STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH FLOYD MYERS,

Plaintiff-Appellee,

v

LISA ANN MYERS,

Defendant-Appellant.

UNPUBLISHED
July 24, 1998

No. 197045
Gladwin Circuit Court
LC No. 93-011824 DM

Before: O'Connell, PJ, and White and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's judgment of divorce, challenging the custody award and division of property. We affirm in part, reverse in part, and remand for further proceedings.

I

Plaintiff graduated from Central Michigan University (CMU) in 1978 with a bachelor's degree in marketing. That year, plaintiff purchased a business in Gladwin that had been in his family since the 1930's. Since then he has run that business.

Defendant obtained a two-year associate's degree from Kirtland Community College in 1984, and met plaintiff that year. She then attended Grand Valley State College for one year, earning thirty credit hours, but quit to marry plaintiff and move to Gladwin. Before marrying plaintiff, defendant was employed for about five years at her father's accounting firm in West Branch.

The parties were married on June 22, 1985. From 1985 until approximately the end of 1989,[1] defendant worked from twelve to twenty hours a week at defendant's business and as of the time she was ending employment there around the end of 1989, was paid a gross salary of $150 a week. She was responsible for all the accounting and bookkeeping, payroll, and handling of daily invoices. In addition, defendant computerized the business, and helped hire and train employees. Plaintiff worked at his business every weekday and on Saturdays. He arrived home by 7:00 p.m. on weeknights. Around 1986 or 1987, plaintiff decided to open the shop on Sundays, and would work approximately one or two hours on Sundays.

In the fall of 1985, defendant commuted from Gladwin to Mount Pleasant/CMU for one semester, but did not continue because the commute from Gladwin was too difficult and she was more interested in her marriage and home.

The parties' child, Ryan, was born on May 1, 1987. Defendant was twenty-four years old at the time and plaintiff was thirty-two. In November 1990, the parties moved into a new home they had had built on fifteen acres in Gladwin.

Defendant began part-time work for TMI, an environmental services firm in Mount Pleasant, in March 1991. Defendant pursued a bachelor's degree in environmental geology, commuting from Gladwin to take three courses at CMU in the winter semester beginning in January 1992. She would leave home fairly early in the morning and return around 5:00 or 6:00 p.m. Plaintiff began leaving work earlier during the week to help pick up Ryan from the babysitter's, but continued to work on Saturdays and Sundays. Defendant commuted to CMU in the summer of 1992 to take one course, and also worked thirty to forty hours a week at TMI. In the fall of 1992 defendant enrolled full time at CMU, continued to commute from Gladwin and worked at TMI about fifteen to twenty hours a week.

Defendant continued full-time studies at CMU in the semester beginning January 1993. Because of marital problems that dated back to 1989 or 1990, the parties separated in February 1993, following several counseling sessions and other attempts to resolve their difficulties. Both parties testified that they had become isolated from one another. Plaintiff testified that he and defendant had not had a marriage for several years and defendant testified that there was tension and unhappiness in the home. Upon separation, defendant moved to Mt. Pleasant to attend school full-time and work.

Defendant testified that before they separated, plaintiff assured her that he would not fight her for custody of Ryan and that, when she finished school, Ryan could be with her. Plaintiff testified that he "never emphatically said" that defendant could have custody when she was finished with school, but that it was a possibility that he had said that. Defendant's father, whom the parties had called upon several times to talk to them about and help them with their marital problems, testified that he had discussed custody with the parties and that plaintiff had said several times that he would not contest custody of Ryan. Lisa Cogswell, a close friend of defendant's who also had a good relationship with plaintiff and had known him for ten years, testified that during an extended phone conversation with plaintiff regarding the parties' separating, plaintiff told her he did not want to see Ryan hurt and would not pursue custody of Ryan. Plaintiff denied telling Lisa Cogswell that, but testified that he may have left that impression with her.

Defendant testified that if plaintiff had not assured her that he would not contest custody, she would not have left Ryan and would have taken him to Mount Pleasant with her in February 1993. She testified that she believed the separation was temporary and could lead to a reconciliation. Plaintiff similarly testified that defendant believed when they separated that it was a separation period. Both parties testified that defendant wanted to take Ryan to Mount Pleasant, and that plaintiff insisted that Ryan remain in Gladwin, so that Ryan would not have to change schools mid-year. Defendant testified that she requested to have Ryan every weekend while she lived in Mount Pleasant, but that plaintiff

would not agree to it. Plaintiff confirmed that while defendant lived in Mount Pleasant she constantly complained that she did not get enough time with Ryan.

During the parties' separation from mid-February 1993 through April 1994, Ryan spent approximately 120 to 130 overnight visits with defendant, or about thirty percent of the time. Defendant had Ryan for thirty-one weekends during this period and plaintiff had Ryan for twenty-nine weekends. Ryan spent spring break and six weeks in the summer with defendant.

The parties tried to reconcile in August 1993, and defendant came home to Gladwin for the weekend, but a reconciliation did not occur. Plaintiff filed for divorce on September 30, 1993. Both parties sought physical custody of Ryan.

In May 1994, defendant graduated from CMU with a bachelor's degree in environmental geology. Defendant testified that she limited her job search to companies within two hours of Gladwin and that to her knowledge, there was no work in her field in Gladwin or West Branch.

Trial began several weeks after defendant's graduation from CMU. At the time of trial in late May 1994, defendant had accepted a job in her field in DeWitt, Michigan, a town north of Lansing, and had moved to a two-bedroom duplex in a residential neighborhood in DeWitt several weeks earlier. Defendant testified that she was also offered a job in her field by a Bay City firm, and that she considered living in Midland if she took that job. Midland is approximately forty-five minutes from Gladwin, while DeWitt is approximately 90 minutes away. Defendant testified that she chose to accept the job offer in DeWitt rather than the Bay City offer for a number of reasons, including that she had learned that DeWitt schools were good and she was unsure of how good the school system was in Bay City; the Bay City position would have included a fair amount of overtime and some travel away from town during the day; she would be able to drive Ryan to school in the morning in DeWitt because her house was less than five minutes away from the school he would attend and from her job; the Bay City position paid $4,000 less a year, and she was not as comfortable with Bay City as a community because it was a larger city. Defendant testified that her employer in DeWitt had paid for her move to DeWitt and assisted her with finding housing. Defendant further testified that her DeWitt employer understood her situation, had given her a week off for trial, and understood that defendant needed an 8:00 a.m. until 5:00 p.m. work schedule every day to care for Ryan, and could not spend nights away from home. Defendant testified that the Bay City position would have required her to cover an area north of Flint and from Brighton to Bay City, which would have required extensive travel, and that she would have had a commute to and from work, and therefore would have had less time with Ryan than if she accepted the DeWitt job. Defendant testified that she concluded that it was not in her or Ryan's best interest to accept the Bay City offer for these reasons.

