

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 23, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP2491-FT

Cir. Ct. No. 2013FA117

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

KANG T. XIONG,

JOINT-PETITIONER-RESPONDENT,

V.

SAIDANG D. XIONG,

JOINT-PETITIONER-APPELLANT.

APPEAL from a judgment of the circuit court for Eau Claire County: KRISTINA M. BOURGET, Judge. *Affirmed.*

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 PER CURIAM. Saidangim Xiong appeals a judgment of divorce from Kang Xiong.¹ He argues the trial court: (1) erroneously concluded his annual income was approximately \$70,000 for purposes of determining maintenance; (2) erroneously ordered an equal division of the parties' real estate assets after concluding Kang had not committed marital waste; and (3) erroneously ordered him to pay Kang's attorney fees in this action. We affirm.

BACKGROUND

¶2 Saidang, fifty, and Kang, fifty-four, were married in 1981 and have eight adult children. They jointly petitioned for divorce on February 26, 2013. A final divorce hearing was held on June 2, 2014. The only issues remaining at the time of the hearing were maintenance and the division of two parcels of real property.

¶3 Following the evidentiary hearing, the circuit court ordered Saidang to pay Kang \$1,500 per month in maintenance. The court found that Kang did not have a high school education and had a limited understanding of the English language, and that her earning capacity was \$1,591 per month based on her ability to work as a laborer. Saidang, on the other hand, graduated from college and owned an insurance agency. Kang supported Saidang's efforts to further his education and launch his insurance business, and she cared for the children and maintained the household while Saidang was in school. The court found that, given Kang's lack of education and difficulty with the English language, it was not

¹ This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

feasible that she would become self-supporting at a standard of living reasonably comparable to that which the parties enjoyed during their marriage.

¶4 Saidang's income was a primary focus at the final hearing. Following the hearing, Saidang argued that, based on his tax returns between 2011 and 2013, his total income for purposes of the maintenance calculation, consisting of both his salary and distributions from his S-Corporation, should be between \$25,000 and \$35,000.² The circuit court concluded these amounts grossly understated the amount of Saidang's actual personal income. In particular, the court found Saidang ignored in his calculation significant, additional income, presumably derived from his business revenue, that he used to pay for personal expenses, including approximately \$16,000 that Saidang spent per year supporting a girlfriend in Laos and traveling to see her. It also concluded Saidang overstated the amount of his claimed automobile business expenses by approximately \$5,000 per year. From these facts, and the fact that Saidang had paid for all of the parties' living expenses since their separation in 2011, the circuit court inferred that Saidang had a substantial amount of unreported income. It ultimately concluded Saidang's income was approximately \$70,000 annually for maintenance purposes.

¶5 With respect to the property division, the court found reasonable the parties' agreement to retain the vehicle and personal property in their possession. The only disputed property for division was the parties' residences: one in Eau Claire, Wisconsin, occupied by Kang; and the other in Lake Elmo, Minnesota, occupied by Saidang. Saidang sought an unequal division of the property based

² The circuit court observed that Saidang's tax returns for these years were not filed until after the divorce was commenced.

upon Kang's alleged marital waste of significant cash assets, but the circuit court concluded the loss of the cash was not intentional and ordered an equal division. As the parties generally agreed the homes were of equal value, the court awarded each party the residence in which they resided.

¶6 A judgment of divorce adopting these maintenance and property division determinations was entered on October 31, 2014. Given the parties' "disparity in incomes and earning potential," the judgment required Saidang to pay Kang's attorney's fees in this action as set forth in an affidavit from Kang's counsel. The affidavit contained a "ledger report" indicating the number of hours spent on each date, but it did not indicate the particular or even general activities for which the fees were charged. The total fee was \$5,952.50.

¶7 Saidang filed a motion to reconsider. Saidang argued the circuit court erred when it determined he had an annual income of \$70,000. Attached to his motion were tax returns from the years 2007 through 2010, which Saidang asserted showed his four-year average income to be approximately \$45,000. Saidang also urged the court to reconsider the award of attorney's fees, asserting there was no income disparity justifying the award and no evidence that the award was reasonable. The circuit court denied the motion for reconsideration, concluding Saidang failed to demonstrate either newly discovered evidence or a manifest error of law or fact.³ See *Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.*, 2004 WI App 129, ¶44, 275 Wis. 2d 397, 685 N.W.2d 853.

³ Saidang does not challenge the denial of his motion for reconsideration on appeal.

DISCUSSION

¶8 Saidang presents three arguments on appeal. First, he argues the circuit court erred when calculating the maintenance award by “imputing” approximately \$21,000 of income to him so as to find that he earned approximately \$70,000 per year. Second, Saidang argues the court erred by ordering an equal property division despite what he contends is evidence that Kang committed marital waste. Third, Saidang argues the court erroneously required him to pay all of Kang’s attorney’s fees related to the divorce proceeding.

