This opinion is nonprecedential except as provided by Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A24-0648
A24-0675

In re the Marriage of:

Nicole Onori Hansen, petitioner,
Respondent,

vs.

Jay Ralph Hansen,
Appellant.

Filed March 3, 2025
Affirmed
Harris, Judge

Olmsted County District Court
File No. 55-FA-22-1920

Thomas R. Braun, Bruce K. Piotrowski, Restovich Braun & Associates, Rochester, Minnesota (for respondent)

Kenneth R. White, Law office of Kenneth R. White, P.C., Mankato, Minnesota (for appellant)

Considered and decided by Harris, Presiding Judge; Cochran, Judge; and Reilly, Judge.[*]

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

NONPRECEDENTIAL OPINION

HARRIS, Judge

In these consolidated marriage-dissolution appeals, appellant challenges the district court's distribution of the parties' property, specifically its determination that certain investment assets purchased using appellant's inheritance and the parties' bank accounts were marital property. Appellant also argues that the district court abused its discretion by denying his posttrial motions and awarding respondent conduct-based attorney fees. Because we conclude that the district court's findings of fact regarding property distribution were not clearly erroneous and we discern no abuse of discretion in the district court's consideration of appellant's posttrial motions, we affirm.

FACTS

Appellant Jay Ralph Hansen (husband) and respondent Nicole Onori Hansen (wife) were married in 1992 and have one adult child. Wife filed a petition for dissolution of marriage in March 2022. The matter proceeded to a two-day court trial. At trial, the main issues were spousal maintenance and husband's nonmarital claims to property.[1] Following trial, the parties submitted written closing arguments and proposed orders. The district court took the matter under advisement and filed a written order. The following is a summary of the district court's findings of fact.

During the marriage, husband worked outside the home and provided for the family financially while wife primarily focused on raising the child and managing the home. Prior

[1] Spousal maintenance is not an issue on appeal.

to the valuation date, the parties sold their marital homestead and received $373,275.77 in sale proceeds. The proceeds were divided equally between the parties. The district court found that it did not "receive any testimony from husband about where the proceeds from the sale of the marital homestead were deposited." The district court received complete bank statements from wife but did not receive complete bank statements from husband. Husband testified that he had a separate account at PNC bank that he used to access cash via ATMs, but the district court noted that, because it did not receive a statement or other notification of husband's bank account(s), husband's share of the proceeds could have been deposited into this separate PNC account. Based on this evidence, the district court determined that the total marital value of the parties' bank accounts was $231,848.67 and ordered husband to pay wife a $91,142.98 equalization payment.[2]

Husband also claimed that the inheritance he received from his father's estate and appreciation related to the investments made using funds from a joint savings account during the marriage were nonmarital assets. A total of $457,544.44 from husband's father's estate was deposited in the parties' joint savings account, which had a previous marital money balance of $10,125.12. The money was commingled for over half a year. Then, the parties invested the money to plan for retirement. The parties invested $13,000 in a TD Ameritrade Roth IRA for husband, $13,000 in a TD Ameritrade Roth IRA for wife, $2,000 in an account for their adult child, and purchased $350,000 worth of shares in the Fidelity Minnesota Municipal Income Fund. The parties later sold their interest in the

[2] When accounting for the parties' vehicles, husband's total equalization payment was $98,104.48.

Fidelity Minnesota Municipal Income Fund and used the proceeds to purchase Fidelity Contrafund mutual funds. The account was titled in the names of both parties with rights of survivorship. The Contrafund paid monthly dividends, which were reinvested in the Contrafund and the Minnesota Tax Free Municipal Income Fund.

The district court determined that these investments were purchased using funds from the joint savings account and were marital assets. The district court found that husband intended to use his knowledge of financial investment tools to maximize the retirement benefits for both parties and that husband used efforts on behalf of the marriage to research the investments purchased. The district court also found that husband "commingle[d] the inheritance monies with marital monies as he moved the money from one account to another to another," and that husband "failed to meet his burden in tracing the money of the inheritance once it was deposited into the parties' joint Think Bank savings account."