Both parties testified that Ryan had a very close relationship with defendant's parents and defendant's sister and her family, and that Ryan was closer to and saw defendant's family more often than he saw plaintiff's. The town defendant moved to, DeWitt, is forty miles from Alma, where defendant's parents live. Plaintiff also testified that he had a very good and close relationship with defendant's parents and that that relationship continued despite the parties' separation. Both parties testified that Ryan had a very close relationship with his cousins, defendant's sister's children; and that

he was closer to his cousins than he was to friends. Defendant's sister's family was moving to Indiana, seven miles from the Michigan border, the month after trial began. Plaintiff's father died the year Ryan was born, and plaintiff's mother, who was also very close with Ryan, was seventy-seven years old and often babysat for Ryan. Plaintiff's sister lives in Texas.

A number of other persons testified at trial. Kelly Rau testified that defendant is a very good mother, that she took very good care of Ryan, and that plaintiff is a good father and she approved of the methods he used to care for Ryan. Donna Ridley, who had been babysitting for Ryan once a week after school, stated that plaintiff was always on time to pick Ryan up, that Ryan was dressed appropriately, that he appeared to have his physical needs met, and that he was always happy to see his father. Ridley testified that defendant is a good mother and that she seemed to meet all of Ryan's needs. Patrick Lennon testified that he had seen plaintiff interact with Ryan several times and that he does a very good job as a father. Jeff Zettel, who had known plaintiff since about 1973 and defendant since about 1985 testified that plaintiff is an excellent father who puts his child first and that defendant is a very good mother. His wife, Anita Zettel, a close friend of plaintiff, testified that plaintiff appeared to be attentive to Ryan's needs and that defendant was a good mother. She testified that at a party in 1993, she was chasing her 1 ½ year old son and defendant said that she was glad she did not have the responsibility anymore. Lisa Cogswell testified that plaintiff is an adequate father, but that defendant was better at helping Ryan see how he felt about himself and the world around him. She testified that she had not seen Ryan since 1991.

At the close of arguments, the trial court ordered the parties and Ryan to meet with a psychologist, Paul Cronstrom. Cronstrom met with each party and the child for approximately 1 ½ to 2 hours, and testified at trial via telephone. Cronstom testified that Ryan bonded well with both parents. He testified that Ryan told him twice that he wanted to live with his mother. Cronstrom nonetheless recommended that Ryan's preference not be taken into account because Ryan could not "substantiate" why he wanted to live with his mother, Cronstrom concluded Ryan was reacting "emotionally," and testified that Ryan had said that he would like equal time with both parents. Cronstrom testified that young children should have as much consistency as possible and that Ryan should not change schools. Cronstrom's written reports were not admitted into evidence and are thus not before us.

After a three-day trial, the court concluded that defendant had been Ryan's primary caretaker until February 1993, and that plaintiff had been the primary caretaker from February 1993 until trial. The court concluded there was no established custodial environment, and that the custody award would accordingly need to be based on the child's best interests as indicated by a preponderance of the evidence. The court noted that Ryan had indicated in chambers that he wanted to live with his mother, but the court concluded, on the basis of its conversation with Ryan and Cronstrom's testimony, that Ryan was "not of sufficient age and maturity to understand the consequences or impact of a preference of picking one parent over the other."

The trial court awarded the parties joint legal custody of Ryan, physical custody to plaintiff, and reasonable rights of visitation to defendant.

The property distribution phase of trial was held over two days in July 1994. The trial court identified a number of assets subject to distribution: the marital home, the increase in the value of the parties' business during the marriage, defendant's college degree, plaintiff's IRA, stock worth approximately $1,200, and defendant's automobile. Around March 1995, the court asked for testimony from an independent accountant with regard to the value of the parties' business, and in December 1995, the court issued an opinion regarding property distribution A hearing to enter the divorce judgment was held in April 1996 and a written opinion issued in July 1996. A revised judgment of divorce was entered on August 7, 1996.

II

Defendant first challenges the trial court's custody award, asserting that the court erred in awarding physical custody to plaintiff without making a finding regarding the parties' agreement that plaintiff would not challenge custody after defendant moved to Mount Pleasant to attend school, and without making specific findings of fact on each of the best interest factors. Defendant further argues that the court placed too much negative weight on defendant's decisions regarding school, employment, and location. We find no error in the trial court's consideration and decision regarding custody.

In a child custody case, we review the trial court's factual findings under the great weight of the evidence standard, its discretionary rulings for an abuse of discretion, and questions of law for clear legal error. *Ireland v Smith*, 451 Mich 457, 463-464 n 6; 547 NW2d 686 (1996); *McCain v McCain*, __ Mich App __; __ NW2d __ (Docket No. 201634, issued 3/31/98). If the trial court determines that an established custodial environment exists, that environment may not be changed unless it is demonstrated by clear and convincing evidence that the change is in the best interests of the child. MCL 722.27(1)(c); MSA 25.312(7)(1)(c). If there is no custodial environment, the statutory best interest factors are assessed under the preponderance of the evidence standard. *Hayes v Hayes*, 209 Mich App 385, 387; 532 NW2d 190 (1995). In the instant case, the trial court found that Ryan did not have an established custodial environment with either parent, and accordingly considered the child's interests under the preponderance of the evidence standard. Neither party takes issue with this aspect of the court's decision on appeal, and so our review of the case will presume the propriety of it.

