**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A09-714**

In re the Marriage of:
Ewa Gabriella Banas, petitioner,
Appellant,

vs.

Antony Jo'sef Banas,
Respondent.

**Filed December 1, 2009**
**Affirmed; motion granted**
**Huspeni, Judge**[*]

Stearns County District Court
File No. 73-F9-93-001460

Ewa Gabriella Banas, P.O. Box 688, East Hampton, NY 11937 (pro se appellant)

Kathryn A. Graves, Katz, Manka, Teplinsky, Graves & Sobol, Ltd., 225 South Sixth Street, Suite 4150, Minneapolis, MN 55402 (for respondent)

Considered and decided by Klaphake, Presiding Judge; Halbrooks, Judge; and Huspeni, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

## U N P U B L I S H E D  O P I N I O N

**HUSPENI**, Judge

Appellant Ewa Banas challenges the district court's decisions to terminate her spousal maintenance award, to decline to open the record on remand, and to impose costs and disbursements against her. Because the district court did not abuse its discretion in these decisions, we affirm. We also grant appellant's motion to expedite release of this opinion.

## FACTS

Appellant and respondent Antony Jo'sef Banas, M.D., were married in Poland in 1976. Respondent immigrated to the United States in 1984 where he became a physician. Appellant remained in Poland with the parties' son, where she worked as a medical technician in a Polish medical center. In 1992, she and her son came to the United States. After first settling in Iowa, the parties experienced serious marital difficulties. They eventually relocated to St. Cloud, Minnesota, where marital problems continued, and where they divorced in 1994. Under the decree, appellant was awarded, among other things, child support and permanent spousal maintenance of $1,150 per month for 36 months and $800 per month thereafter.

After the divorce, respondent moved to Missouri to practice pediatric medicine; appellant and the parties' son remained in Minnesota. At the time, respondent's annual income was approximately $90,000 per year. Shortly after moving to Missouri, respondent was diagnosed with severe bipolar disorder. His employment contract with a clinic in Missouri was not renewed, and he moved to Illinois. While in Illinois, his

illness continued to be debilitating. Due to his illness and the effects of the medication taken to control it, respondent failed his pediatric board examination six times. His hospital privileges were revoked, forcing him to practice solely on an outpatient basis. Respondent's income fell precipitously. He remarried in 1997; his present wife does not work outside the home.

In 2004, the district court granted respondent's request to stay the imposition of cost-of-living adjustments, but denied his motion to terminate maintenance. In 2005 respondent earned approximately $60,000; in 2006 the cost of his medical malpractice insurance increased from $17,682 to $29,719.

At the time of the dissolution, appellant was attending St. Cloud State University, pursuing a degree that would enable her to be employed in a field similar to the one in which she had worked in Poland. Appellant graduated and became employed. According to her resume, however, she changed jobs four times between May 1997 and July 1999, staying in each position for no more than a few months. The record is silent regarding the bases for appellant's frequent changes in employment, although she states that she was never fired from any position for misconduct. In 2001, appellant moved to New York, having decided to become a full-time artist. Ultimately, she engaged in painting and performing odd jobs to supplement her income.

In 2006, respondent once again sought termination of spousal maintenance, citing his continuing mental illness, his inability to pass the medical boards, and his decreased income. Appellant did not respond, and the motion was granted as a default matter. Several weeks after entry of an amended decree incorporating the order for termination of

spousal maintenance, appellant notified the district court that she had not heard of the proceedings that resulted in that termination because she had been unable to pay her post office box rent.

The district court permitted appellant to proceed with a motion for reconsideration of the order terminating spousal maintenance and also permitted her to submit affidavits on her behalf; documentation that appellant submitted was received by the court only a few days before the motion was to be heard. The motion was heard and denied in April, 2007. The district court also granted $185 in costs and disbursements payable to respondent. Appellant sought review of that order in this court.

On appeal, this court reversed and remanded, determining that neither termination of spousal maintenance nor the award of costs and disbursements was sufficiently supported by findings. *Banas v. Banas*, No. A07-1164, 2008 WL 5057032, at *3–*4 (Minn. App. Dec. 2, 2008) (*Banas I*). Discretion was left with the district court whether to re-open the record upon remand. *Id.*

Upon remand, the district court issued 27 findings of fact in support of its order reaffirming termination of spousal maintenance and awarding $185 in costs and disbursements to respondent.

