**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A19-1235**

In re the Marriage of:

James Edward Cook, II, petitioner,
Respondent,

vs.

Hitomi Arimitsu,
Appellant.

**Filed April 27, 2020**
**Affirmed in part, reversed in part, and remanded**
**Cochran, Judge**

Hennepin County District Court
File No. 27-FA-15-499

Victoria M. B. Taylor, Shawn C. Reinke, Crossroads Legal Services, St. Paul, Minnesota (for respondent)

Valerie Arnold, Micaela Wattenbarger, Arnold, Rodman & Kretchmer, P.A., Bloomington, Minnesota (for appellant)

Considered and decided by Cochran, Presiding Judge; Ross, Judge; and Segal, Judge.

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

**COCHRAN**, Judge

In this international child-custody and divorce dispute, appellant-mother argues that the district court erred by (1) failing to recognize and enforce certain Japanese court orders,

(2) exercising jurisdiction over child custody, (3) making findings not supported by the record, (4) awarding conduct-based attorney fees, and (5) holding mother in contempt of court. We affirm on the first four issues, but we reverse and remand on the issue of contempt.

## FACTS

This is the third appeal by appellant Hitomi Arimitsu (mother) in this child custody and divorce dispute. In the first appeal, we affirmed the district court's determination that it had subject-matter jurisdiction to address child custody. *See Cook v. Arimitsu*, 907 N.W.2d 233 (Minn. App. 2018), *review denied* (Minn. Apr. 17, 2018) (*Cook I*). We dismissed the second appeal by order because mother again challenged the district court's subject-matter jurisdiction and no relevant change in circumstances affected our de novo jurisdiction analysis. We briefly summarize the complicated history of this case and the relevant facts.

Respondent James Edward Cook, II (father) and mother were married in 1998. They have two sets of twin children. In July 2014, mother took all four children to Japan. Though father agreed to mother taking the children to Japan for a period of time, mother and the children never returned to Minnesota and the children remain in Japan.

Father petitioned to dissolve the marriage in 2015 in Hennepin County District Court. Early in the case, the district court determined that it did not have subject-matter jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) to address child custody because, among other reasons, Minnesota was not the

children's home state. The district court judge that made this determination retired, and a successor judge was assigned.

Meanwhile, in Japan, father petitioned the Japanese courts to order the return of the children under the Hague Convention on the Civil Aspects of International Child Abduction, *opened for signature* Oct. 25, 1980, T.I.A.S. No. 11670 (the Hague Convention). Initially, a Japanese court issued an order (1) determining that the United States was the children's habitual residence,[1] (2) requiring mother to return the younger set of twins to the United States, and (3) concluding that the older set of twins could remain in Japan based on their preferences. Both father and mother appealed the order. In January 2016, a Japanese appellate court issued a new order that required mother to return all four children to the United States based on the interest in keeping the children together (hereinafter "2016 Hague Order"). Mother appealed the 2016 Hague Order to the Japanese supreme court, but the Japanese supreme court denied review in February 2016. Japan then issued indirect enforcement orders that required mother to pay certain fines and costs and also issued direct enforcement orders.

In September 2016, back in Minnesota, father moved the district court to reconsider its subject-matter jurisdiction determination. In December 2016, the district court did reconsider and determined that it had jurisdiction under the UCCJEA because, among other reasons, Minnesota *was* the children's home state under the UCCJEA. The district court

[1] The Hague Convention does not define "habitual residence," but the federal appellate courts of the United States have adopted a common understanding that a child's "habitual residence" is "[t]he place where a child is at home, at the time of removal or retention." *Monasky v. Taglieri*, 140 S. Ct. 719, 726 (2020).

ordered mother to return the children to Minnesota. But mother never returned the children, and the district court found mother in constructive civil contempt in June 2017.

Mother, however, brought a petition in Japan to modify the 2016 Hague Order, which required mother to return all of the children to the United States. In February 2017, a Japanese court ruled that, based primarily on a deterioration in father's financial circumstances, mother was no longer required to return the children to the United States (hereinafter "2017 Japanese Modification Order"). The 2017 Japanese Modification Order did not amend the previous finding that Minnesota was the children's habitual residence.