Husband filed a motion for amended findings, and a motion under what is now Minn. Stat. § 518.145, subd. 2 (2024) to reopen and be relieved of the judgment. Husband filed a motion for a new trial in the alternative. Husband requested to introduce additional exhibits to demonstrate that the house sale proceeds were deposited in his Think Bank savings account. Husband argued that he should be relieved of the judgment due to "mistake, inadvertence, surprise, or excusable neglect," because the division of the house sale proceeds was not in dispute at trial and because counsel did not foresee the need for the additional evidence. He also requested several amended findings related to his nonmarital claims to his inheritance and the parties' investments. The district court noted that husband's requested amendments were identical to the findings in his proposed order following trial. The district court denied husband's motion as an unauthorized request for reconsideration, denied husband's motion for a new trial, and granted wife $13,000 in conduct-based attorney fees incurred by responding to husband's posttrial motions.

Husband appeals.[3]

ANALYSIS

Husband argues that the district court (1) abused its discretion by denying his motion for amended findings as an improper motion for reconsideration and awarding wife conduct-based attorney fees incurred by responding to the motion; (2) erred by determining that assets purchased using his inheritance were marital assets because husband failed to meet his burden to adequately trace assets commingled with marital assets to a nonmarital source; (3) erred by determining that appellant's savings account was a marital asset when calculating the equalization payment; and (4) abused its discretion by denying his motion to reopen the judgment based on counsel's failure to introduce evidence about where husband's portion of the house sale proceeds were deposited. We address each issue in turn.

I. The district court did not abuse its discretion by denying husband's motion for amended findings and granting wife's request for conduct-based attorney fees.

The parties agree that the district court's decision regarding husband's motion for amended findings is directly related to its decision to award wife conduct-based attorney

[3] Husband appealed both the marital dissolution judgment and the attorney fee judgment. This court consolidated the appeals in the interests of judicial economy because both appeals arose from the same dissolution proceeding.

fees. First, husband challenges the district court's denial of his posttrial motion for amended findings. "We review the district court's decision whether to grant a motion for amended findings for an abuse of discretion." *Landmark Cmty. Bank, N.A. v. Klingelhutz*, 927 N.W.2d 748, 754 (Minn. App. 2019). "A district court abuses its discretion by making findings of fact that are unsupported by the evidence, misapplying the law, or delivering a decision that is against logic and the facts on the record." *Woolsey v. Woolsey*, 975 N.W.2d 502, 506 (Minn. 2022). Husband argues that the district court abused its discretion because it did not consider his motion for amended findings, but determined the motion was an unauthorized request for reconsideration.

Upon a party's motion, the district court "may amend its findings or make additional findings, and may amend the judgment accordingly." Minn. R. Civ. P. 52.02. "The purpose of a motion for amended findings is to permit the [district] court a review of its own exercise of discretion." *Johnson v Johnson*, 563 N.W.2d 77, 78 (Minn. App. 1997) (quotation omitted), *rev. denied* (Minn. June 30, 1997). In contrast, "motions for reconsideration play a very limited role in civil practice, and should be approached cautiously and used sparingly." Minn. R. Gen. Prac. 115.11, 1997 adv. comm. cmt. Motions to reconsider have a limited role because motions to reconsider "are prohibited except by express permission of the court, which will be granted only upon a showing of compelling circumstances" and cannot be used to introduce new evidence. Minn. R. Gen. Prac. 115.11; *State v. Allwine*, 963 N.W.2d 178, 190-91 (Minn. 2021).

A motion for amended findings is proper if it "both identif[es] the alleged defect in the challenged findings and explain[s] why the challenged findings are defective." *Lewis* *v. Lewis*, 572 N.W.2d 313, 315 (Minn. App. 1997). The district court determined that husband's motion did not meet these requirements and was "a veiled motion for reconsideration." The district court noted that husband's motion failed to identify alleged defects and explain why the challenged findings are defective, and that husband requested that the court "make findings that are identical to those found in husband's proposed findings." The district court also stated:

> The Court is surprised and frustrated that Husband has asked the Court to change findings regarding Husband's credibility and make new findings that an argument is credible. This Court is specifically and uniquely tasked with making credibility findings regarding the parties, witnesses, and the evidence, which the Court did during trial as is required. The Court carefully listened to and observed each party testify. The Court took notice of and paid specific and particular attention to the credibility of both Wife and Husband during their testimony. Following that, the Court made findings [] in the Decree as to who and what the Court found credible and not credible. In addition, an argument may or may not be persuasive, but an argument is not offered evidence and as such is unlikely to be found to be credible.