¶9 We review each of these matters for an erroneous exercise of discretion. See *Hokin v. Hokin*, 231 Wis. 2d 184, 190, 605 N.W.2d 219 (Ct. App. 1999) (amount of maintenance and property division); *Popp v. Popp*, 146 Wis. 2d 778, 798, 432 N.W.2d 600 (Ct. App. 1988) (award of attorney fees). “We affirm a trial court’s discretionary decision if the court makes a rational, reasoned decision and applies the correct legal standard to the facts of record.” *Hokin*, 231 Wis. 2d at 190. A trial court’s findings of fact will not be overturned unless they are clearly erroneous. *Id.* at 190-91.

I. Maintenance

¶10 Maintenance awards upon a divorce are governed by WIS. STAT. § 767.56. *McReath v. McReath*, 2011 WI 66, ¶43, 335 Wis. 2d 643, 800 N.W.2d 399. Courts are to begin with the proposition that the dependent partner is entitled to fifty percent of both parties’ total earnings. *Id.*, ¶45. The court then makes any necessary adjustments after considering the factors enumerated in WIS. STAT. § 767.56(1c). *McReath*, 335 Wis. 2d 643, ¶45. Any maintenance award should aim to achieve two goals: (1) support of the payee spouse at the predivorce standard of living; and (2) fairness to the parties. *Id.*, ¶44

(citing *LaRocque v. LaRocque*, 139 Wis. 2d 23, 33, 35-36, 406 N.W.2d 736 (1987)).

¶11 Saidang challenges the amount of income the trial court imputed, or more accurately, attributed, to him. He concedes that, based on his tax records, the circuit court could properly conclude that he was earning approximately \$49,000 per year through a combination of salary and pass-through business income. However, Saidang contends the circuit court wrongly attributed an additional \$21,000 in annual income to him.

¶12 The circuit court concluded Saidang's income was "probably closer to at least \$70,000 annually," not because it imputed income to Saidang, but because it concluded he underreported or failed to report income. It reached this conclusion by adding: (1) an annual salary of \$24,000; (2) ordinary business income of \$25,000; (3) annual transfers to his Laotian girlfriend of approximately \$10,000, paid using unreported income; (4) annual travel expenses to Laos of \$6,000, again paid using unreported income; and (5) an additional \$5,000 in income attributable to overstated automobile business expenses on Saidang's tax returns. The court indicated it doubted both Saidang's credibility and the validity of the total income Saidang reported in the tax filings.

¶13 There was sufficient testimony to demonstrate that Saidang spent at least \$16,000 annually supporting his Laotian girlfriend and traveling to see her. Kang testified Saidang would travel to Laos to see his girlfriend every year. He would bring up to \$6,000 with him on these trips. Saidang's plane tickets were admitted into evidence. There was evidence in the form of wire-transfer receipts that Saidang sent at least \$4,100 to Laos between January and May 2013. That is

approximately \$820 per month, which supports the circuit court's approximate \$10,000 finding if extrapolated over a full year.⁴

¶14 Saidang argues that even if the circuit court's finding as to the *amount* of these expenditures was not clearly erroneous, it was nonetheless error to impute additional income to him under the circumstances. Saidang asserts that it can be inferred from the evidence that he earned a sufficient amount of money to fund these expenditures without underreporting his actual personal income. He argues there was "no evidence showing that [he] had claimed the trips to Laos or the transfers of money as deductions from gross income on his taxes, even assuming he transferred or withdrew the funds from his [business] account."

¶15 Saidang also challenges the circuit court's finding that he overstated his automobile expenses by approximately \$5,000. Saidang argues there was no direct evidence showing that he was inflating his automobile expenses, and highlights his testimony that he traveled extensively around the country to generate sales for his insurance business. The circuit court observed, and Saidang concedes, that he provided no documentation supporting his claimed vehicle expenses of \$27,000 in 2011 and \$25,000 in 2012. The court also noted Saidang claimed additional personal monthly automobile expenses of approximately \$450 on a recent financial statement.⁵ Saidang refused to state during

⁴ For his part, Saidang did not dispute that he supported a girlfriend and traveled overseas, but he testified he did not keep records of the amounts he spent. Saidang testified on direct examination he recalled sending approximately \$1,000 to Laos over a two-to-three year period. However, when confronted with the wire receipts on cross-examination, Saidang acknowledged both that the amounts reflected in the receipts were not the only funds he sent to Laos, and that the total amount sent could have been greater.