A

Defendant first argues that the trial court erred by failing to make a factual finding regarding the parties' agreement that plaintiff would not seek custody once defendant completed her education and that defendant would have custody of Ryan. Defendant argues that under the principles of *Theroux v Doerr*, 137 Mich App 147; 357 NW2d 327 (1984), the trial court committed clear legal error requiring reversal in failing to give effect to the parties' agreement.

In *Theroux, supra*, the mother, who had legal and physical custody of the parties' child, relinquished custody to the father for nine months while she pursued a graduate degree in another state, and the father petitioned for custody shortly before the mother returned. The trial court, wishing to encourage familial continuity for the child, granted physical custody to the father for the school year but to the mother for summers. *Id.* at 149. This Court reversed, citing the parties' stipulated temporary

custody order, and stating that public policy demands that where one parent temporarily and voluntarily relinquishes custody to the other for the sake of the child, that action is not a proper basis for taking custody from that parent. *Id.* at 149-150.[2]

Additional case law speaks to this state's public policy favoring returning children to custodial parents who have transferred custody temporarily in the children's interests. In *Loyd v Loyd*, 182 Mich App 769, 779-781; 452 NW2d 910 (1990), the parents formally stipulated that the father would have physical custody for approximately four years, after which custody would be revert to the mother. The trial court enforced that agreement, and this Court affirmed, citing *Theroux, supra*. In *Straub v Straub*, 209 Mich App 77; 530 NW2d 125 (1995), the mother had voluntarily relinquished custody of her daughter to the child's paternal grandparents, and all parties admitted that the custody arrangement was temporary. This Court ruled that the trial court had abused its discretion in failing to respect that agreement. *Id.* at 81, citing *Loyd, supra*.

However, the instant case is distinguishable from the cases cited in that here there was no existing custody order or custodial environment exclusively with defendant at the time of the alleged agreement. In all the cases where an agreement for temporary custody was found dispositive, the party in whose favor the agreement was enforced had temporarily given up *existing* custodial rights in the child's interests. In each case, the party asking for a continuation of the temporary arrangement would not have had custody were it not for the custodial parent's voluntary relinquishment. Here, there was no custodial order in defendant's favor and the parties were sharing custody as a familial unit until the moment that defendant left the marital home to attend college in Mt. Pleasant. Thus, defendant did not voluntarily relinquish existing custodial rights to plaintiff; neither party had exclusive custody. Accordingly, the public policy favoring the enforcement of agreements to return custody when the custodial parent voluntarily relinquishes custody in reliance upon a promise to return custody is not operative here.

Further, whereas *Theroux* and the other cases cited involved undisputed agreements under which an established custodial parent temporarily relinquished custody, in the instant case the existence of an agreement is a matter of some dispute. The trial court could reasonably have credited plaintiff's testimony that he did not promise defendant that she would ultimately obtain custody of Ryan,[3] and accordingly was not obliged to give effect to the purported agreement. Further, even where an agreement if found to exist, that agreement is not necessarily binding upon a trial court. *Moser v Moser*, 130 Mich App 97, 102 n 3; 343 NW2d 246 (1983). For these reasons, we find no error in the trial court's declining to give effect to the custody agreement that defendant insists was in existence.

B

Defendant next asserts that the trial court erred by failing adequately to articulate findings of fact and conclusions of law concerning the statutory best interest factors, by ignoring Ryan's stated preference, and by placing too much weight on defendant's decision that had the effect of distancing her from Ryan.

The trial court must analyze the evidence concerning each of the factors enumerated in MCL 722.23; MSA 25.312(3) when determining the best interests of the child. *Lombardo v Lombardo*, 202 Mich App 151, 160; 507 NW2d 788 (1993). The court must explicitly state its findings and conclusions on each of the factors. *Bowers v Bowers (After Remand)*, 198 Mich App 320, 328; 497 NW2d 602 (1993). The failure to do so may be error requiring reversal. *Daniels v Daniels*, 165 Mich App 726, 730; 418 NW2d 924 (1988).

The trial court provided the following statements concerning the statutory best interest factors:

> [a] In applying the factors set forth in the Child Custody Act, the Court finds that both parents have the love and affection for the minor child. They're both interested in his welfare. They're both very good parents. They're both bonded with the child, to the extent that the child is in a position where he misses the parent who is not present at the—at any particular point in time.
>
> [b] Both parents have the capacity and the disposition to give the child love and affection and guidance and to provide for the child's education. The mother has been able to give to Ryan those things that it is necessary that mother's [sic] give, and the father has been able to give those things to Ryan that father's [sic] give. It is noteworthy that the father has changed his life so that Ryan has become his priority. The mother, since the time of separation, has been doing . . . things . . . in order to make herself financially independent so that she would be able to get divorced. And it's apparent that the necessity of going to school to accomplish this purpose, and also the necessity, from her perspective, of getting a job, has been of primary importance for her, and that the care of Ryan has become secondary.
>
> [c] As far as factor C is concerned, both parties are capable of providing for the needs set forth in this factor for the child. The father is better able to do so simply because he makes more money. But the mother also is capable of providing these necessities of life for Ryan, although . . . she does not have as great a capacity as the father has. It is expected that both parents will provide for the child in the future.
>
> It is noteworthy that the father essentially has taken care of all of the child's needs since the separation, and there's been no support order. However, the mother has in fact, when she does have the child, provide for Ryan's needs as set forth in this factor.
>
> [d] As far as length of the time that the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity, Ryan has lived in Gladwin since his birth. He has been in the marital home since 1990, and he has gone to the Gladwin schools. It is very important at his age, as indicated by the psychologist, that he have consistency and continuity.
>
> The father's job is such that it allows for flexibility to be able to provide for care for the child, and there certainly is nothing undesirable about continuing this situation.

It certainly is evident that the existing situation does provide for a stable, satisfactory environment.

The mother's alternative would be to live in DeWitt, and Ryan would be required to go to a new school. She has a duplex that she is renting down there, and from the testimony, it certainly is an adequate place to raise a child.

[e] As far as factor E is concerned, the Gladwin home certainly is permanent. It's very likely that this will continue in the future, given the father's ownership of a business in Gladwin. The grandmother has been the primary baby sitter for Ryan, and it does appear that this will continue.