The district court's findings are supported by the record. While husband did request specific amendments and then connect the proposed amendments to record evidence and the law in his memorandum, husband's requested changes are disagreements with the district court's findings of fact and legal conclusions. It is notable that some of husband's requested changes are identical to his proposed order. *See State ex rel. Fort Snelling State Park Ass'n v. Minneapolis Park & Rec. Bd.*, 673 N.W.2d 169, 178 (Minn. App. 2003) (stating that if there is conflicting evidence, a court is not compelled to amend), *rev. denied*

(Minn. Mar. 16, 2004). Therefore, the district court did not abuse its discretion by denying husband's motion for amended findings.

Second, husband argues the district court abused its discretion when it imposed $13,000 in attorney-fee on the sole basis that his motion for amended findings was an improper motion for reconsideration. Since we affirm the district court's findings of fact and conclusions of law regarding husband's motion for amended findings, husband's sole argument for reversal of the award of conduct-based attorney fees falls short.

We review the district court's decision to award conduct-based attorney fees for an abuse of discretion. *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 295 (Minn. App. 2007).A district court has discretion to award conduct-based attorney fees and costs against a party "who unreasonably contributes to the length or expense of the proceedings." Minn. Stat. § 518.14, subd. 1(a) (2022). Generally, conduct-based fees are based on conduct occurring during the course of litigation. *Baertsch v. Baertsch*, 886 N.W.2d 235, 238 (Minn. App. 2016). The district court must make findings that explain the basis for an award of conduct-based attorney fees. *Brodsky v. Brodsky*, 733 N.W. 2d. 471, 477 (Minn. App. 2007). The party moving for attorney fees has the burden to show that the conduct of the other party warrants an award. *Baertsch*, 886 N.W. 2d. at 238.

Here, the district court determined that husband unreasonably contributed to the length and expense of the proceeding. To support its finding, the district court cited to husband's "failure to conform to the statutory and Rule requirements for the Motions," and because of husband's "request for the Court to change its credibility findings." These examples support the finding husband unreasonably contributed to the length and expense of the proceeding. The record further reflects that the district court independently reviewed wife's attorney's billing statements requesting $26,551.58 and discounted items that were administrative, duplicative, lacking sufficient explanation, and relating to unnecessary work, ultimately reducing wife's request to $13,000 due to husband's conduct. Supporting this conclusion are an affidavit and billing statements from wife's counsel and, as discussed above, record evidence showing husband improperly filed a motion for reconsideration.

Because we conclude that the district court did not abuse its discretion by determining that husband’s posttrial motion was, functionally, an unauthorized motion for reconsideration. And because the district court's award is supported by the evidence in the record, and because the district court made specific findings in support of the award, we discern no abuse of discretion in the district court's decision to award conduct-based attorney fees.

II. The district court did not clearly err by determining that husband did not meet his burden to trace his commingled inheritance assets.

Next, husband challenges the district court’s determination that he did not meet his burden to trace adequately his inheritance that was commingled with marital assets in a joint bank account. “We independently review the issue of whether property is marital or nonmarital, giving deference to the district court’s findings of fact.” *Baker v. Baker*, 753 N.W.2d 644, 649 (Minn. 2008). “When marital and nonmarital assets have been commingled, the party asserting the nonmarital claim must adequately trace the nonmarital funds in order to establish their nonmarital character. Whether a nonmarital interest has been traced is also a question of fact." *Kerr v. Kerr*, 770 N.W.2d 567, 571 (Minn. App. 2009) (citation omitted).

"All property obtained by either spouse during the marriage is presumed to be marital property, regardless of the form of ownership." *Olsen v. Olsen*, 562 N.W.2d 797, 800 (Minn. 1997); *see* Minn. Stat. § 518.003, subd. 3b (2022). "To overcome the presumption that property is marital, a party must demonstrate by a preponderance of the evidence that the property is nonmarital." *Olsen*, 562 N.W.2d at 800. Property acquired as "inheritance made by a third party to one but not to the other spouse" is nonmarital property. Minn. Stat. § 518.003, subd. 3b(a). "For nonmarital property to maintain its nonmarital status, it must either be kept separate from marital property or, if commingled with marital property, be readily traceable." *Olsen*, 562 N.W.2d at 800.