Relying on the 2017 Japanese Modification Order, mother moved the district court to reconsider its order reestablishing subject-matter jurisdiction. The district court denied mother's motion in an April 2017 order. Mother appealed both the December 2016 order reestablishing subject-matter jurisdiction and the April 2017 order denying mother's motion to reconsider. This court affirmed the district court, concluding, among other things, that subject-matter jurisdiction existed under the UCCJEA because Minnesota was the children's home state. *Cook I*, 907 N.W.2d at 238-40.

Father appealed the 2017 Japanese Modification Order in Japan. In December 2017, the Japanese supreme court affirmed the order and, in January 2018, a certificate of final decision was issued by the Japanese courts. In March 2018, a Japanese court issued a subsequent order (herein after "March 2018 Japanese Order") that revoked the previous Japanese enforcement orders issued against mother. The March 2018 Japanese Order, in effect, provided that mother was no longer required to pay a financial sanction for her

failure to return the children. In April 2018, a certificate of service was filed in the Japanese courts stating that the March 2018 Japanese Order was served on father and mother.

In September 2018, mother filed a new motion in Hennepin County District Court requesting the district court to register and enforce the 2017 Japanese Modification Order and subsequent Japanese orders. Mother also asked the district court to decline to exercise jurisdiction, characterizing Minnesota as an inconvenient forum under Minn. Stat. § 518D.207 (2018) in light of the more recent Japanese orders. Father opposed mother's motions.

By an order dated December 10, 2018, the district court largely denied mother's motions, concluding that the 2017 Japanese Modification Order misinterpreted the Hague Convention, was inconsistent with the Hague Convention's premises and objectives, and was not supported by sufficient evidence. But the district court reserved consideration of whether to register the March 2018 Japanese Order that reversed the prior direct and indirect enforcement orders—despite concluding that it had the discretion to decline to register the order. Mother again appealed to this court, asserting that the district court lacked subject-matter jurisdiction based on the Japanese orders that determined that mother was not required to return the children. Mother argued that the Japanese supreme court decision, which rendered the 2017 Japanese Modification Order final, was a new fact that materially impacted the jurisdiction issue. This court dismissed the appeal, citing Minn. R. Civ. P. 140.01 ("No petition for rehearing shall be allowed in the Court of Appeals.").

After we dismissed mother's second appeal, the parties proceeded to trial in district court in May 2019. Mother did not appear for trial. The district court held trial in mother's absence. The district court later issued findings of fact, conclusions of law, and judgment based on evidence introduced by father. The district court awarded permanent sole legal and physical custody of the children to father. The district court also awarded attorney fees to father. And, without notice that contempt would be addressed at trial, the district court again found mother in contempt and issued a bench warrant for mother's arrest, among other sanctions.

Mother appeals.

## D E C I S I O N

Mother appeals the district court's judgment, arguing that (1) the district court erred by failing to recognize and enforce the Japanese orders she sought to register, (2) the district court erred by exercising jurisdiction over child custody, (3) the district court's posttrial findings of fact, conclusions of law, and order for judgment rested on clearly erroneous findings of fact, (4) the district court's award of attorney fees was based on clearly erroneous findings, and (5) the district court erred in holding mother in constructive civil contempt. We first address mother's argument that the district court erred by failing to recognize and enforce the later Japanese orders because that issue is at the heart of this case.

### I. Registration and Enforcement of the Japanese Orders

The Japanese orders at issue are based on the Hague Convention, an international agreement to which the United States and Japan are signatories. The objects of the Hague

Convention are "to secure the prompt return of children wrongfully removed to or retained in any Contracting State" and "to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States." Hague Convention, Art. 1. The Eighth Circuit Court of Appeals has described the purpose of the Hague Convention:

> The Convention's purpose is to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence. The Convention seeks to deter abduction by depriving the abductor's actions of any practical or juridical consequences. It accomplishes this goal not by establishing any substantive law of custody, but rather by acting as a forum selection mechanism, operating on the principle that the child's country of habitual residence is best placed to decide upon questions of custody and access. The purpose of proceedings under the Hague Convention is thus not to establish or enforce custody rights, but only to provide for a reasoned determination of where jurisdiction over a custody dispute is properly placed.