As has been indicated, the mother is renting a duplex in DeWitt. She is starting a new job. It is not known what the permanence of this situation will be. It may be permanent, it may not. There just simply is no indication one way or another. The mother has indicated that she believes that it's going to be permanent, but there's nothing at this point upon which this can be based, other than the desire that it be continued in the future.

[f] As far as factor F is concerned, the moral fitnesses [sic] of the parties, there's no indication that either party has any moral problems; and, therefore, it is not a factor for consideration by the Court.

[g] Factor G, the Court finds that both parties are both mentally and physically healthy.

[h] As far as factor H is concerned, the home, school, and community record of the child, Ryan . . . had some problems in school in terms of reading and establishing relationships. Both parents and the school have attended to these needs and are dealing with these problems on a reasonably effective basis. The reports from the school indicate that Ryan no longer has any problems getting along with any of the children. And he certainly has developed appropriate skills to be able to deal with that. He still has some reading problems, but both parents are aware of that, and they're doing what parents are supposed to do in order to attempt to deal with that problem.

[i] As far as the reasonable preference of the child is concerned, the Court has talked with Ryan. Based on the conversation that the Court had with Ryan, and the testimony of the psychologist, the Court concludes that Ryan is not of sufficient age and maturity to understand the consequences or impact of a preference of picking one parent over the other.

It's apparent to the Court that if he lives with the mother, he doesn't have any understanding that would result in him not being able to see his father, and vice versa.

It is clear that Ryan is bonded virtually equally with both parents, and he is attached to both parents, and that he wants to have and be with both of his parents. And this

bonding goes beyond what the Court would classify as being a normal child who wants his parents to get back together. Ryan has an absolute necessity to be able to continue with his bond with both of his parents, and he has a very, very real need to be parented by both of his parents on virtually a daily basis.

[j] Factor J, both parents have been able to facilitate and encourage a relationship with the other parent. There's only been some minor problems that really have been worked out by the parties. And this certainly has worked to Ryan's benefit and has been a key factor in Ryan being as well off as he is at this point in time.

[l] In terms of factor K, any other factor considered by the Court to be relevant to a particular child custody dispute, there were certain situations that were presented that the Court considers to be significant in terms of the appropriate decision on custody. One of these factors was that the mother, in talking with Ryan and explaining to him that if she received custody, that they would move down to DeWitt, led Ryan to believe that his cousins, who he's very close with, would be down in the DeWitt area. It became evident that these cousins plan to move in the near future to the state of Indiana, and the mother never indicated anything like this at all to Ryan, so that Ryan was definitely under the impression that if he did move to DeWitt with his mother, that he would be able to see his cousins on a regular basis, and she had not seen fit at all to advise him that this would not be the case.

Another factor that the Court considers to be significant is that when the mother left the home, in February of 1993, and separated, she was willing to change her primary relationship with Ryan so that the father would become the primary caretaker. She certainly had other alternatives. She could have moved out and lived in another house within the Gladwin School District. The parties and the father did not want Ryan to have to change schools in the middle of a school year. And that certainly is an appropriate consideration. However, the mother, instead of staying the primary caretaker of Ryan and commuting to school, decided that it was in her best interest to move down to Mount Pleasant, which is only 45 miles from Gladwin.

In addition, the mother certainly was in a situation where she wasn't so far away that she could have—couldn't have seen Ryan on much more of a more frequent basis than what she did. It's apparent that she opted to concentrate on going to school and to work and left the primary care to the father.

This is significant to the Court because it really shows to the Court where her priorities were and where they, frankly, are at this point in time.

It is also significant, a comment that she made at a party in the summer in 1993 to a Mrs. Zettel. The situation was, is that they were looking at some children playing, and there was a necessity of one of the parents to take care of one of the children, and the Defendant mother indicated to Mrs. Zettel that she was glad that she didn't have that

responsibility anymore. This testimony was uncontradicted during the course of these proceedings. And that also indicated to the Court where the mother's priorities were at that point in time.

Another significant factor is, as the Court has indicated, it is patently obvious, from all of the evidence, that Ryan is bonded to both of his parents and has a need to be parented by both parents as often as possible. The obvious solution to fulfilling this need is to have the parents live in reasonable proximity to each other.

It's apparent that the father, being involved in a family business for a number of years, would find it the . . . most difficult to relocate, and that certainly would not be practical. The mother, on the other hand, had many more alternatives as to where she could work, and she opted to live 90 miles away, which would prohibit the child from being parented by both parents on a daily or a nearly daily basis.

The Court is convinced that either the mother was not aware of this obvious need of Ryan, or that it was of secondary importance to her, her career and her development in work being more important to her.

To make this more clear, the mother had an opportunity for employment in Bay City. And perhaps this would not have been as good as that employment that she found in the Lansing area, but she did in fact have this opportunity, and it appears that the needs of Ryan were not a factor at all in her determining where she was going to live.

Being over 90 miles away, or approximately 90 miles away, obviously this would entail a three-hour round trip for either parent to be able to be with Ryan, and that would be prohibitive for any kind of daily or nearly daily contact by both parents with Ryan.

The Defendant mother has indicated that she believes this distance is insignificant. The Court finds this to be disingenuous given her unwillingness to drive the 45 miles from Mount Pleasant to Gladwin to be able to see her child more often while she was going to school.

Taking into effect all of the factors required under the Child Custody Act, and all of the testimony, the Court concludes that Ryan's best interest and needs are to be more likely met if physical custody of Ryan is with the Plaintiff father. The need for consistency at his age is more likely to be met. The likelihood of having a stable environment continue in the future is more likely. The likelihood of having a custodial parent giving him more priority is more likely. And the likelihood of all of his needs being met in the future are much more likely if, in fact, physical custody is with the Plaintiff father.

As a consequence, the Court is going to establish custody as being joint custody with physical custody to the father. The Defendant shall have reasonable rights of visitation. And the Court is confident that the parties will in fact be able to work out, as they have in the past, reasonable visitation.

> Child support[4] shall be determined by the child support guidelines of the state of Michigan. And the division of responsibility for the medical care shall also be determined by the Friend of the Court consistent with the guidelines.