## D E C I S I O N

### I. The district court did not abuse its discretion by denying appellant's motion to re-open the record.

We address initially appellant's argument that the district court abused its discretion in failing to reopen the record on remand. Unquestionably, a district court has

the duty to execute the mandate of the remanding court strictly according to its terms. *Duffey v. Duffey*, 432 N.W.2d 473, 476 (Minn. App. 1988), *review denied* (Minn. Feb. 24, 1988). But "[w]hen the trial court receives no specific directions as to how it should proceed in fulfilling the remanding court's order, the trial court has discretion in handling the course of the cause to proceed in any manner not inconsistent with the remand order." *Id.* This court's opinion gave the district court the discretion to reopen the record on remand, not a mandate to do so. *Banas I*, 2008 WL 5057032 at *3. "Appellate courts review a district court's compliance with remand instructions under the deferential abuse of discretion standard." *Janssen v. Best & Flanagan, LLP*, 704 N.W.2d 759, 763 (Minn. 2005). Possessing the discretion either to reopen the record or to decline to reopen the record on remand, the district court declined. Its discretion was not thereby abused.

Appellant nonetheless insists that the district court wrongfully refused to examine certain documents, including her tax records and a letter she wrote to her former attorney containing answers to some of respondent's interrogatories. Appellant does not explain, however, why the documents she wanted reviewed on remand were not included with the affidavits she submitted in support of her motion for reconsideration. She had sufficient opportunity to provide this information at the time the district court had the motion for reconsideration before it. And appellant offers no compelling argument that this additional documentation, had it been received, would have altered the district court's analysis. *See Midway Ctr. Assocs. v. Midway Ctr., Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975) (stating that, to prevail on appeal, a party must show both error by the

district court and that the error prejudiced the complaining party); *see also* Minn. R. Civ. P. 61 (requiring harmless error to be ignored). While appellant states that she no longer has possession of the proffered documents due to being evicted from her residence by her landlord and her landlord disallowing her access to many of her possessions, these unfortunate events took place after earlier opportunities to submit the documents to the district court. Further, the record reflects that appellant did provide the court with detailed explanations of her financial, medical, and emotional conditions, sufficient for the court to make an informed decision about whether there had been a substantial change in circumstances rendering respondent's spousal maintenance obligation unreasonable and unfair. The district court did not abuse its discretion by declining to reopen the record.

## II. The district court did not abuse its discretion in terminating spousal maintenance.

Appellant next argues that the district court abused its discretion by terminating spousal maintenance. Whether to modify spousal maintenance is discretionary with the district court. *Youker v. Youker*, 661 N.W.2d 266, 269 (Minn. App. 2003), *review denied* (Minn. Aug. 5, 2003). A district court abuses its discretion when its findings of fact are unsupported by the record or if it improperly applies the law. *Dobrin v. Dobrin*, 569 N.W.2d 199, 202 (Minn. 1997).

A modification of spousal maintenance is appropriate when a substantial change in circumstances renders the original award "unreasonable and unfair." Minn. Stat. § 518A.39, subd. 2(a) (2008). A substantial increase or decrease in the gross income of

an obligor or obligee, or a substantial increase or decrease in the needs of an obligor or obligee, is sufficient to show changed circumstances. *Id.* Whether or not there have been changed circumstances is a factual finding. *Prange v. Prange*, 437 N.W.2d 69, 70 (Minn. App. 1989), *review denied* (Minn. May 12, 1989). Factual findings will not be set aside unless they are clearly erroneous. Minn. R. Civ. P. 52.01.

Here, the 27 findings of the district court made on remand are sufficient to enable this court to meaningfully review the decision to terminate spousal maintenance. Among the numerous findings of the district court are the following:

> At the time of the divorce the trial court . . . specifically found that: "[Respondent's] salary at his new job is $90,000 per year with an opportunity for production bonuses. It is likely that his earnings will increase substantially in future years."
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> [Respondent's] 2002 to 2005 income tax returns show he had gross annual income between $50,000 to $62,000 during this time period. [Respondent's] gross business income after payment of reasonable business expenses in 2005 was $58,370. . . . [Respondent] estimated that his 2006 income would be less because the cost of his malpractice insurance was increasing from approximately $15,000 per year to almost $30,000 per year. . . .
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> [Respondent] had remarried; however his wife does not work outside the home. [Respondent's] net monthly income was $2,817. He has monthly expenses (not including his spousal maintenance obligation) of $3,356. This is a reasonable budget considering the level of his income in recent years.
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> . . . .