*Barzilay v. Barzilay*, 600 F.3d 912, 916-17 (8th Cir. 2010) (quotations and citations omitted). And the Supreme Court of the United States has indicated that the Hague Convention "is based on the principle that the best interests of the child are well served when decisions regarding custody rights are made in the country of habitual residence." *Abbott v. Abbott*, 560 U.S. 1, 20, 130 S. Ct. 1983, 1995 (2010); *see also Monasky*, 140 S. Ct. at 723 (recognizing that the "core premise" of the Hague Convention is that the children's best interests are generally "best served when custody decisions are made in the child's country of habitual residence").

Under the Hague Convention, a person or entity claiming that a child has been wrongfully removed to, or retained in, another country may apply to a contracting state for assistance in securing the return of the child. *See* Hague Convention, Art. 8. The judicial or administrative authorities of the contracting states "shall act expeditiously in proceedings for the return of children." *Id.*, Art. 11. The judicial authority of the requested state must order the return of a wrongfully removed or retained child unless one of several exceptions apply. *Id.*, Art. 12-13. The Japanese courts originally ordered the return of the children, concluding that the United States is the children's place of habitual residence. Then, in the 2017 Japanese Modification Order, a Japanese court invoked the following exceptions under the Hague Convention to conclude that mother was not required to return the children: (1) that "there is a grave risk that [the child's] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation," and (2) that the child "has attained an age and degree of maturity at which it is appropriate to take account of [the child's] views." *Id.*, Art. 13.

The central focus of mother's arguments on appeal is that the district court erred by failing to extend comity to or otherwise recognize the 2017 Japanese Modification Order that determined that mother was no longer required to return the children to the United States. She argues that the district court erred by failing to extend judicial comity to that order and the subsequent Japanese orders, and also that the district court erred by failing to enforce the orders under Minn. Stat. § 518D.302 (2018) and under the Uniform Foreign-Country Money Judgments Recognition Act (UFCMJRA), Minn. Stat. §§ 548.54-.63 (2018).

### A. Comity

"Judicial comity is the respect a court of one state or jurisdiction shows to another state or jurisdiction in giving effect to the other's laws and judicial decisions." *In re Commitment of Hand*, 878 N.W.2d 503, 506 (Minn. App. 2016), *review denied* (Minn. June 21, 2016) (quotations omitted). Comity is "at the heart of the Hague Convention." *Smedley v. Smedley*, 772 F.3d 184, 189 (4th Cir. 2014) (quotation omitted); *Asvesta v. Petroutsas*, 580 F.3d 1000, 1011 (9th Cir. 2009); *Diorinou v. Mezitis*, 237 F.3d 133, 142 (2nd Cir. 2001). Consequently, "American courts will normally accord considerable deference to foreign adjudications as a matter of comity." *Diorinou*, 237 F.3d at 142.

American courts may decline to extend comity to foreign Hague Convention orders, however, if the foreign court's determination "clearly misinterprets the Hague Convention, contravenes the Convention's fundamental premises or objectives, or fails to meet a minimum standard of reasonableness." *Smedley*, 772 F.3d at 189 (quoting *Asvesta*, 580 F.3d at 1014); *see also Friedrich v. Friedrich*, 78 F.3d 1060, 1067 (6th Cir. 1996); *Carrascosa v. McGuire*, 520 F.3d 249, 262-63 (3rd Cir. 2008). We review a district court's application of the principle of comity for an abuse of discretion. *Hand*, 878 N.W.2d at 506.

The district court did not afford comity to the 2017 Japanese Modification Order and the subsequent related orders for three reasons. It determined that the orders (1) lacked a factual basis, (2) defied the purposes of the Hague Convention, and (3) misinterpreted the Hague Convention. Mother challenges all three bases for the district court's decision to decline comity. We conclude that the district court did not abuse its discretion in

declining to extend comity because the district court correctly concluded that the orders contravened the Hague Convention's fundamental premises and objectives. *See Smedley*, 772 F.3d at 189.

In reaching its decision, the district court found that mother did not comply with the 2016 Hague Order requiring her to return the children to the United States despite attempts by father and the Japanese government to enforce the order in Japan, and despite monetary sanctions imposed by the Japanese courts. Then, after more than a year of noncompliance, mother sought to modify the 2016 Hague Order based on father's deteriorated financial circumstances, which resulted in the Japanese courts issuing the 2017 Japanese Modification Order and subsequent orders. The district court concluded that the 2017 Japanese Modification Order and subsequent orders that mother sought to recognize contravened the purpose of the Hague Convention because they did not "ensure that custody rights will be determined in the country of the children's habitual residence," and instead "legitimize[d] [mother's] wrongful retention of the children."