"A spouse seeking to trace an asset to a nonmarital source is not held to a strict tracing standard, but need only show by a preponderance of the evidence that the asset was acquired in exchange for nonmarital property." *Doering v. Doering*, 385 N.W.2d 387, 390 (Minn. App. 1986) (quotation omitted).

Husband claimed that the inheritance held in a joint savings account and various investments purchased using funds from the joint savings account were his nonmarital property. To trace the various investments of a nonmarital source, husband provided the district court with an exhibit and testimony describing each transaction from the joint savings account between August 2017 and January 2022. The exhibit included husband's tracing analysis and explanations for each transaction.

On appeal, husband argues that the district court failed to consider the issue of tracing using the proper legal construct and requests that we "either direct the decision on tracing, or in the alternative, remand for the [district court] to undertake tracing using the proper legal standard." Husband argues that the district court did not use the proper legal construct because the district court "relied upon the joint nature of the accounts, the time the funds were in joint accounts, and the intent of the parties." He further argues that "no witness disputed that the inheritance funds went from one account to another," and that "tracing is not dependent on the credibility of any witness."

The record supports husband's argument that the district court relied on the joint nature of the accounts and the intent of the parties when determining that the property was nonmarital. For example, the district court found that:

> Husband failed to meet his burden in tracing the money of the inheritance once it was deposited into the parties' joint Think Bank savings account that had previously had a balance of over $10,000 before the inheritance was deposited. The funds were commingled for a significant period of time, in this case almost 8 (eight) months.

The district court also noted that husband's actions of depositing the inheritance funds into a joint account and then transferring the inheritance into another joint account undermined his argument that he intended for the property to be nonmarital. Instead, it found that "[h]usband continued to commingle the inheritance monies with the marital monies as he moved the money from one account to another to another."

While jointly titling assets and routing funds through a joint account alone does not transform nonmarital property into marital property, the record also demonstrates that the district court determined that husband's evidence was insufficient to meet his burden to demonstrate that the property was nonmarital. *Griffith v. Griffith*, 415 N.W.2d 763, 766 (Minn. App. 1987), *rev. denied* (Minn. Feb. 12, 1988). In particular, the district court made multiple findings of fact that husband was not credible and found that his arguments were motivated by the dissolution process. We must defer to these credibility determinations. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). For example, regarding the Fidelity Contrafund Investment, the district court found:

> Husband's testimony that he spent merely a few hours over a couple of days to choose which fund would best suit the parties is not credible. This Court specifically finds that Husband's fastidious nature as testified to by Wife, and in many respects observed by the Court in Husband's testimony, lead this Court to find that Husband's testimony was unfortunately seeking to reduce the time spent in contradiction to the truth solely to advance Husband's claim that the gains were non-marital in nature. This Court does not find Husband credible in his testimony.

Regarding the parties' joint savings account in which the inheritance was initially deposited, the district court found:

> During the pendency of this litigation, Husband restricted Wife's access to the joint Think Bank savings account in a claimed attempt to preserve his inheritance. Husband testified that the account had been depleted and he was just seeking to protect the value. The Court does not find Husband credible. The vast majority if not entirety of withdrawals were done by Husband. The restriction of Wife's access by Husband was in direct response to potential dissolution of marriage.

This finding demonstrates that the district court had reason to doubt husband's tracing analysis, as husband's credibility and almost sole control of the parties' joint savings account are directly tied to whether husband's evidence was sufficient to demonstrate that the nonmarital property was readily traceable. Additionally, commingling of nonmarital and marital funds may convert all funds in the account into marital property in cases in which the bank account was used to pay ordinary living expenses and nonmarital funds were withdrawn but not traced to another asset. *See Haaland v. Haaland*, 392 N.W.2d 268, 272 (Minn. App. 1986) (concluding that a nonmarital property's character was lost when it was commingled with the general family account to pay for living expenses). Even if credible, husband's explanations for the transactions that occurred after the inheritance was deposited in the joint savings account include various family expenses in addition to the purchase of investment assets, a vehicle for the parties' adult son, bills, vehicle tires, and multiple payments on a marital credit card. Therefore, the district court's findings supporting the district court's determination that the nonmarital character of the property was lost by commingling the inheritance with marital funds and that husband did not meet his burden to trace the various investments to a nonmarital source were not clearly erroneous. Therefore, we affirm its ultimate determinations that husband failed to adequately trace his nonmarital inheritance, and hence that husband was not entitled to prevail on his asserted nonmarital claim.

