

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**June 14, 2011**

A. John Voelker  
Acting Clerk of Court of Appeals

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**Appeal No. 2008AP2527**

**Cir. Ct. No. 2006FA2649**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**IN RE THE MARRIAGE OF:**

**KACHI YANG,**

**PETITIONER-APPELLANT,**

**v.**

**DAO YANG,**

**RESPONDENT-RESPONDENT.**

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APPEAL from a judgment of the circuit court for Milwaukee County: MAXINE A. WHITE, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 CURLEY, P.J. Kachi Yang appeals the order supplementing the trial court's judgment of divorce granted earlier to Kachi and her former husband,

Dao Yang.<sup>1</sup> Kachi argues the trial court erred in determining that Dao did not commit waste when he sold a half interest in twenty acres of farmland for \$50,000 or when he withdrew \$171,000 over the course of several years from a Landmark Credit Union account. She also contends the trial court erred in not finding that all of Dao's trips to Laos constituted waste. Because the trial court's findings of fact were not clearly erroneous and the trial court did not err in determining that, with the exception of monies spent by Dao on three trips, Dao's actions did not constitute waste, we affirm.

### I. BACKGROUND.

¶2 This case comes to us after remand. Originally the trial court adopted a partial stipulation of the parties concerning custody and placement of the minor children and divided certain property and debts of the parties. However, several matters remained unresolved and a bench trial was held. Following the trial court's decision, Kachi appealed and we remanded the matter to the trial court to permit the court to make additional findings of fact concerning Kachi's contention that Dao committed waste.<sup>2</sup>

¶3 Kachi and Dao are both Laotian immigrants who were married in 1982. Five minor children were living at the time of their divorce. Dao obtained a GED during the marriage and was the primary breadwinner for the family. Kachi was primarily responsible for keeping the family's home, and did not obtain a

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<sup>1</sup> Because both of the parties have the same last name, we refer to them by their first names.

<sup>2</sup> Kachi also sought maintenance in the first appeal, despite the fact that the "Divorce Judgment Addendum" attached to the divorce judgment indicates that maintenance is waived as to both parties. In any event, the issue of maintenance to Kachi has not been raised in this appeal.

GED, but she did work outside the home at the time of the divorce. Prior to the filing of the divorce the parties separated, reconciled, and then a domestic abuse injunction was issued against Dao requiring him to vacate the family home. Several weeks later, in April 2006, Kachi filed for divorce, which was ultimately granted in August 2008. As noted, at the time of the default judgment of divorce the parties entered into a partial stipulation that resolved many of the outstanding issues. The trial court held a trial on the remaining issues over the course of several months, ultimately rendering a written decision. Because the trial court failed to make the necessary findings of fact and failed to apply the proper statutory analysis to the question of whether Dao committed waste for certain actions he took during the marriage, we remanded the matter for further consideration. On remand, the trial court made additional findings and determined that Dao did not commit waste, except for taking three trips to Laos, which the trial court found to be excessive.

¶4 The following facts pertinent to this appeal are set forth in the order remanding this matter to the trial court. *See Yang v. Yang*, No. 2008AP2527, unpublished slip op. (WI App Feb. 4, 2010). The parties acquired several pieces of real estate during the marriage, including a one-half interest in twenty acres of farmland in Franklin. In April 2006 (the same month and year of the divorce action being filed, but before Dao had been served), Dao sold the one-half interest to one of his brothers for \$50,000 (another brother owned the other fifty percent).<sup>3</sup> Over a year later, Kachi obtained an appraisal of the property that valued the

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<sup>3</sup> The order remanding this matter mistakenly stated that Dao sold the one-half interest for \$100,000. *See Yang v. Yang*, No. 2008AP2527, unpublished slip op. (WI App Feb. 4, 2010).

one-half interest at \$75,000. She contended that Dao committed waste when he sold the property to a different brother for \$25,000 less than the appraised value.