On this record and under these unique facts, we conclude that the district court did not abuse its discretion by declining to extend comity to the 2017 Japanese Modification Order and subsequent orders that mother wanted the district court to recognize. The Japanese orders abandoned a fundamental purpose of the Hague Convention—to ensure the *prompt* return of the children—and undermined the Hague Convention's forum-selection mechanism by allowing mother to wait for changed circumstances that were advantageous to her goal of keeping the children in Japan. *See Barzilay*, 600 F.3d at 916 ("The Convention's purpose is to protect children internationally from the harmful

effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence." (quotation omitted)).

Mother asserted at oral argument that it is the district court's December 2018 order, not the 2017 Japanese Modification Order and subsequent Japanese orders, that contravenes the fundamental premises and objectives of the Hague Convention. Mother argued that the district court's December 2018 order is contrary to the Hague Convention because the order does not "ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States." Hague Convention, Art. 1(b). We are not persuaded. The Hague Convention has two purposes: (1) securing "the prompt return of children wrongfully removed to or retained in any Contracting State," and (2) ensuring "that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States." *Id.*, Art. 1. The 2017 Japanese Modification Order and the subsequent Japanese orders undermine *both* purposes. As discussed above, the orders reflect a failure to secure a *prompt* return of the children. And they contravene the second objective by allowing mother to forum-shop a child-custody determination to Japan.

Because we conclude that the district court acted within its discretion in declining to extend comity on the grounds that the 2017 Japanese Modification Order and the subsequent Japanese orders contravened the fundamental purpose and objectives of the Hague Convention, we do not address whether the other two grounds cited by the district court support its decision.

### B. Minn. Stat § 518D.302

Mother also argues that the district court erred by failing to recognize the most recent Japanese orders under Minn. Stat. § 518D.302. The statute provides that "a court of this state may enforce an order for the return of the child made under the [Hague Convention] as if it were a child custody determination." Minn. Stat. § 518D.302. Because the statute provides that a court "may" enforce such an order, the district court concluded that it would exercise its discretion and refuse to enforce the 2017 Japanese Modification Order and subsequent orders based on the Japanese courts' failure to abide by the principles of the Hague Convention.

The district court also concluded that because the statute only refers to "an order for the return of the child," that the Japanese orders in question were not within the reach of the statute because they did not require the children to return to the United States. Mother maintains that the district court erroneously interpreted the statute to apply only to orders that require the return of a child. Mother argues that the statute applies more broadly to any order "resulting from a petition for [the] return of the child," which would include orders denying a petition for the return of a child in addition to orders granting a petition for the return of a child.

This court reviews matters of statutory interpretation de novo. *Cf. Bergman v. Caulk*, 938 N.W.2d 248, 250 (Minn. 2020). The goal of statutory interpretation is to "ascertain and effectuate the intention of the legislature." *Christianson v. Henke*, 831 N.W.2d 532, 536 (Minn. 2013) (quotations omitted). If the text of the law is unambiguous, a court must apply the law as written. *Id.* at 537. If the law is ambiguous,

the court may examine factors other than the words of the statute in interpreting the statute and discerning the legislature's intent. *Id.*

The unambiguous text of section 518D.302 indicates that it applies only to a foreign order "for the return of a child." Minn. Stat. § 518D.302. The 2017 Japanese Modification Order and the subsequent Japanese orders that mother sought to enforce under this statute were not orders "for the return of a child"—the orders did not require mother to return the children. The 2016 Hague Order is the only order that required return of the children, and the district court properly recognized that order in 2016. Consequently, we conclude that the district court did not err in declining to enforce the more recent Japanese orders at issue in this appeal.[2]

### C. Minn. Stat. § 548.57—the Uniform Foreign-Country Money Judgments Recognition Act

Minnesota has adopted the Uniform Foreign-Country Money Judgments Recognition Act (UFCMJRA). *See* Minn. Stat. § 548.54-.63. Under the act, Minnesota courts must recognize a foreign-country judgment under certain circumstances. Minn. Stat. § 548.57. But a district court "need not recognize a foreign-country judgment if . . . the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment." *Id.*, (c)(7).