These statements clearly indicate that the trial court found the parties equal on factors (a), (c), (f), (g), (h), and (j), and that plaintiff was favored under factors (e), and (l). The statements imply that the court gave plaintiff the advantage concerning factors (b) and (d).

Defendant argues that the court failed to state specific findings concerning factor (d), the length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity. Although the court did not explicitly announce a conclusion regarding how the parties fared under this factor, we agree with plaintiff that the court weighed this factor in plaintiff's favor. The court likewise provided no explicit conclusion regarding how the parties compared under factor (b), but the court's statements indicate that the court gave plaintiff a slight advantage under the factor.

We note that the trial court apparently applied an outdated version of MCL 722.23; MSA 25.312(3) under which factor (k) was "[a]ny other factor considered by the court to be relevant to a particular child custody dispute," and under which there was no factor addressing domestic violence. The court did not address domestic violence, which is the present-day factor (k). However, neither the record below nor the arguments on appeal include evidence or allegations of domestic violence on the part of either party, and thus the court's failure to address that factor was harmless error.

We conclude that, but for the inconsequential omission of consideration of domestic violence, the trial court adequately addressed each statutory factor. "Brief, definite, and pertinent findings and conclusions on the contested matters are sufficient, without overelaboration of detail or particularization of facts." MCR 2.517(A)(2).

C

Regarding factor (i), the trial court interviewed Ryan but gave no weight to the boy's stated preference for defendant. The court concluded that "Ryan is not of sufficient age and maturity to understand the consequences or impact of a preference of picking one parent over the other," and that Ryan did not have any understanding that if he lived with defendant "that would result in him not being able to see his father, and vice versa." Defendant argues that the court erred in declining to weigh Ryan's preference in her favor. We disagree.

Generally, the trial court must indicate on the record whether the child was able to express a preference and whether the court considered that preference. *Fletcher v Fletcher*, 200 Mich App 505, 518; 504 NW2d 684 (1993), aff'd in part, rev'd in part on other grounds, 447 Mich 871; 526 NW2d 889 (1994). This Court has held that a child of six is old enough to have his or her preference given some weight in a custody dispute, especially where there was a prior custody arrangement, and that failure to interview such a child is error requiring reversal. *Bowers v Bowers*, 190 Mich App 51, 55-56; 475 NW2d 394 (1991).

We find no error requiring reversal here, however. Although Ryan was seven at the time of trial, it was Ryan's *reasonable* preference, if one was found to exist, that the court was obliged to consider. The court fulfilled its duty to interview Ryan, but then found in effect that the boy's preference was not reasonable because the boy did not understand the ramifications of living with one parent or the other. The trial court's conclusion that Ryan had no reasonable preference was not against the great weight of the evidence, and accordingly the court committed no legal error in declining to weigh the boy's stated preference in defendant's favor.

D

Defendant argues that in considering factors (b) and (l), the trial court weighed far too heavily the extent to which defendant's decisions concerning her education, employment, and location distanced her from Ryan, defendant insisting that she acted primarily with an eye on establishing suitable arrangements for providing financial security for herself and a good home for her son.

Defendant testified that, in response to several years of marital disharmony, she pursued finishing a bachelor's degree in order that she could be self sufficient with Ryan, and that she did this with the understanding that defendant would not seek custody when she finished school. Defendant further testified that she separated from plaintiff believing that a reconciliation might ensue, and that she was surprised when plaintiff filed for divorce in September 1993. Both parties testified that defendant asked to have Ryan every weekend during the separation, but that plaintiff did not agree to this. Plaintiff admitted that while defendant lived and worked in Mount Pleasant she constantly complained that she did not have enough time with Ryan. The parties agree that defendant had Ryan during this sixteen-month period approximately thirty percent of the time, while always campaigning for a larger share of parenting time.

Defendant testified that Ryan's needs were paramount in her decision to accept the job in DeWitt rather than the one in Bay City. According to defendant, there were no jobs available in her field in Gladwin or neighboring towns, but that she limited her job search to cities within two hours of Gladwin in order to remain near Ryan. Defendant explained that she accepted the job offer from DeWitt, rather than the one from Bay City, because the former, unlike the latter, involved neither travel nor overtime, and would permit her to drive Ryan to his new school every morning, adding that the DeWitt employer understood the situation with Ryan and would allow defendant to keep regular hours accordingly. Further, the DeWitt job paid better than the Bay City one would have.

Despite this testimony, the trial court faulted defendant for not spending more time with Ryan. The court suggested that defendant should have moved to an apartment in Gladwin and continued to see Ryan on a daily basis, and that she had "many choices" regarding where she could work. The court reasoned that defendant's decision to take the DeWitt job, away from Gladwin where plaintiff had a long established business, effectively eliminated the possibility that both parents could be involved in Ryan's life on a daily or near daily basis. The court determined that this was an "obvious need of Ryan" and that this need was of "secondary importance" to defendant as she made her career decisions.

This Court gives deference to the trial court's opportunity to hear the witnesses and its consequently unique qualification to assess credibility. *In re Leone Estate*, 168 Mich App 321, 324; 423 NW2d 652 (1988). We cannot conclude that the trial court erred in concluding as a matter of fact that defendant, having moved out of the marital home to finish college in Mt. Pleasant, then having accepted a job in DeWitt, was not acting primarily out of concern for Ryan. Further, this concern bears on factor (b), and the court was free to accentuate it as an additional consideration under factor (l). For these reasons, we affirm the trial court's findings and conclusions regarding those two factors.

III

Defendant next claims error in the trial court's division of the marital estate. The trial court must make factual findings and dispositional rulings in a divorce action. *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993). The findings of fact are reviewed for clear error and the dispositional rulings are reviewed to ensure that they were fair and equitable in light of the facts. *Id.*; *Hanaway v Hanaway*, 208 Mich App 278, 292; 527 NW2d 792 (1995). The dispositional rulings should be affirmed unless this Court has a firm conviction that the distribution of property was inequitable. *Id.*, quoting *Sparks v Sparks*, 440 Mich 141, 152; 485 NW2d 893 (1992). When relevant to the circumstances of a case, trial courts must consider, among any other relevant factors: the duration of the marriage; the parties' contributions to the marital estate; the parties' ages, health and life status; the necessities and circumstances of the parties and their earning abilities; the past relations and conduct of the parties; and general principles of equity when deciding how to distribute the marital estate. *Sparks*, *supra* at 159-160.