¶5 Dao also took numerous trips to Laos. Kachi testified that she did not approve of these trips, although she did, sometimes, drive Dao to the airport. His first trip was in July 2003. It was the first of several multi-week trips that he took over the next few years. Dao estimated that each trip cost \$4000, and withdrawals from bank statements revealed that he withdrew substantial amounts of money before each trip. Four of the trips occurred either within one year of, or subsequent to, the filing of the divorce petition. Kachi argues that these monies are subject to the rebuttable presumption found in WIS. STAT. § 767.63 (2009-10).<sup>4</sup> Kachi was suspicious as to the reasons behind Dao's need to take multiple trips. Her suspicions were heightened when she found several photographs of Dao and another woman that suggested they were in a romantic relationship. Dao also attempted to bring this woman into this country as a permanent visitor and he admitted he opened a credit card in the woman's name and sent her approximately \$1000. Kachi claims that Dao misappropriated marital assets when paying for these trips.

¶6 Before the many trips to Laos, Dao's paycheck had been deposited into a joint account. Within months of the first trip, Dao opened an individual account at Landmark Credit Union and deposited his paycheck into that account. Kachi did not have access to the Landmark account. From the time the account was opened in 2003 until it was closed in May 2007, Dao withdrew approximately

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<sup>4</sup> All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

\$171,000. Dao claimed he used the money for marital expenses. Kachi, on the other hand, argued that this money was not used for a marital purpose and it should be included in the marital estate and charged against Dao's share. The trial court determined that neither the sale proceeds of the twenty acres nor the \$171,000 withdrawals constituted waste. The trial court did find three of the vacations to be excessive and charged \$12,000 (\$4000 per trip) against Dao's property division. Kachi appeals.<sup>5</sup>

## II. ANALYSIS.

¶7 WISCONSIN STAT. § 767.61(3) creates a rebuttable presumption that at the time of divorce the parties' marital property is to be divided equally, although distribution may be altered by factors enumerated in the statute. One express consideration is what each party contributed to the marriage. *See* WIS. STAT. § 767.61(3)(d). This factor allows the court to consider each party's efforts to preserve the marital assets. *See id.* The trial court may "consider each party's efforts to preserve marital assets," and may "require a party to pay the debts caused by the squandering of the parties' assets, or the intentional or neglectful destruction of property, *see Anstutz v. Anstutz*, 112 Wis. 2d 10, 12, 331 N.W.2d 844 (Ct. App. 1983), by including in the marital estate the value of the assets which would have been in the marital estate but for the waste, *see Covelli v. Covelli*, 2006 WI App 121, ¶30, 293 Wis. 2d 707, 718 N.W.2d 260. Additionally, WIS. STAT. § 767.63 states that assets valued at more than \$500 "transferred for

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<sup>5</sup> Numerous record citations in Kachi's brief and in Dao's brief do not reference the record, in violation of WIS. STAT. RULE § 809.19(1) & (3). We remind counsel that we have no duty to scour the record to review arguments unaccompanied by adequate record citations. *See Tam v. Luk*, 154 Wis. 2d 282, 291 n.5, 453 N.W.2d 158 (Ct. App. 1990).

inadequate consideration, wasted, given away, or otherwise unaccounted for by one of the parties within one year prior to the filing of the petition ... [are] rebuttably presumed to be property subject to division under s. 767.61.”

¶8 Property division is a matter within the sound discretion of the trial court, and we will uphold its decision if the court “‘examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion a reasonable judge could reach.’” *See LeMere v. LeMere*, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789 (citation omitted). We accept the trial court’s findings of fact if not clearly erroneous. WIS. STAT. § 805.17(2). We accord “great deference” to the trial court’s exercise of discretion. *Sievert v. American Family Mut. Ins. Co.*, 180 Wis. 2d 426, 431, 509 N.W.2d 75 (Ct. App. 1993). The reason for our deference is the trial court’s superior opportunity to evaluate the evidence by observing the demeanor of witnesses and gauging the persuasiveness of their testimony. *See Krolkowski v. Chicago & Nw. Transp. Co.*, 89 Wis. 2d 573, 580-81, 278 N.W.2d 865 (1979). The trial court is better positioned than we are to resolve disputed factual issues and to draw reasonable inferences from the facts it finds. *See id.* We generally look for reasons to sustain a discretionary decision of the circuit court, *see Loomans v. Milwaukee Mut. Ins. Co.*, 38 Wis. 2d 656, 662, 158 N.W.2d 318 (1968), and “we may search the record to determine if it supports the court’s discretionary decision,” *Randall v. Randall*, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737.