[2] We note that, even if the statute did apply to the orders at issue, mother makes no argument on appeal regarding how the district court abused the discretion afforded to it by the statute. Therefore, even if we reached the issue, we would conclude that it was forfeited. *See State Dep't. of Labor and Indus. v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997) (declining to address an issue absent adequate briefing).

The only Japanese order that mother sought to register that involves a foreign-money judgment is the March 2018 Japanese Order that revoked the prior Japanese enforcement orders, which required mother to pay sums of money. *See* Minn. Stat. § 548.56(a) (noting that the UFCMJRA applies only to judgments that grant or deny recovery of a sum of money). The orders concerning the return of the children are plainly not subject to the UFCMJRA. *See id.*

In its December 2018 order, the district court recognized the exception in the UFCMJRA for orders issued under "circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment." *See* Minn. Stat. § 548.57(c)(7). Based on its determination that the Japanese orders are inconsistent with the Hague Convention, the district court concluded that this exception applies to the March 2018 Japanese Order. The district court's conclusion that the exception applies is supported by the reasons discussed above relating to comity—specifically that the 2017 Japanese Modification Order and subsequent Japanese orders are not entitled to comity because they contravene the purposes of the Hague Convention. For the same reasons that we conclude that the district court did not abuse its discretion in declining to extend comity to the orders at issue, we conclude that the district court did not abuse its discretion by declining to recognize the March 2018 Japanese Order under the UFCMJRA.

In sum, we conclude that the district court did not abuse its discretion by not recognizing the 2017 Japanese Modification Order and the subsequent Japanese orders because the orders contravened the purposes of the Hague Convention.

## II. Jurisdiction

We next address mother's argument that the district court lacked jurisdiction to decide child custody. This argument is closely tied to mother's argument that the district court should have recognized the 2017 Japanese Modification Order. We conclude that the district court properly exercised jurisdiction.

### A. The Existence of Subject-Matter Jurisdiction is Law of the Case

This is the third time that mother has appealed the district court's subject-matter jurisdiction determination. This court affirmed the district court's jurisdiction determination in *Cook I*. *See* 907 N.W.2d at 238-40. In *Cook I*, this court concluded that the district court had subject-matter jurisdiction over child custody under the UCCJEA because Minnesota was the children's home state. *Id.*; *see also* Minn. Stat. § 518D.201(a)(1) (2018) (providing that "a court of this state has jurisdiction to make an initial child custody determination only if . . . this state . . . was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state"). In mother's second appeal, this court dismissed mother's appeal, concluding that mother failed to "articulate a reason why the Minnesota District Court, since the filing of *Cook I*, lost subject-matter jurisdiction to hear this case." Mother candidly conceded at oral argument in this appeal that the Japanese orders do not affect the home-state analysis that we conducted in *Cook I*.

"The doctrine of 'law of the case' is based on a policy requiring issues once fully litigated to be set at rest." *Sylvester Bros. Dev. Co. v. Great Cent. Ins. Co.*,

503 N.W.2d 793, 795 (Minn. App. 1993), *review denied* (Minn. Sept. 30, 1993). The doctrine "applies when an appellate court has ruled on a legal issue and remanded the case for further proceedings on other matters. The issue becomes 'law of the case' and may not be relitigated in the trial or reexamined in a second appeal." *Id.* To the extent that mother challenges the *existence* of jurisdiction, we conclude that our determination of subject-matter jurisdiction under the home-state provision of the UCCJEA is law of the case.

**B. Inconvenient Forum**

Mother argues that the district court erred by failing to decline jurisdiction under Minn. Stat. § 518D.207. Section 518D.207(a) provides that "[a] court of this state which has jurisdiction under this chapter to make a child custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum." To determine whether it is an inconvenient forum, the court must consider "all relevant factors," including:

> (1) whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;
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> (2) the length of time the child has resided outside this state;
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> (3) the distance between the court in this state and the court in the state that would assume jurisdiction;
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> (4) the relative financial circumstances of the parties;
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> (5) any agreement of the parties as to which state should assume jurisdiction;
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> (6) the nature and location of the evidence required to resolve the pending litigation, including the testimony of the child;

> (7) the ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and
>
> (8) the familiarity of the court of each state with the facts and issues in the pending litigation.

Minn. Stat. § 518D.207(b). Because the statute requires the district court to consider "*all relevant factors*, including" the listed factors, the statute contemplates that the identified factors are not exclusive considerations. *Id.* (Emphasis added).