A

Defendant first asserts that the trial court erred in determining the value of the marital interest in the business by deducting $150,000 from the value of the business and awarding it to plaintiff as a premarital asset, when no basis in fact existed to deduct that amount. We agree.

Plaintiff purchased the corporation in 1978. He was to pay $150,000, at 8½percent interest over twenty years. The monthly payments were $1000, at least for a time, and were made by plaintiff prior to and throughout the parties' marriage. The trial court concluded that the value of the business at the time the parties married in 1985 was $150,000, awarded plaintiff that amount as a premarital asset, and then distributed the remaining value of $54,000 as a marital asset. Defendant does not dispute the trial court's conclusion that the business was worth $204,000 at the time of trial.

The trial court's award to plaintiff of $150,000 representing the 1985 value of the business as a premarital asset has no support in the record and was clearly erroneous. Plaintiff testified at trial in July 1994 that he paid $1,000 a month and continued to make payments to his mother since his father's death in 1987, had not missed any payments, and that his current payments were $1,200 per month. Plaintiff initially testified that he owed $74,000 on the business in 1985, but on cross-examination testified that he did not know how much he owed in 1985. According to one of plaintiff's financial statements, submitted at trial as exhibit 9[5], plaintiff's equity in the business at the time the parties married was approximately $45,000. There was no evidence regarding whether the value of the business in

1985 had gone up or down from the $150,000 it was apparently worth in 1978. If the court used the $150,000 figure in valuing plaintiff's premarital interest in the business, it erred by failing to consider that defendant had not paid for the business at that time, and continued to pay for the business throughout the marriage.

We therefore remand this issue to the trial court for recalculation of the business value in light of plaintiff's equity in the business at the time the parties married on June 22, 1985, and for modification of the award.

B

Defendant also argues that the trial court erred in determining the value of the parties' commercial property. We agree.

The parties agreed that the property had a value of $220,000, less the debt of approximately $26,000 to $27,000. Plaintiff's expert, however, subtracted a seven percent real estate commission, while defendant's expert did not. The report of the court-ordered independent expert indicated that he operated under the assumption that the parties agreed that the value of the real estate was $173,000 net of the debt. The trial court's opinion states that "it's agreed that the land was worth $200,000, and there was a $27,000 debt, therefore the land itself was worth $173,000."

The parties, however, had agreed that the property was worth $220,000, not $200,000. Therefore, the trial court's finding that the parties agreed that the property was worth $200,000 is clearly erroneous. We also note that where, as here, the evidence establishes that there is no intention of selling real estate, the trial court need not consider the effects of realtor fees in distributing assets. See *Hanaway, supra* at 301; *Nalevayko v Nalevayko*, 198 Mich App 163, 164; 497 NW2d 533 (1993). We reverse the portion of the trial court's decision regarding the value of the parties' commercial real estate and remand for correction.

C

We next address defendant's argument that the trial court erred by awarding the entire equity in the marital home, $71,000, to plaintiff. We agree that the court erred in its analysis.

The parties purchased the property for $15,000 in 1987 or 1988. Defendant contributed toward the purchase of the property, and took a second job after the property was purchased, to help pay off the debt on the property and save for a down payment for the house. Defendant's part-time employer at her second job excavated the lot and performed other work on the property at a discounted rate. Additionally, defendant contributed physical labor to the home, including helping with interior detail work and insulation of the new home. Plaintiff estimated that before he inherited the money from his father in 1989, he and plaintiff had paid off approximately $5,000 on the property. Plaintiff testified that it cost approximately $140,000 to build the home in 1990. He contributed $74,500 from his inheritance, and the parties obtained a mortgage for about $65,000. Plaintiff estimated that at the time of trial, there was $61,000 remaining on the mortgage, and the home was worth $132,000. He indicated that defendant agreed with this assessment of the value of the home.

Property distribution in a divorce is controlled by statute. MCL 552.2 *et seq.*; MSA 25.81 *et seq.*; *Charlton v Charlton*, 397 Mich 84, 92; 243 NW2d 261 (1976). All property that came to either party by reason of the marriage is subject to distribution. *Reeves v Reeves*, 226 Mich App 490; 575 NW2d 1 (1997). Generally, the marital estate is divided between the parties, and the parties each take their separate estate without invasion by their spouse. *Id.*

Whether to include one spouse's inheritance in the marital estate is discretionary and depends on the circumstances. *Demman v Demman*, 195 Mich App 109, 112; 489 NW2d 161 (1992). One spouse's inheritance may be treated as part of the estate if an award would otherwise be insufficient to maintain either party, *id.*, or if the opposing party has contributed to the acquisition, improvement or accumulation of such property. *Charlton, supra* at 93-94. One factor courts often consider is the length of the marriage. *See Ross v Ross*, 24 Mich App 19; 179 NW2d 703 (1970). Another factor courts may consider is the disposition of the property and whether it was converted to joint property. *Id.*; *Charlton, supra* at 94. Where property inherited or gifted during the marriage has been commingled with marital property or used for joint purposes, courts have tended to presume that the parties intended to treat it as marital property. *See Polate v Polate*, 331 Mich 652; 50 NW2d 190 (1951); *Ross, supra.*

Defendant does not assert that the division of the marital assets with plaintiff receiving credit for his inheritance is not sufficient for her support. However, defendant argues that the facts establish that she contributed substantially to the acquisition, improvement and accumulation of the marital home and that $74,500 of plaintiff's inheritance during the marriage was converted to joint ownership with her during the marriage, and should be treated as marital property subject to distribution.

