STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1164

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

vs.

Antony Jo'sef Banas,
Respondent.

Filed December 2, 2008
Appeal dismissed in part, reversed in part, and remanded; motion denied
Schellhas, 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 Schellhas, Presiding Judge; Halbrooks, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

SCHELLHAS, Judge

On appeal, pro se appellant challenges three district court rulings. The first terminated appellant's permanent spousal maintenance award, the second denied her motions for reconsideration and to vacate, and the third awarded costs and disbursements to respondent. We reverse and remand the rulings terminating maintenance and awarding costs and disbursements because both are unsupported by findings. In light of our reversal, we dismiss as moot the portion of the appeal taken from the denial of appellant's motion to vacate. We also deny as moot appellant's motion to expedite release of this opinion.

FACTS

Appellant Ewa Gabriella Banas and respondent Antony Jo'sef Banas were divorced by judgment and decree entered April 26, 1994. The decree awarded appellant spousal maintenance in the amount of $1,150 per month for 36 months and then $800 per month on a permanent basis.

In 2002, respondent, who is a medical doctor, moved the district court to terminate his spousal-maintenance obligation on the basis that (1) he had mental-health problems that affected his employment and prevented him from passing the pediatric board exam and (2) his income had declined. The court denied respondent's motion.

In 2006, respondent again moved to terminate his spousal maintenance obligation, again alleging decreased income and earning capacity because of his mental-health problems and failure to pass the pediatric board exam. Respondent also alleged that

appellant had completed schooling contemplated in the divorce decree but had thereafter moved to New York with the parties' son to work as an artist. Respondent alleged that appellant had been notified of his motion, served with discovery, and had not responded to the motion or discovery. Respondent advised the district court that because of appellant's failure to respond to his motion and discovery, his only information about her was that she lived "in an exclusive resort city, Montauk, New York," and he assumed that appellant "has the significant financial resources required to live in such a city." Respondent argued that because appellant had completed her education contemplated by the divorce decree and the parties' minor child had emancipated, she should be able to contribute to her own support.

On August 16, 2006, respondent's counsel appeared at a hearing on respondent's motion to terminate maintenance. Appellant made no appearance and did not submit any response to the motion. Respondent proceeded with his motion as if by default. The district court issued an order amending the decree to terminate spousal maintenance and divest the court's jurisdiction over the issue of spousal maintenance. The order contains no findings or analysis. An amended judgment and decree was entered on August 29, 2006.

The record reflects that after entry of the amended judgment and decree, the following events occurred. On September 28, 2006, the district court received a letter from appellant stating that there was "a mistake . . . due to my mailing address change." On October 26, 2006, on behalf of appellant, an attorney sent the district court a letter and an ex-parte motion with his own affidavit. Appellant moved the court to (1) allow

"reconsideration of this matter" and grant a new hearing and (2) vacate the amended decree and require a new hearing to consider the merits of the motion to modify spousal maintenance. In his affidavit, appellant's attorney stated that appellant had received no notice of the legal proceedings seeking modification. In correspondence, respondent's attorney asked the court to deny appellant's motion for reconsideration, alleging that appellant had received a hearing notice and then had chosen not to pick up her mail.

On October 31, 2006, the district court signed an order providing that (1) the court would consider appellant's motion for reconsideration at a hearing set for November 16, 2006, (2) appellant must support the motion with her own affidavit, and (3) after the hearing, the court would issue an order determining whether the amended judgment and decree should be vacated. On November 7, 2006, appellant submitted an affidavit alleging that she had experienced significant financial difficulties since the divorce, was unable to work in the field in which she was educated, and was trying to make a living as an artist. On November 9, 2006, respondent filed a motion with his attorney's affidavit, asking that appellant's motion be denied in its entirety and for an award of attorney fees.

On December 27, 2006, the district court signed an order reflecting that the court held a hearing "for the sole purpose of determining whether or not the Court would allow the Motion for Reconsideration." The court ordered that (1) appellant was allowed to proceed with her motion for reconsideration, (2) the issue of attorney fees was reserved,

and (3) the hearing would take place on February 21, 2007.[1] Subsequently, the parties agreed to continue the hearing to April 5, 2007.

On March 30, 2007, appellant submitted a motion and additional affidavit asking the district court (1) to deny respondent's motion to terminate maintenance and (2) to retroactively reinstate maintenance. In her affidavit, appellant stated that she was struggling financially and doing her best to make a living in art. In response, respondent submitted a motion asking for dismissal of appellant's latest motion, denial of appellant's motion for reconsideration, and an award of attorney fees. Respondent's attorney submitted an affidavit stating that appellant had not responded to discovery requests and that her latest motion and affidavit were untimely. Through his attorney's affidavit, respondent acknowledged that he had not responded to appellant's discovery requests. On April 2, 2007, appellant's attorney filed an affidavit along with appellant's incomplete discovery responses.

On April 5, 2007, at the scheduled hearing, the district court began by asking respondent's counsel if she had anything additional to say in support of respondent's motion to terminate maintenance. She did not. Appellant's attorney then said: "I mean the reconsideration is all done. We are—actually so I am clear we are here to redecide, as if we were back in August?" The court answered, "Right." Appellant's attorney then presented arguments on the merits of the termination motion.