We review the district court's decision under section 518D.207 regarding whether it is an inconvenient forum for an abuse of discretion. *See Levinson v. Levinson*, 389 N.W.2d 761, 762 (Minn. App. 1986). Mother argues that the district court abused its discretion by failing to decline jurisdiction because the section 518D.207(b) factors weigh in favor of finding that Japan is a more appropriate forum.

The district court did not expressly analyze the section 518D.207(b) factors. Instead, the district court concluded that its analysis regarding comity supported its decision that Japan is not a more appropriate or convenient forum. As discussed above, we have concluded that the district court did not abuse its discretion in declining comity to the most recent Japanese orders. Mother's arguments regarding the section 518D.207(b) factors are primarily based on the fact that the children have been in Japan for a significant amount of time. But these arguments ignore the fact that the children have been in Japan because mother wrongfully retained the children there and refused to comply with the 2016 Hague Order to return the children. Given the unique posture of this case, we conclude that the district court did not abuse its discretion when it decided not to decline jurisdiction under section 518D.207.

## III. Challenges to the District Court's Post-Trial Findings of Fact, Conclusions of Law, Order, and Judgment

Mother next argues that the district court made several clearly erroneous findings in its post-trial order. Factual findings are reviewed for clear error. *In re Guardianship of Dawson*, 502 N.W.2d 65, 68 (Minn. App. 1993), *review denied* (Minn. Aug. 16, 1993). Mother did not appear for trial and did not file a motion for a new trial. Consequently, the scope of review on appeal is "to determine whether the evidence sustains the findings of fact and whether such findings sustain the conclusions of law and the judgment." *Rubey v. Vannett*, 714 N.W.2d 417, 425 (Minn. 2006). We also may review any "substantive questions of law when a genuine issue of law is properly raised and considered at the district court level." *Alpha Real Estate Co. of Rochester v. Delta Dental Plan of Minn.*, 664 N.W.2d 303, 311 (Minn. 2003). "To challenge the [district] court's findings of fact successfully, the party challenging the findings must show that despite viewing that evidence in the light most favorable to the [district] court's findings (and accounting for an appellate court's deference to a trial court's credibility determinations and its inability to resolve conflicts in the evidence), the record still requires the definite and firm conviction that a mistake was made." *Vangsness v. Vangsness*, 607 N.W.2d 468, 474 (Minn. App. 2000).

### A. Mother's Qualifications for Employment

Mother challenges the district court's finding that she is "capable and is qualified for full-time employment as an English as Second Language (ESL) teacher or as a Graphic Designer." The record contains evidence that mother worked as a senior graphic designer

in 2001, and evidence that mother was attempting to find a job teaching children English in Japan. Father testified about mother's work as a graphic designer. He testified that mother has a college education. Viewing the evidence in the light most favorable to the district court's findings, we conclude that the finding is not clearly erroneous.

### B. Parenting Time Adjustment

Mother argues that the district court clearly erred in assigning 14% parenting-time adjustment to mother. She maintains that there is "no basis for a finding of 14% in overnight equivalents" for mother. We see no merit in this argument. "The district court has broad discretion in determining parenting-time issues and will not be reversed absent an abuse of that discretion." *Dahl v. Dahl*, 765 N.W.2d 118, 123 (Minn. App. 2009). Child support is adjusted based on the obligor parent's parenting time. *See* Minn. Stat. § 518A.36 (2018). Here, the district court assigned a parenting-time adjustment based on 14% parenting time for mother. The 14% parenting time allocation is based on the district court's thorough analysis of the best interests of the children under the extraordinary circumstances of this case. Because the district court carefully considered the best interests of the children based on the evidence presented at trial, we conclude that the district court did not clearly err or abuse its discretion in granting father's request that mother be allotted 52 overnights per year (about 14% of the year).

### C. Boston Scientific 401(k) as Nonmarital Property

Mother challenges the district court's finding that father's Boston Scientific 401(k) account is nonmarital property because it was acquired after the parties' separation.[3] Nonmarital property includes property that is acquired by a spouse after the valuation date. Minn. Stat. § 518.003, subd. 3b(d) (2018). The valuation date is the "initially scheduled prehearing settlement conference . . . unless the court makes specific findings that another date of valuation is fair and equitable." Minn. Stat. § 518.58, subd. 1. The district court must make findings that support its decision to adopt an equitable valuation date. *See Grigsby v. Grigsby*, 648 N.W.2d 716, 720 n.1 (Minn. App. 2002).