Although we recognize that the trial court's determination whether to treat the portion of plaintiff's inheritance that went into the marital home as marital property is discretionary, *Demman, supra* at 112, the trial court gave inadequate consideration to the line of cases supporting the proposition that inherited property that is converted to joint ownership during the marriage is intended to be marital property and is subject to distribution.[6] The trial court also did not consider defendant's pre-inheritance monetary contributions to the acquisition of the land and land contract payments, her physical labor contributed toward the building of the marital home, the services she secured at a discount and that she was the primary provider of household maintenance when the land was purchased, when the house was built, and for several years after the marital home was completed in 1990. Although division of the marital estate need not be equal, it must be equitable. *Sparks, supra* at 159. The contribution of the parties to the marital estate is an appropriate factor for the trial court to consider. *Id.* at 159-160. We conclude the court erred in awarding the entire equity to plaintiff and remand for reconsideration of the distribution of the equity in the marital home.

D

Defendant next asserts that the trial court erred in awarding plaintiff $11,000 for the value of defendant's undergraduate degree. It appears that the trial court did initially conclude that this was the value of defendant's degree. However, it later elaborated on its decision in its written opinion regarding defendant's objections to plaintiff's motion for entry of judgment:

> So that it is hopefully clear, the Court determined that when the Defendant moved from the marital home is February 1993, the marriage was over for all intents and purposes. After that point in time, the *Defendant received money from the Plaintiff totaling $11,000*. The Court concluded that this amount was directly related to the achieving of the undergraduate degree and was, therefore, something that was a marital asset subject to distribution. *The Court did not value the degree at $11,000, as it was specifically determined that "there was no testimony presented as to what the value of that degree would be." Later on in the Opinion when the Court stated "so yes, the Court is ruling that $11,000, through equitable considerations is, in fact, the value of that degree," the Court was in essence simply classifying for convenience purposes the asset of the $11,000*. Consequently, the language to be utilized in the Judgment should be as follows: Defendant shall receive the $11,000 directly related to the Defendant's achieving her undergraduate degree. [Italics added, underscoring in original.]

While the court's statement is somewhat ambiguous, we conclude that the court, in effect, determined that the $11,000 reflects the amount plaintiff contributed to defendant from February 1993 to May 1994, while defendant lived, worked and went to school full-time in Mount Pleasant, to help with apartment rental expenses, auto insurance and gasoline, and health insurance. Viewing the award in this fashion, we conclude the court did not abuse its discretion in awarding plaintiff the same sum defendant effectively withdrew for her education.

Defendant argues, however, that the $11,000 award to plaintiff is not equitable because during the time defendant lived in Mount Pleasant, plaintiff appropriated all rental income derived from jointly owned commercial property. We consider the issue of rental income separately below, but agree with defendant that there should be some consistency of approach. It is not equitable to award plaintiff the entire rental proceeds and additionally award him $11,000 representing an amount equal to the $11,000 defendant received during the separation. Therefore, the court shall reconsider this issue together with the rental proceeds issue on remand.

E

We next address defendant's argument that the trial court failed to recognize as a marital asset rental income from jointly held rental property that accrued during the course of the marriage.

The parties owned commercial rental property together. This property generated rental income after the date the trial court chose for purposes of property distribution, December 31, 1992. According to the 1993 income tax return, the property generated approximately $17,000 in rental income. In failing to award defendant a portion of the rental payments, the trial court noted that it relied on the December 31, 1992[7] date and that plaintiff was responsible for the household finances and child care and related matters after defendant moved from the marital home. The court also explained that it did not give plaintiff credit for gifts totaling $19,000 that he received during the marriage.

Assets earned by a spouse during the existence of a marriage and received after the judgment of divorce are properly considered part of the marital estate. *Byington v Byington*, 224 Mich App 103, 110; 568 NW2d 141 (1997). A marriage "legally terminates only upon the death of a spouse or upon entry of a judgment of divorce." *Id.* at 109. The *Byington* Court instructed that trial courts may not consider actions on the part of spouses that reflect an intent to lead separate lives when determining what assets comprise the marital estate. However, the court may properly consider manifestations of intent to lead separate lives when apportioning the marital estate . . . ." *Id.* at 113-114. Thus, because the parties' marriage was ongoing, the rental income was part of the marital estate. However, the trial court was permitted to consider the parties' separation when determining how to apportion the rental income.

To the extent the trial court did not consider the rental income as part of the marital estate, we remand for reconsideration in light of *Byington, supra*. In considering an asset such as the rental income from joint property, the court may not use equitable considerations in determining whether the asset is part of the marital estate, although it may use such considerations when apportioning the marital estate. *Byington*, *supra*. We remand to the trial court for reconsideration of the apportionment of the rental income earned between December 31, 1992 and the divorce. The court shall take a consistent approach with regard to the rental proceeds and the $11,000 spent on defendant's education, but may properly consider the household and child care expenses incurred by plaintiff during the separation, and defendant's separate bank account.[8]

F

Defendant next argues that she should receive interest on the amount of the marital estate awarded to her because the property was valued as of December 31, 1992, and the judgment of divorce was not entered until August 6, 1996. The trial court ordered that plaintiff pay defendant an award of $69,100 within forty-five days of the date of the judgment. It provided that upon the forty-sixth day, interest would accumulate on the unpaid balance at the statutory interest rate. Plaintiff asserts in his brief that he mailed the award, including seven percent interest, to defendant on October 31, 1996. Under these circumstances, we conclude that the trial court's failure to award defendant interest on her award did not produce an unfair or inequitable result.

In *Thomas v Thomas (On Remand)*, 176 Mich App 90; 439 NW2d 270 (1989), this Court awarded five percent interest on a judgment when, seven years after the divorce trial was held, from which the defendant received no award, this Court determined that the defendant should be awarded a portion of the value of the plaintiff's law degree. The degree was valued as of the date of the divorce trial. *Id.* at 91-92. On appeal from an earlier decision in *Thomas*, our Supreme Court concluded that if this Court valued the plaintiff's law degree in 1981 dollars rather than 1987 dollars, the failure to award interest would produce an unfair and inequitable result. *Thomas v Thomas*, 431 Mich 903; 432 NW2d 203 (1988).

Here, however, the passage of time between the date of the valuation of the marital estate, the entry of the judgment of divorce and plaintiff's payment of the judgment was not that great, about 3 ½ years, and defendant received the payment in a lump sum. We conclude that the failure of the trial court to award statutory interest from the date of the valuation of the marital estate to the entry of the judgment of divorce did not produce an unfair and inequitable result.