[1] In this order, the district court noted that it was "not completely convinced that [appellant] was not aware of Respondent's Motion. However, the Court is also mindful of the difficulty of establishing that a person had no knowledge of an event or occurrence. Further, the law favors decisions on the merits rather than by default."

On April 11, 2007, the district court issued an order denying the motion for reconsideration and confirming the order to amend the judgment and decree. The court ruled that (1) appellant's motion for reconsideration of the court's order terminating spousal maintenance was denied, (2) the court's amended judgment and decree would remain in full force and effect, and (3) appellant was ordered to pay respondent's costs and disbursements. In a separate order on May 16, 2007, the district court awarded respondent costs and disbursements in the amount of $185.

This appeal follows.[2]

D E C I S I O N

I.

On appeal from a default judgment, "[o]ur review is limited . . . to whether the evidence on record supports the findings of fact and whether the findings support the conclusions of law set forth by the trial court." *Nazar v. Nazar*, 505 N.W.2d 628, 633 (Minn. App. 1993), *review denied* (Minn. Oct. 28, 1993).

"A party moving to modify an award of maintenance bears the burden of showing a substantial change of circumstances since the last time maintenance was modified, or if maintenance has not been modified, since it was originally set." *Youker v. Youker*, 661 N.W.2d 266, 269 (Minn. App. 2003) (citing Minn. Stat. § 518.64, subd. 2 (2002), now

[2] This court accepted jurisdiction in a July 17, 2007 order. In accepting jurisdiction, we construed the appeal as taken from the August 29, 2006 amended judgment and decree terminating maintenance, the April 11, 2007 order denying the motion for reconsideration and ordering that the amended judgment and decree would remain in full force and effect (thus, denying the motion to vacate), and the May 16, 2007 order awarding respondent costs and disbursements.

codified as Minn. Stat. § 518A.39, subd. 2), *review denied* (Minn. Aug. 5, 2003). "The moving party must then demonstrate that these changed circumstances render the original award unreasonable and unfair." *Id.* Changed circumstances that will justify modification include substantially increased or decreased income or expenses of either party. Minn. Stat. § 518A.39, subd. 2 (2006).

Effective appellate review of an award of maintenance is possible only when the district court has made findings that demonstrate its consideration "of all factors relevant to an award." *Stich v. Stich*, 435 N.W.2d 52, 53 (Minn. 1989). Even where changed circumstances are found, effective review is prevented if there is "no finding on whether these changed circumstances were substantial and rendered the original maintenance award unreasonable and unfair." *Dougherty v. Dougherty*, 443 N.W.2d 193, 195 (Minn. App. 1989). Because the district court made no findings in its order terminating maintenance, we are unable to effectively review the order terminating maintenance. Accordingly, we reverse and remand. *See id.* (reversing and remanding where findings were insufficient). On remand, the district court may, in its discretion, reopen the record for further evidence.

II.

When an appeal is properly taken from an underlying judgment, this court has discretion to review a subsequent order denying a motion to vacate. *Rettke v. Rettke*, 696 N.W.2d 846, 850 (Minn. App. 2005). In light of our reversal and remand of the spousal maintenance decision, we conclude that the appeal of the district court's denial of appellant's motion to vacate is moot and dismiss the appeal of this order. *See Mertins v.*

Comm'r of Natural Res., 755 N.W.2d 329, 334 (Minn. App. 2008) ("Generally, when an event occurs that makes a decision on the merits unnecessary or an award of effective relief impossible, the appeal should be dismissed as moot.").

III.

Awards of attorney fees and costs and disbursements are governed by the same statute, Minn. Stat. § 518.14, subd. 1 (2006). "An award of attorney fees rests almost entirely within the discretion of the trial court and will not be disturbed absent a clear abuse of discretion." *Crosby v. Crosby*, 587 N.W.2d 292, 298 (Minn. App. 1998) (quotation omitted), *review denied* (Minn. Feb. 18, 1999). A district court "shall" make a need-based award when it finds that the award is necessary for the good-faith assertion of a party's rights, that the party from whom the award is sought has the means to pay them, and that the party to whom the award is made does not have the means to pay. Minn. Stat. § 518.14, subd. 1. The district court can also make a conduct-based award against a party who unreasonably contributes to the length or expense of the proceeding. *Id.*

The district court must make findings on the specific factors set forth in the statute; general findings on the income and expenses of the parties are insufficient. *Richards v. Richards*, 472 N.W.2d 162, 166 (Minn. App. 1991). In addition, "[b]ecause there are different requirements for a fee award, depending on the authority upon which the award is based, a proper review requires that the district court identify the authority for its fee award." *Geske v. Marcolina*, 624 N.W.2d 813, 816 (Minn. App. 2001). The district court's May 16, 2007 order awarding costs and disbursements contains no

findings. Because there are no findings, the fee award is reversed and remanded. The district court may, in its discretion, reopen the record on this issue as well.

IV

Finally, by motion filed by mail on November 17, 2008, appellant moves this court to expedite this appeal. Because we have resolved this appeal, we deny appellant's motion as moot. *See Mertins v. Comm'r of Natural Res.*, 755 N.W.2d 329, 335 (Minn. App. 2008) (denying a motion as moot).

Appeal dismissed in part, reversed in part, and remanded; motion denied.