⁵ The circuit court also expressed the amount of personal expenses claimed as an annual amount (\$5,400), which is, we presume, how the circuit court arrived at the \$5,000 figure.

cross-examination whether the amounts claimed on his tax forms were what he actually spent on his vehicle during the applicable years.

¶16 Saidang effectively argues the circuit court had no choice but to credit the amount of income and expenses stated in his tax returns. However, the amount of annual income and the existence of various claimed expenses are facts to be determined by the trial court based on the evidence. *Lellman v. Mott*, 204 Wis. 2d 166, 170, 554 N.W.2d 525 (Ct. App. 1996). The weight to be given the tax returns “is largely dependent upon the testimony of witnesses, and the credibility to be afforded to their testimony is for the trial court.” *Delap v. Institute of Am., Inc.*, 31 Wis. 2d 507, 511-12, 143 N.W.2d 476 (1966).

¶17 During the hearing, Saidang highlighted his professed financial difficulties. He argued that he earned even less than indicated on his 2011 and 2012 tax returns due to a downturn in business. Saidang testified his income decreased substantially in 2013, such that he was now paying himself only \$2,000 per month for just six months out of the year, and earning only \$10,000 annually in pass-through, business income. When asked how he affords to live during the remaining months, Saidang stated he had “some sort of other income [like cash] available.” Saidang did not identify the source from which this “other” income was derived. Saidang further testified that, unlike many businesses, he dealt in “lots of cash” for expenses.

¶18 The circuit court found Saidang was not a credible witness. Our review of the final hearing transcript reveals Saidang was often evasive when answering questions about financial information. Under the circumstances, the circuit court did as best as could be expected, and it certainly was in a better position than this court to assess Saidang’s credibility based on the transcript or

other evidence in the record. Using the evidence presented at the final hearing, and permissible inferences from that evidence, the circuit court reasonably concluded Saidang had much more personal income than he disclosed on his tax forms. “As long as the determination of fact could be achieved by a reasonable factfinder based upon the evidence presented, a reviewing court is required to accept the facts found by the trier of fact.” *Lellman*, 204 Wis. 2d at 171.

¶19 Indeed, we find the *Lellman* case instructive. Lellman surrendered some financial information to the trial court, but much of the required information was undisclosed and could not be determined from the records that were produced. *Id.* at 169-70. The trial court concluded Lellman intentionally misrepresented his income on tax documents and lived a lifestyle requiring substantially greater expenses than was consistent with reported income. *Id.* at 170. On appeal, we concluded the trial court acted appropriately when it made the necessary factual findings regarding net income despite not having precise information available. *Id.* at 173. “The trial court may make its finding based upon the available evidence when a party’s intentional conduct precludes a precise determination of that annual income.” *Id.* Importantly, a party “cannot be heard to complain that this approximation was excessive when the precise information available to make that determination was in his exclusive control.” *Id.* at 175.

¶20 In all, we cannot conclude the circuit court’s finding that Saidang was receiving an additional \$21,000 annually in unreported, personal income is clearly erroneous. Furthermore, based on the record, the court’s discretionary decision of calculating the maintenance award by attributing that additional income to Saidang was based on a rational, reasoned process in which the court applied the correct legal standard to the facts of record.

II. Property division

¶21 Saidang next challenges the property division. The parties reached agreement on all aspects of the property division except for the disposition of the real property located in Eau Claire and Lake Elmo. Kang requested that each party be awarded the residence they then occupied—Kang the Eau Claire residence and Saidang the Lake Elmo residence. Saidang, on the other hand, requested that he receive the Lake Elmo property, and that the Eau Claire property be sold and the proceeds divided equally. The circuit court rejected Saidang’s proposal and adopted Kang’s proposal.⁶

¶22 Saidang’s assertion that he should be awarded half of the proceeds from the sale of the Eau Claire residence is based on a theory of marital waste. Before the circuit court, Saidang asserted that the parties had, by agreement and shortly after the divorce filing, divided their cash assets; Kang received \$153,000, while Saidang received \$123,000. Saidang used the cash to purchase the Lake Elmo residence. Kang gave her cash to a friend for safekeeping. The friend was later murdered by her husband and the cash was not recovered.

¶23 The circuit court observed that, under *Anstutz v. Anstutz*, 112 Wis. 2d 10, 331 N.W.2d 844 (Ct. App. 1983), it was permitted to consider, when determining each party’s contribution to the marriage, whether one of the parties squandered marital assets or caused the “intentional or neglectful destruction of property.” See *id.* at 12; see also WIS. STAT. § 767.61(3)(d) (presumption of equal

⁶ The court noted that the Eau Claire residence has a fair market value of \$179,000. No evidence of the value of the Lake Elmo property was provided, but Saidang requested the court to assess a value equal to that of the Eau Claire property.

division may be altered based upon each party's contribution to the marriage); WIS. STAT. § 767.63 (rebuttable presumption that any property "transferred for inadequate consideration, wasted, given away, or otherwise unaccounted for" within specified time is subject to property division). The court remarked that Kang's decision to give the cash to her friend "may not have been the most prudent course of action," but it also found that, under the circumstances, the decision did not constitute waste.