III. The district court did not clearly err in considering the entirety of husband's bank accounts as marital property when calculating the equalization payment.

Husband argues that the district court clearly erred by considering the entirety of his Think Bank savings account as a marital asset when calculating the equalization payment. Husband contends that the only reasonable inference from the evidence is that husband's portion of the house sale proceeds was deposited into his individual Think Bank savings account in April 2022.

"Whether property is marital or nonmarital is a question of law, but a reviewing court must defer to the district court's underlying findings of fact." *Muschik v. Conner-Muschik*, 920 N.W.2d 215, 223 (Minn. App. 2018) (quotation omitted). An appellate court may determine that district court findings are clearly erroneous if the appellate court is "left with the definite and firm conviction that a mistake has been made . . . notwithstanding the existence of evidence to support such findings." *Olsen*, 562 N.W.2d at 800 (quotation omitted). But a district court finding is not defective simply because the record may support a different finding. *Muschik*, 920 N.W.2d at 223.

Wife testified that the proceeds from the house sale were deposited into an escrow account at husband's attorney's law firm. She testified that she received her portion of the funds in April 2022 and that husband received his portion of the funds sometime before her. Evidence admitted at trial showed that the balance of husband's Think Bank savings account at the end of January 2022 was $35,648.55. The balance was $202,731.29 at the end of May 2022. Husband also agreed during his testimony that the exhibit reflecting the balance of his Think Bank savings account as of May 31, 2022, included $35,573.55, plus 50% of the house sale proceeds. He testified that the money from the house sale was wired to him directly from his attorney's trust account. Therefore, one possible inference is that husband's portion of the house sale proceeds was deposited into his Think Bank savings account because the balance increased by $186,637.88, an amount similar to husband's portion of the house sale proceeds.

However, because the district court did not receive husband's complete, detailed bank statements and husband testified to having a PNC bank account, another possible inference is that husband's Think Bank savings account balance increase was from another source, and the evidence in the record dies not account for his portion of the house sale proceeds. The district court made the following findings:

> Of the total, $186,637.88 of that **<u>may be</u>** from the proceeds of the house, but the Court did not receive **<u>any</u>** detailed statements, nor did the Court receive **<u>any</u>** testimony from Husband about where the proceeds from the sale of the marital homestead were deposited.
>
> The Court was made aware of a bank account Husband testified to in trial at PNC Bank, but did not receive a statement or other notification of Husband's bank account(s). For all the Court knows, the proceeds from the marital homestead could have been deposited in this account.
>
> The Court **<u>cannot</u>** and **<u>will not</u>** assume facts that are not in evidence, therefore the Court will use the totals of the bank accounts that the Court has received in evidence and/or testimony.

On this record, we do not have a definite and firm conviction that the district court's findings are clearly erroneous. The record reflects a lack of evidence, such as bank statements and testimony about what husband did with the house sale proceeds once deposited, and also includes the district court's findings that husband was not credible. Therefore, the district court did not clearly err by finding that the entirety of husband's bank accounts was marital property when calculating the equalization payment.

IV. The district court did not abuse its discretion by denying husband's motion for relief from judgment.

Lastly, husband argues that the district court abused its discretion by denying his posttrial motion for relief from judgment. We review the district court's decision whether to reopen a dissolution judgment for an abuse of discretion. *Bender v. Bernhard*, 971 N.W.2d 257, 262 (Minn. 2022). "A district court abuses its discretion by making findings of fact that are unsupported by the evidence, misapplying the law, or delivering a decision that is against logic and the facts on record." *Id.* (quotation omitted). We defer to the district court's credibility determinations and will not set aside a district court's findings of fact unless clearly erroneous. *Knapp v. Knapp*, 883 N.W.2d 833, 835-837 (Minn. App. 2016). "That the record might support findings other than those made by the trial court does not show that the court's findings are defective." *Vangsness v. Vangsness*, 607 N.W.2d 468, 474 (Minn. App. 2000).