> [Respondent] no longer has the financial ability to pay spousal maintenance to [appellant] and still pay his monthly expenses. His net monthly income of $2,817 is insufficient to pay monthly expenses of $3,356.

We are not insensitive to appellant's circumstances, which have also changed. She was able, however, to complete her education and find employment in the field for which her education prepared her. The record is silent as to a cause for appellant's frequent changes of employment. Her decision to become a full-time artist rather than remain in the profession for which she was trained or finding other work that would be able to provide her with a suitable income appears to be a fully voluntary one. She contends that she was not allowed to work in her chosen field because her internship in the medical technology program was terminated during her training. The record reflects, however, that she did find employment in several positions within the medical field after graduation.

In determining whether to terminate a spousal maintenance award, the district court considers the recipient's need for maintenance balanced against the obligor's financial ability to pay maintenance. *Erlandson v. Erlandson*, 318 N.W.2d 36, 39-40 (Minn. 1982); *see Maeder v. Maeder*, 480 N.W.2d 677, 679 (Minn. App. 1992) (noting that a maintenance decision generally balances the incomes and needs of the parties), *review denied* (Minn. Mar. 19, 1992). The district court's findings are not clearly erroneous and demonstrate that the balance of appellant's need weighed against respondent's diminished ability to pay supports terminating the spousal maintenance.

As recited in the decree of dissolution, the initial grant of spousal maintenance was "to provide for [appellant] and her son, to acquire sufficient education to enable [appellant] to find appropriate employment, and to become fully or partially self-supporting." Fifteen years later, appellant has completed her education, the parties' son has been emancipated, and appellant has had a reasonable time to obtain a sufficient standard of living. We recognize that the award of spousal maintenance, while a declining one, was permanent, and that respondent bore the burden of proof to demonstrate not only a substantial change in circumstances, but that such change rendered the maintenance award unreasonable and unfair. Recognizing also the numerous, detailed, and evidence-based findings of the district court and the deference we must accord those findings, we are unable to find that the court's discretion was abused in terminating respondent's spousal maintenance obligation.

## III. The district court did not abuse its discretion by granting costs and disbursements to respondent.

In the proceedings generating *Banas I*, the district court awarded respondent $185 in costs and disbursements from appellant. *Banas I* noted that the award was governed by what is now Minn. Stat. § 518.14, subd. 1 (2008), ruled that the district court's findings were insufficient to support the award to respondent, and remanded the question to the district court. 2008 WL 5057032, at *4. A district court "may" award conduct-based costs and disbursements "against a party who unreasonably contributes to the length or expense of the proceeding." Minn. Stat. § 518.14, subd. 1. An award of conduct-based costs and disbursements must be based on behavior occurring during the

litigation, and the court must identify the specific conduct on which it bases the fee award. *See Geske v. Marcolina*, 624 N.W.2d 813, 819 (Minn. App. 2001). Conduct-based awards are discretionary with the district court. *See Szarzynski v. Szarzynski*, 732 N.W.2d 285, 295 (Minn. App. 2007). On remand, the district court indicated that the award of costs and disbursements was based on appellant's unreasonable delay in responding to respondent's interrogatory requests. Specifically, the district court noted that appellant did not respond with documents until three days prior to the hearing date, and that, when she did respond, "[h]er discovery responses were incomplete or provided no verification of her income or financial resources." The district court found that appellant's conduct was sufficient to justify an award of costs and disbursements to respondent. Because the record supports the district court's findings, and because the described conduct occurred during the litigation, we cannot say that the district court abused its discretion by awarding respondent $185.

**IV. Appellant's motions to expedite this appeal are granted.**

Appellant has filed two motions to expedite the consideration and processing of this opinion. A motion to expedite the appeal was granted by this court on September 1, 2009. Appellant filed an additional motion on November 9, 2009 to expedite the release of the opinion. While this court's order of September 1, 2009 was sufficiently broad to encompass a directive that release of the opinion be accelerated also, we do hereby grant the relief sought by appellant in her November 9, 2009 motion. This court has accelerated release of this opinion.

**Affirmed; motion granted.**