¶24 To reiterate, the division of marital property rests in the sound discretion of the circuit court, and we conclude that discretion was properly exercised here. Specifically, the court indicated Kang has "limited education and was confused and stressed due to her husband of 20+ years leaving her for another woman." Kang was suddenly responsible for a large sum of cash, which she received from Saidang. Rather than deposit the funds in the bank, Kang entrusted the money to a friend for safekeeping; she received a receipt in return. Saidang testified it is common in their Hmong culture to use cash rather than checks or credit; from this, the circuit court inferred that it is not unusual for individuals in that culture, such as Kang, to personally hold significant sums of cash rather than deposit them in a bank account. Under these circumstances, the court concluded the loss of the money was not intentional and did not constitute waste.

¶25 On appeal, Saidang contends that although the circuit court found Kang's actions *subjectively* reasonable under the circumstances, her actions were nonetheless *objectively* unreasonable and therefore neglectful. Saidang essentially argues that we can decide, independently of the circuit court, whether, for property division purposes, a party has wasted or squandered marital assets as a matter of law. We decline Saidang's invitation to unsettle well-established law dictating that property division—and the corresponding inquiry under *Anstutz* regarding

marital waste and reasonableness—is reviewed for an erroneous exercise of discretion. See *Hokin*, 231 Wis. 2d at 190-91.⁷

III. Attorney's fees

¶26 A circuit court may, in its discretion, award attorney's fees after considering the reasonableness of the fees, the need of the spouse requesting contribution, and the ability of the other spouse to pay. *Popp*, 146 Wis. 2d at 798. Here, Saidang asserts the parties were placed in an “equal financial position,” such that Kang should have been able to pay for her own attorney. Saidang also argues the court could not determine the reasonableness of the requested fees because the affidavit submitted by Kang's attorney contains a “ledger report” that showed only the amount of time expended by date and the associated fee, without indicating how the time was spent.

¶27 Although the dearth of detail in the ledger report makes this a close call, we cannot conclude the circuit court erroneously exercised its discretion with

⁷ Saidang cites *Derr v. Derr*, 2005 WI App 63, 280 Wis. 2d 681, 696 N.W.2d 170, in support of his argument, but that case is inapposite. In that case, we concluded that a party sufficiently met her burden of proving waste when the other party was unwilling to give clear information about the loss of \$45,000 during day-trading activities. *Id.*, ¶¶63-67 (citing *Lellman v. Mott*, 204 Wis. 2d 166, 175, 554 N.W.2d 525 (Ct. App. 1996)). The circuit court in *Derr* found the day-trading spouse not credible, a factual finding we necessarily credited on appeal. *Id.*, ¶66. It is clear we were reviewing the circuit court's decision for an erroneous exercise of discretion.

We observe that, in this case, the circuit court made credibility findings as well. It rejected Saidang's testimony that he had warned Kang that her friend was not to be trusted. The court accepted Kang's testimony that she did not receive such a warning, and that she had no information that would have caused her to question her friend's trustworthiness.

respect to its decision to award Kang attorney's fees. The circuit court determined an award of attorney's fees was appropriate "given the disparity in incomes and earning potential" between Saidang and Kang. This was a reasonable conclusion in light of the evidence the parties presented and the circuit court's other findings of fact—particularly, that Kang has an annual earning capacity of approximately \$19,000, while Saidang has an annual income of approximately \$70,000. While the circuit court's \$1,500-per-month maintenance award reduces that disparity, it does not eliminate it.

¶28 Further, although the ledger submitted by Kang's attorney does not itemize the fees by activities performed, we conclude, under the circumstances of this case, the circuit court could, in its discretion, reasonably rely upon it when determining the amount of the award. The parties jointly petitioned for divorce and reached agreement on many issues without the need for extensive litigation. Still, as reflected in this appeal, Saidang fiercely contested issues related to his amount of total income and allegations of Kang's waste of marital assets. The ledger indicated Kang's attorney spent a total of thirty hours on the case between April 9, 2013, and September 9, 2014. Saidang does not contend the \$200 rate charged by Kang's attorney was excessive. To the extent the ledger lacked detail, the record supports the appropriateness of the aggregate amount of fees awarded without the need for further findings of fact, given the nature and extent of issues litigated and specifically addressed by the circuit court, as fully chronicled in its decision. The court therefore did not erroneously exercise its discretion when it relied on the ledger to determine the amount of the attorney's fee award.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)5.

