 677, 623 P.2d 527, *rev. denied* 229 Kan. 670 (1981) (district court retained jurisdiction to modify maintenance despite pending appeal of original decision); Kansas Child Support Guidelines § V (2013 Kan. Ct. R. Annot. 143) (district court retains continuing jurisdiction to modify child support).

Therefore, the district court erred when it dismissed Larry's motion to modify maintenance and child support for lack of jurisdiction. The district court did retain continuing jurisdiction to modify child support and maintenance and should have determined whether a material change in circumstances occurred in order to modify Larry's support obligations.

Carrie attempts to persuade this court that although the district court erred when it determined it did not have jurisdiction, the error was harmless because Larry failed to prove a material change in his circumstances in order to modify maintenance and child support. Carrie's argument fails because a material change in circumstances is a fact-

specific question, which the district court did not answer. See *In re Marriage of Hedrick*, 21 Kan. App. 2d 964, 968, 911 P.2d 192 (1996). This court is not a fact-finding court; thus, this court cannot determine whether Larry did or did not show that there was a material change in circumstances.

Carrie's final argument, that Larry's failure to abide by the local rules should prohibit him from obtaining a modification, is also unpersuasive for two reasons. First, it appears that the procedure followed was consistent with the rules. Douglas County District Court Local Rule 11(C)(1) provides that "[m]otions to enforce parenting time and motions to enforce or modify child support are assigned to the Pro-tem Division." However, if the case involves issues other than parenting time and child support Local Rule 11(C)(2) provides that "[c]ases that involve issues *other than or in addition to* motions to enforce parenting time and motions to enforce or modify child support will continue in the division to which the case was originally assigned." (Emphasis added.) This case involved issues "other than or in addition to" parenting time and child support—it involved maintenance. Accordingly, it appears that the case was properly heard in the division to which the case was originally assigned.

Second, it appears that Carrie waived any claim that Larry was required to have his case heard in the Pro-tem Division. At the hearing before the district court, Larry's attorney stated:

"I have a motion to modify maintenance and child support. The child support was in the pro tem division, and the maintenance is before you today, and [Carrie's attorney] and I agreed that it was duplicitous to go back to the pro tem once you determine what [Larry's] income is. When you determine what it is for purposes of maintenance, then we will just apply it for purposes of child support and cancel that hearing."

Carrie's attorney did not object to this procedural path, and the district court was fine with the suggested procedural path. She cannot now complain that it was improper.

Finally, after oral argument in this case, Larry filed a motion for costs and attorney fees. Larry argues that Carrie concedes error and raised frivolous arguments requiring a reply brief. As a result, Larry requests \$4,636 in appellate attorney fees and costs in connection with this appeal. Carrie has not filed a response or an objection to the request.

This court has authority to award attorney fees for services on appeal in cases where the district court had authority to award attorney fees. Supreme Court Rule 7.07(b)(1) (2013 Kan. Ct. R. Annot. 67). Additionally, K.S.A. 2013 Supp. 23-2715 grants the trial court authority to award attorney fees to either party as justice and equity require. After considering the arguments of both parties in this case as a whole, we determine that an award of \$4,636 to Larry would be an adequate and just award for attorney fees for this appeal.

Reversed and remanded.