Here, the district court concluded that it was fair and equitable to adopt an equitable valuation date for certain assets. The district court found that father acquired the Boston Scientific 401(k) account long after the parties separated. This finding is supported by father's testimony. The district court's intent to treat the account as nonmarital for equitable reasons is clear and supported by its findings. Because the district court's factual findings support its decision to treat father's Boston Scientific 401(k) as nonmarital property, we conclude that the district court did not err in treating the Boston Scientific 401(k) as nonmarital.

[3] Mother also argues that there is no evidence to support the district court's valuation of the account, but that argument has no merit because, as mother concedes, father submitted a chart that supported the valuation as evidence.

### D. Marital Equalizer Payment

Mother argues that the amount of the marital equalizer payment ordered by the district court is clearly erroneous because it does not take into account the Boston Scientific 401(k) or father's Pershing IRA account. As discussed above, father's Boston Scientific 401(k) account is nonmarital, so it has no effect on the marital equalizer payment and mother's argument on that point is meritless. Father testified that he had a Pershing IRA account with a balance of approximately $18,000, but that he had cashed out the account in April 2015 to pay for living expenses. Because the value of the account was zero, it did not affect the district court's marital equalizer payment. We discern no error in the district court's marital equalizer payment.

## IV. Conduct-Based Attorney Fees

The district court issued a post-trial order awarding conduct-based attorney fees to father based, in part, on the fact that mother's failure to appear for trial increased the length and expense of the proceedings. Mother argues that the district court abused its discretion because her failure to appear for trial did not increase the length or expense of the proceedings.

Minnesota law provides that a district court may award conduct-based attorney fees against a party who "unreasonably contributes to the length or expense of the proceeding." Minn. Stat. § 518.14, subd. 1 (2018). The decision to award attorney fees "rests almost entirely within the discretion of the [district] court and will not be disturbed absent a clear abuse of discretion." *Jensen v. Jensen*, 409 N.W.2d 60, 63 (Minn. App. 1987).

Mother only argues that the district court abused its discretion because her failure to appear did not affect the length or expense of the proceedings. While father would have been required to prepare for trial regardless of whether mother appeared, we disagree that father would have incurred the same time and expense preparing for a trial if mother had provided prior notice that she would not appear. But more importantly, mother does not challenge the other bases of the district court's conduct-based attorney fee award, including mother's filing of frivolous motions. Consequently, we determine that the district court's finding that mother's conduct unreasonably contributed to the length and expense of the proceedings was not clearly erroneous. Based on our review of the record, we conclude that the district court did not abuse its discretion in awarding conduct-based attorney fees.

## V. Contempt

Finally, mother argues that the district court abused its discretion in holding her in contempt and issuing a bench warrant for her arrest after the May 2019 trial. She maintains that the district court (1) erred by holding her in contempt for actions taken in compliance with the 2017 Japanese Modification order, (2) denied her due process by failing to provide notice that the contempt issue would be heard at trial, and (3) erred by imposing sanctions that were not aimed at inducing compliance with its December 2016 orders requiring her to return the children to Minnesota.

"The district court has broad discretion to hold an individual in contempt." *In re Marriage of Crockarell*, 631 N.W.2d 829, 833 (Minn. App. 2001) *review denied* (Minn. Oct. 16, 2001). We review a district court's decision to invoke its contempt power for an

abuse of discretion. *Mower Cty. Human Servs. v. Swancutt*, 551 N.W.2d 219, 222 (Minn. 1996).

To exercise civil contempt powers, the district court must meet several requirements:

> (1) the court has jurisdiction over the subject matter and the person;
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> (2) a clear definition of the acts to be performed;
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> (3) notice of the acts to be performed and a reasonable time within which to comply;
>
> (4) an application by the party seeking enforcement giving specific grounds for complaint;
>
> (5) a hearing, after due notice, to give the nonperforming party an opportunity to show compliance or the reasons for failure;
>
> (6) a formal determination by the court of failure to comply and, if so, whether conditional confinement will aid compliance;
>
> (7) an opportunity for the nonperforming party to show inability to comply despite a good faith effort; and
>
> (8) the contemnor's ability to gain release through compliance or good faith effort to comply.