¶9 In *Waln v. Waln*, 2005 WI App 54, ¶7, 280 Wis. 2d 253, 694 N.W.2d 452, this court held that deciding whether property is subject to division involves the application of a statute to uncontested facts and thus presents a question of law that we review independently. Extrapolating from this holding,

we determine that whether waste occurred here is also a question of law that we review independently.

*A. The trial court properly exercised its discretion in determining that Dao needed to sell the farmland, and correctly found that Dao's actions did not constitute waste.*

¶10 Kachi's first claim is that by selling the one-half interest in the farmland for \$25,000 less than the appraised value, Dao committed waste. Kachi points out that the sale occurred during the one-year look-back pursuant to WIS. STAT. § 767.63, and is rebuttably presumed to be property of the estate.

¶11 In the supplemental order, the trial court made the following findings: (1) when Dao sold the one-half interest in the farmland to his brother, he made a \$7500 profit; (2) when Dao sold the property, the divorce papers had not yet been served on him; (3) Dao was homeless at the time of the sale and needed money to find a place to live, both for himself and for his children, as he shared the care of the children with Kachi; and (4) only the one-half interest in the property was for sale, so whoever bought it would own it with another brother. With respect to the appraisal, the trial court found that the amount of the appraisal was not totally reliable because: (1) it was obtained on the property over a year after its sale; (2) the comparables were not an indication of the true value of the property because the comparables were located in better locations, in close proximity to laterals for sewer and water service, and offered greater development potential; and (3) the farmland was a unique piece of property. Discussing the testimony of the appraiser, the trial court found that on cross-examination the appraiser admitted that his appraisal contained a great deal of speculation and that the property was highly unusual in a number of ways.

¶12 Kachi faults the trial court's findings in several respects. She argues that Dao did not have an urgent need to find housing, and, if he did, it was of his own making because he was obligated to vacate the family home after the domestic abuse injunction was entered. Further, she argues that the trial court's finding that selling the property was a benefit to the estate was a clearly erroneous finding. As to the appraisal, Kachi argues that the trial court made factual mistakes such as believing that the farmland was zoned agricultural, not residential, and in assessing the validity of the appraisal, Kachi contends that the factors which the trial court used to deviate downward from the appraised amount of \$50,000 were all taken into account by the appraiser, and thus, were built into the amount of the appraised value. Further, Kachi argues that she never received any proceeds from the sale because Dao put the proceeds of the sale into his individual account, to which she had no access, and he withdrew these monies during the pendency of the action.

¶13 We disagree with Kachi's contentions. We first observe that in evaluating the trial court's findings, it is obvious that the trial court believed Dao's testimony that he had little resources with which to obtain housing after the separation, but still had the responsibility for the care of his five children. The trial court also did not believe the purchase amount was unreasonable, inasmuch as Dao made a profit on the sale and the sale price was identical to the city's appraised value for the property. Also, this was not a typical sale because Dao was selling only a one-half interest in undeveloped farmland, and whoever purchased it would become a co-owner with Dao's brother. This would, in all likelihood, restrict the number of prospective buyers and not command a high price. Further, the trial court could reasonably believe that the sale was a benefit to the family because it permitted Dao, at least potentially, to quickly obtain

housing for himself and his children and it also eliminated the necessity of paying a real estate commission had he sold it in the open market. As it turned out, Dao moved into the family home several months after the sale of the farmland. This occurred after Kachi voluntarily left it, taking all the appliances, furnishings and children's clothing.