G

Finally, defendant argues that the trial court abused its discretion in refusing to award her attorney fees.[9] We agree.

We review the decision whether to award attorney fees in a divorce for an abuse of discretion. *Hawkins v Murphy*, 222 Mich App 664, 669; 565 NW2d 674 (1997). The award of attorney fees is provided for by MCL 522.13(1); MSA 25.93(1), which allows the court to require a party to "pay any sums necessary to enable the adverse party to carry on or defend the action . . . ." Thus, an award of legal fees is authorized when the fees are necessary to enable a party to carry on or defend a divorce action. MCL 552.13(1); MSA 25.93(1); MCR 3.206(C); *Hawkins*, *supra*. However, the party requesting attorney fees and costs must allege facts sufficient to demonstrate an inability to bear the expense of the action and the ability of their spouse to pay. MCR 3.206(C)(2). This Court has held that attorney fees should be awarded where the parties' incomes and assets are disproportionate and the issues involved are real and difficult. *Bone v Bone*, 148 Mich App 834, 840; 385 NW2d 706 (1986). Additionally, a party should not be required to invade assets to pay attorney fees when the party is relying on those assets for support. *Maake v Maake*, 200 Mich App 184, 189; 503 NW2d 664 (1993).

The trial court, in refusing to award defendant attorney fees, noted that it was ordering plaintiff to bear the entire cost of the court-ordered expert. The court also stated:

> It appears to the Court that the Defendant has substantial employment and would be able to pay for her own attorney fees. And obviously to the Court, from all the other factors involved, there is a considerable amount of equity in the favor of the Plaintiff that the Court has not awarded to him by way of property division. As a consequence the Court is concluding that it would not be appropriate to grant attorney fees in this particular case.

The record demonstrates that the parties' incomes are disproportionate. The issues involved in this divorce were difficult. The trial court relied solely on defendant's salary of $28,000,[10] but did not assess her ability to pay attorney fees in light of her financial responsibilities. We conclude that the trial court abused its discretion by failing to make a finding regarding plaintiff's ability to pay the fees and whether she would be required to use the assets upon which she relies for support to pay the fees.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Richard A. Bandstra

[1] There is some dispute over when defendant ceased working in defendant's business. Plaintiff testified that defendant worked in the business until the end of 1989, defendant testified that she believed she was still working at defendant's business when they moved into their new house in November 1990, but that it could have been the end of 1989.

[2] This Court relied on *Miller v Miller*, 23 Mich App 430; 178 NW2d 822 (1970), *Dowd v Dowd*, 97 Mich App 276; 293 NW2d 797 (1980), and *Speers v Speers*, 108 Mich App 543; 310 NW2d 455 (1981).

[3] Plaintiff did not admit that such an agreement existed, testifying that there were too many unknown factors, and that the situation was too emotionally charged, to make such an important decision regarding Ryan's best interests at that time.

[4] After filing appellate briefs and presenting oral arguments, the parties filed a stipulation that the issues defendant raised regarding child support were moot. Accordingly, we do not address those issues.

[5] Plaintiff first testified that he owed $74,000 on the business in 1985, i.e., that the equity in the business in 1985 was $76,000, but on cross-examination testified that he did not know what he owed his parents in 1985. Testimony at trial establishes that trial exhibit 9, a personal financial statement of plaintiff's, revealed that plaintiff's equity in the business as of 1985 was $45,000. The trial exhibits are not before us. Plaintiff's accountant, Dallas Falls, testified that exhibit 9 showed the business' book value in 1985 was $45,000. Falls did not prepare that statement. In any event, it is clear that plaintiff's equity in the business in 1985 was not $150,000, as the trial court found.

[6] The court's statement that the $74,500

> pretty much was kept separate and not treated as a marital asset during the course of the marriage. The Defendant really never liked the home and never wanted to live there. Plus, as I've already indicated, she, as of the time they moved into the marital home really was feeling that the marriage was over and she was preparing herself for a divorce

ignores that the money was used to build a jointly held asset, that was jointly occupied as the marital home, and which secured a joint obligation.

[7] The trial court apparently used December 31, 1992 as the date of separation, although the parties actually separated in February 1993.

[8] Plaintiff testified at trial that in 1990 or 1991 he inadvertently opened a bank statement addressed to defendant that indicated that defendant had a savings account in her own name, with over $3,000 in it. Plaintiff testified that he was not aware of the account before then, and that defendant told him at that time that she was saving money for school.

Defendant testified that she and plaintiff had two joint checking accounts, and that plaintiff had an account of his own where he kept money that he wanted for his own personal purposes. She testified that she opened the savings account in her name to save for school, and that she had told plaintiff about the savings account when she opened it at the bank.

Defendant testified that she believed she opened the savings account in January 1991. When asked where the money in the account came from, defendant testified that the initial money came from her father, who had given her a $350 check to pay for a class she was taking, and from saving money she received for Christmas and her birthday (January 9). Defendant testified that she also used to put money from bottle returns at the grocery store in the account, and that that "didn't amount to much." Defendant testified that when she started working at TMI she began saving money more regularly. The record established that defendant began working at TMI in March 1991.

The trial court's opinion of December 21, 1995, addressing property distribution stated that it was apparent to the court that the divorce was inevitable from 1990 on. The trial court's next sentence in its opinion was, "The Defendant had a separate bank account that was a secret account. The Plaintiff was not aware of it and she had set that up for her school purposes."

It appears that at one point, the account had as much as $4,000 in it, but there was no testimony at trial regarding how much plaintiff had in the savings account at the end of 1992 or when the parties separated in February 1993.

[9] Defendant testified during the property distribution phase of trial on July 27, 1994, that her attorney fees were approaching $4,000 at that point. On appeal, defendant estimated that the legal fees for this appeal and post-judgment matters would be $15,000, and noted that plaintiff's prior counsel (trial counsel) claims ($4,000 of $8,000 which covered the trial). Thus, defendant requests $23,000 in attorney fees.

[10] Defendant testified during the property distribution phase of trial, in late July 1994, that her base salary was $28,000 and that she received quarterly bonuses, tied directly to her work performance.