*Id.* at 223. These requirements are known as the *Hopp* requirements. *Id.*; *see also Hopp v. Hopp*, 156 N.W.2d 212 (Minn. 1968).

Typically, civil contempt proceedings involve two hearings. At the first hearing, the district court addresses whether a party is in contempt and, if so, sets purge conditions. *Swancutt*, 551 N.W.2d at 223-24. If the party seeking enforcement of an order later alleges non-performance of the purge conditions, the district court holds a second hearing (known

as a *Mahady* hearing) at which the court determines "whether there has been a failure to comply and if so, whether conditional confinement is reasonably likely to produce compliance fully or in part." *Id.* at 224 (quotation omitted); *see also Mahady v. Mahady*, 448 N.W.2d 888, 891 (Minn. App. 1989) (establishing a two-stage contempt proceeding). "At that point, the court may order confinement upon such terms and conditions as meet the *Hopp* requirements, including providing to the contemnor the opportunity to gain release through compliance or a good faith effort to comply." *Swancutt*, 551 N.W.2d at 224.

In this case, the district court held the initial contempt hearing in March 2017 and then held a *Mahady* hearing in April 2017. At the *Mahady* hearing, mother argued that she would not return the children to the United States because she was abiding by the Japanese orders and that her noncompliance was therefore excusable. But the district court did not find mother's argument persuasive. In June 2017, the district court issued an order finding mother in contempt, requiring mother to return the children, imposing a $1,000 per day fine for each day that mother failed to return the children, and staying both confinement and a requirement that mother post a bond to exercise parenting time.

In May 2019, the district court held trial on child custody and dissolution issues. The district court did not provide notice that it would address the contempt issue. At the hearing, father raised the issue of contempt and requested that the district court issue a warrant and enter a judgment of $694,000 against mother to reflect the $1,000 per day fine that had been imposed 694 days before trial. Following trial, the district court issued an

order again finding mother in contempt. In its order, the district court also lifted the stay on confinement and the bond, and issued a bench warrant for mother's arrest.

Mother argues that she did not have notice that the issue of contempt would be heard at trial and maintains that she was not provided with a fair opportunity to respond. She also argues that the district court violated Minn. Gen. R. Prac. 309.03(a) when it issued the bench warrant. That rule provides that where a court has entered an order with a stay of sentence and there has been a default in the performance of the conditions of the stay, an affidavit of noncompliance and a request for writ of attachment must be served upon the defaulting person before the district court may issue a bench warrant against the defaulting person, unless the person is shown to be avoiding service. Minn. Gen. R. Prac. 309.03(a). The moving party must submit a proposed order for writ of attachment that directs law enforcement to bring the defaulting party before the court for a show-cause hearing regarding why the stay of sentence should not be revoked. *Id.*, (b). Finally, mother contends that the district court's order violated Minn. Stat. § 588.04(a) (2018), which requires an affidavit alleging the facts constituting contempt before a warrant may issue.

We agree with mother that, because no affidavit of noncompliance had been filed or served upon mother as required by the rule, the district court failed to comply with Rule 309.03(a) prior to lifting the stay and issuing the bench warrant. We are also concerned that mother received no other type of notice that the district court would address the issue of contempt at trial. Given the divergence from Rule 309.03(a) and the lack of notice that contempt would be addressed at trial, mother was not afforded "a hearing, *after due notice* . . . to show compliance or the reasons for failure" since the previous contempt

order. *Swancutt*, 551 N.W.2d at 223 (emphasis added); *see also* Minn. Gen. R. Prac. 309.03. Consequently, we conclude that the district court abused its discretion by holding mother in contempt again, lifting the stay, issuing a bench warrant, and imposing other sanctions following trial.

Because we conclude that the district court abused its discretion by holding mother in contempt again without sufficient notice, we do not address mother's arguments challenging the findings supporting contempt or the sanctions that the district court imposed. We reverse the contempt order and remand for further proceedings consistent with this opinion.[4]

**Affirmed in part, reversed in part, and remanded.**

[4] Our conclusion affects only the posttrial contempt order and bench warrant and not the district court's previous contempt orders. We do not intend to limit the district court's discretion to hold mother in contempt for failure to obey its orders. Our decision is based solely on the lack of notice afforded to mother that this issue would be heard at trial.