¶14 Contrary to Kachi's contention that the trial court mistakenly believed that the farmland was zoned agricultural, the trial court clearly stated that the farmland was "zoned as R-3 residential and being used as agricultural." In addressing the appraisal of the farmland, the trial court observed that the appraisal was not obtained contemporaneously with the sale. The trial court was apparently unimpressed with the appraisal because one of the findings states that the appraisal "contained a great deal of speculation, and explanation about property that was highly unusual in a number of ways." In addressing the appraisal, the trial court wrote:

[I]t is reasonable to conclude that the farmland may have declined in value since he completed the appraisal ... The appraiser's reliance on three comparable sales which were quite dissimilar to this 20 acre agricultural land in the middle of a [c]ity, the fact that the three comparables had the potential for sewer and water improvement and residential use were additional factors the Court considered in concluding that the \$50,000 sales price was reasonable under the circumstances and did not constitute waste.

Finally, we observe that while Kachi insists that the trial court was obligated to accept the appraiser's valuation, this is incorrect. The trial court was free to disregard the testimony of the only expert witness because "[t]he weight and credibility to be given to the opinions of experts is uniquely within the province of the fact-finder"—in this instance, the trial court. See *Bauer v. Piper Indus., Inc.*, 154 Wis. 2d 758, 764, 454 N.W.2d 28 (Ct. App. 1990).

¶15 Next, Kachi complains that she never shared in the proceeds of the sale. The trial court found that Dao deposited \$45,000 of the sale proceeds in his Landmark Credit Union account. The trial court found that Dao used the proceeds of the sale of the farmland to pay the back property taxes and to restock the marital home with all the appliances and furnishings, including beds and clothing for the children that had been taken by Kachi when she moved out of the marital home. While true that Kachi did not personally share in the proceeds, had Dao not had the proceeds from the farmland to purchase needed items, in all likelihood he would have had to petition the court for the release of funds or the sale of an asset to pay the taxes in order to clothe his children and refurnish the household. Given Dao's dire circumstances and his responsibilities, it is likely the trial court would have granted his request. Had this occurred, the marital estate would have been depleted.

¶16 Ultimately, the trial court concluded that Dao did not commit waste in selling the property for less than the appraised value:

(a) The Respondent provided credible and convincing testimony when he testified that with the injunction in place on March 27, 2006, he was homeless; (b) The Court concluded that the Respondent had an obligation to continue his Court ordered placement with the five children and living in a small space with his parents, or cousins or other relatives was insufficient accommodations for the respondent and his children; (c) In March 2006, the Respondent needed money to get a place to stay and purchasing rather than renting a place for five children was a reasonable goal; (d) In April 2006, the Respondent intended to get money to purchase a home by selling his interest in the farmland as quick[ly] as he could for as high of a price as he could; (e) At the time that the [R]espondent was trying to sell the farmland, the Petitioner had not vacated the family home; (f) Under these circumstances a "quick" sale of the farmland was reasonable, justified and a benefit for the estate.

¶17 We accept the trial court’s findings of fact as they are not clearly erroneous, *see LeMere*, 262 Wis. 2d 426, ¶13, and under the circumstances, conclude that Dao did not commit waste.

*B. The trial court properly determined that Dao’s taking one trip per calendar year to Laos was not waste but more than one trip per year constituted waste.*

¶18 Kachi complains that the trial court erred when it concluded that five of Dao’s eight trips to Laos did not constitute waste. This is so, according to Kachi, because four of the eight trips occurred during the statutory look-back period addressed in WIS. STAT. § 767.63, and thus, it was Dao’s burden—which, according to Kachi, he did not meet—to prove the trips did not constitute waste. Further, Kachi argues that the trial court should have looked at what the purpose of the trips was, not the number. Kachi contends that because Dao took these trips to throw lavish parties and to have sexual trysts with other women, all the money expended on these trips should have been added back into the marital estate. Kachi also argues that the trial court’s finding that Dao took these trips to visit family was clearly erroneous because his family lives in the United States.

¶19 Contrary to Kachi’s claims, Dao testified that he went to his homeland for recreational purposes, to visit family and friends, and, according to the trial court’s finding, “to help him handle the stress related to problems in his marriage [which was] especially needed after the fall of 2005 to help him cope with the lengthy period of strife, separation, litigation and ultimate breakdown of his marriage.” Dao also explained that the young woman who he tried to bring over to this country was a friend and he helped her with her school expenses over a number of years and the amount totaled no more than \$1000.