"The sole relief from a dissolution judgment and decree lies in meeting the requirements of Minn. Stat. § 518.145, subd. 2." *Knapp*, 883 N.W.2d at 835 (quoting *Shirk v. Shirk*, 561 N.W.2d 519, 522 (Minn. 1997)). A district court may relieve a party from a dissolution judgment for "mistake, inadvertence, surprise, or excusable neglect." Minn. Stat. § 518.145, subd. 2(1) (2020). The party moving to reopen a dissolution judgment has the burden to prove at least one statutory ground by a preponderance of the evidence. *Knapp*, 883 N.W.2d at 835.

Husband sought relief from the portion of the dissolution judgment finding that the entirety of the $207,067.31 in husband's bank accounts was marital property, resulting in in a $91,142.98 equalization payment to wife. In his motion, husband requested to reopen the record to introduce three exhibits. Husband argued that these exhibits would demonstrate that his bank accounts contained his nonmarital portion of the house sale proceeds. Husband argued that counsel's failure to introduce these exhibits at trial was mistake, inadvertence, surprise and/or neglect because accounting for the house sale proceeds was never in controversy and counsel neglected to foresee that additional evidence on this issue would be necessary.

In analyzing husband's motion, the district court applied the four *Finden* factors and determined that husband did not meet his burden to be relieved of judgment.[4] *See Finden v. Klaas*, 128 N.W.2d 748, 750 (Minn. 1964) (outlining four factors for court to consider when determining whether a defendant should be granted relief from judgment under rule 60.02). The four factors are: (1) a reasonable defense on the merits or a debatably meritorious claim; (2) a reasonable excuse for his/her failure or negligent act; (3) the movant acted with due diligence after learning of the error or omission; and (4) no substantial prejudice will result to the other party. *Id.*

For husband to be entitled to relief for mistake or excusable neglect, he was required to meet all four *Finden* factors. *Gams v. Houghton*, 884 N.W.2d 611, 619-20 (Minn. 2016). The district court denied husband's motion, finding that only the third factor was met because husband filed his motion within the statutory timelines.

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[4] We note that parties seeking relief from dissolution judgments must meet the requirements of Minnesota Statutes section 518.145, subdivision 2, not the requirements of Minnesota Rule of Civil Procedure 60.02, because rule 60.02 expressly excludes marital dissolution decrees. *See Knapp*, 883 N.W.2d at 838 n.3 (concluding that district court did not abuse its discretion by not addressing rule 60.02 when considering appellant's motion to vacate the dissolution judgment under section 518.145, subdivision 2(1), and suggesting that considering rule 60.02 on a motion to vacate a dissolution judgment may be an abuse of discretion). However, because both parties applied the *Finden* factors and neither argued it was a misapplication of law for the district court to do so, we review the district court's application of the *Finden* factors for an abuse of discretion. *See Bender*, 971 N.W.2d at 263 ("Because Rule 60.02 and section 518.145 are virtually 'identical,' we use cases evaluating Rule 60.02 when addressing the application of section 518.145.").

Husband argues that the district court abused its discretion because it did not properly analyze the first, second, and fourth *Finden* factors. Regarding the fourth factor—that no substantial prejudice to wife would result by granting the motion—the district court determined that husband did not meet this factor because substantial prejudice would result to wife. The district court noted that reopening the judgment would cause delay in wife receiving needed funds, as the parties have lived separately for approximately two years and that wife is in need of spousal maintenance to meet her monthly needs. Husband argues under *Finden*, that the district court did not properly analyze the fourth factor because delay and having to defend litigation are not prejudice. *Finden*, 128 N.W.2d at 751. While it is correct that prejudice cannot be inferred from delay alone, "the movant bears the burden of demonstrating that the delay resulting from his or her error or omission has not resulted in a real or particular harm to other party." *Cole v. Wutzke*, 884 N.W.2d 634, 639 (Minn. 2016). And here the district court's finding that delay would cause particular financial harm to wife is supported by the record. Therefore, the district court did not abuse its discretion by denying husband's motion for relief from judgment.[5]

Affirmed.

[5] Because we conclude that the fourth *Finden* factor was not met, we need not analyze the remaining factors.