¶20 In its conclusions of law, the trial court stated:

In judging the reasonable[ness] of the costs of the vacations, the Court concludes that an appropriate factor under the circumstances of this case could include the frequency of Respondent's vacations to Laos. Therefore, when applying that factor to this case, while more than one vacation per year may be reasonable for places requiring less money for airfare and expenses[,] the costs of a trip to Laos is not such a destination. The Court concludes that the Respondent's use of marital assets to take more than one vacation in any calendar year at a cost of \$4000 per trip to his homeland of Laos *was not* reasonable and therefore in the instant case constituted dissipation of marital assets or waste of a total of \$12,000 (\$4000 x 3 trips).

... Under the logic of *Dean [v. Dean]*, 87 Wis. 2d 854, 275 N.W.2d 902 (1979)], the Court concludes that since the Court has found that the Respondent's use of assets for vacation purposes is reasonable, the Petitioner's complaint that he had no family there, went over her objections and possibly engaged in extramarital conduct is not relevant or determinative on the question of waste.<sup>6</sup>

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<sup>6</sup> We also observe that, had the trial court accepted Kachi's explanation for the trips, WIS. STAT. § 767.61(3) may have restricted the trial court's ability to reduce Dao's award of property because of marital misconduct.

(3) PRESUMPTION OF EQUAL DIVISION. The court shall presume that all property not described in sub. (2)(a) is to be divided equally between the parties, but may alter this distribution without regard to marital misconduct after considering all of the following:

- (a) The length of the marriage.
- (b) The property brought to the marriage by each party.
- (c) Whether one of the parties has substantial assets not subject to division by the court.
- (d) The contribution of each party to the marriage, giving appropriate economic value to each party's contribution in homemaking and child care services.
- (e) The age and physical and emotional health of the parties.

(continued)

¶21 We first observe that the trial court utilized the correct standard of law. The trial court wrote: “[w]hether applying the rebuttable presumption or the ordinary burden of proof to the use of the money by [Dao] for vacations the Court’s conclusions are the same.”

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(f) The contribution by one party to the education, training or increased earning power of the other.

(g) The earning capacity of each party, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage.

(h) The desirability of awarding the family home or the right to live therein for a reasonable period to the party having physical placement for the greater period of time.

(i) The amount and duration of an order under s. 767.56 granting maintenance payments to either party, any order for periodic family support payments under s. 767.531 and whether the property division is in lieu of such payments.

(j) Other economic circumstances of each party, including pension benefits, vested or unvested, and future interests.

(k) The tax consequences to each party.

(L) Any written agreement made by the parties before or during the marriage concerning any arrangement for property distribution; such agreements shall be binding upon the court except that no such agreement shall be binding where the terms of the agreement are inequitable as to either party. The court shall presume any such agreement to be equitable as to both parties.

(m) Such other factors as the court may in each individual case determine to be relevant.

¶22 As noted, the trial court relied on the holding in *Dean* for support. In *Dean*, our supreme court held that:

A trial court does not commit an abuse of discretion by permitting some expenditure for yearly vacations during the pendency of a divorce. However the amount expended should always be reviewed, subject to the standards of reasonableness.

*Id.* at 869. Here, the trial court applied this formula and found three trips to be excessive and unreasonable. We agree. Again, the trial court's findings of fact were not clearly erroneous and its legal conclusion was not incorrect. See *LeMere*, 262 Wis. 2d 426, ¶13.

*C. The trial court findings concerning Dao's \$171,000 bank withdrawals are not clearly erroneous and the trial court properly determined that Dao did not commit waste when withdrawing this money.*

¶23 Kachi argues that the trial court erroneously exercised its discretion when it failed to separate out the withdrawals taken by Dao from Landmark Credit Union account during the one year look-back from the other withdrawals. In addition, she submits that the trial court's finding that both parties handled their finances by taking large cash withdrawals was clearly erroneous. Further, she submits that the trial court failed to require Dao to turn over requested discovery and failed to apply case law relevant to the issue. She has proposed that this court, at a minimum, require the inclusion of twenty percent of these monies because Dao could not explain all of the withdrawals.

¶24 The trial court made the following findings concerning the Landmark account: Kachi did not have the complete record of the account and she used her own calculations in her attempt to prove that Dao spent \$171,000 and that none of these sums were used for the benefit of the family; Kachi's accounting

was misleading and inaccurate, but “[Dao, on the other hand,] provided complete answers to questions about his deposits and use of the money in the Landmark account; he was not evasive when he testified about the use for vacations, for huge family debts, to make his home livable again for himself and his children to provide necessities of daily living.” The trial court accepted Dao’s testimony that he used much of the money to pay back family loans, debts, and provide for the children. Further, the trial court found that during the marriage and the separation, both parties had separate accounts, as well as a joint account, and that the Landmark account was substantially funded by Dao’s payroll deposits and the proceeds obtained through the liquidation of assets.

¶25 The trial court concluded that whether it applied the rebuttable presumption found in WIS. STAT. § 767.63 or the standard burden of proof, Kachi failed to prove that Dao unjustifiably dissipated assets. The trial court found that Dao used this account when he and Kachi were living together and he used it, among other things, to pay family debts and contributed to the upkeep of the home and the care of the children. The trial court noted that during the marriage, both Kachi and Dao took out large sums of money from different accounts without documenting what they were using it for. Further, Kachi agreed that Dao deposited money in their joint account until June 2006, and she admitted that he gave her significant sums during their separation. We accept the trial court’s findings, as they are not clearly erroneous, *see LeMere*, 262 Wis. 2d 426, ¶13; consequently, we conclude, as did the trial court, that no waste occurred.

¶26 What Kachi fails to acknowledge in her briefs is that the trial court did not believe her claim that Dao spent \$171,000 on things other than the family.

[Dao] adequately rebutted [Kachi's] claim that he unjustifiably dissipated assets. For example, his strong argument that she disregarded his contribution "in cash" to the household during the 4 of the 5 years that they lived under the same roof operating out of separate accounts jointly expending large sums of money from their separate accounts on bills and family obligations.

¶27 In addition, the court noted that Kachi's own financial disclosure statement listed several separate accounts that she had, which led credence to Dao's contention that they each had separate accounts, along with a joint account with which they paid their debts.

¶28 As to Kachi's claim that the trial court did not require Dao to cooperate with discovery, the trial court came to the opposite conclusion:

Following the dictates of *Derr*, the Court concludes that the Respondent testified completely and without evasiveness, and answered all questions put to him, and similar to the reasoning in *Anstutz*, showed no sign of volition or negligence in his testimonials about this account. The Court's conclusions about the Petitioner's recitation of the data in trial exhibit 1 and her creation of trial exhibit 2[,] without more[,] was insufficient to refute the detail given by the Respondent which the Court found credible giving numerous examples of what he spent and why he had to expend it.

The Court disagrees with the [P]etitioner's assertion that this was a situation where the Respondent was in exclusive control of the account data; As the Court has summarized using trial exhibit 1, numerous items of documentation was [sic] produced from Landmark and numerous more were available – if requested by either party via discovery.

... There is no evidence in the record that the Respondent refused to answer any question or provide information about his use of the funds nor did he prohibit the discovery of same.

¶29 Although Dao could not account for every dollar that was withdrawn from the Landmark account, the trial court was satisfied with his detailed recollections that the money was spent principally on the family and his vacations:

The [R]espondent convinced this Court of his veracity about his use of funds in the Landmark Credit Union Account – to cover the costs of daily living, necessities, family debts, vacations at a reasonable costs [sic] and other acceptable purposes, which the Court found did not constitute an unjustified depletion of marital assets (except for the multiple year vacation costs).

¶30 Finally, Kachi also argues that the trial court’s finding that she took out large sums of money was clearly erroneous. This contention is belied by Exhibit 28 in the record, which reflects that Kachi did take out large sums of money from her own account, including a \$3000 withdrawal.

¶31 We are satisfied that the trial court’s findings of fact and conclusions of law are supported by the record. The trial court simply discounted Kachi’s recollections of the family’s financial dealings and adopted Dao’s.

¶32 For the reasons stated, the judgment is affirmed.

*By the Court.*—Judgment affirmed.

Not recommended for publication in the official reports.

