STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH FLOYD MYERS,

Plaintiff-Appellee,

v

LISA ANN MYERS,

Defendant-Appellant.

UNPUBLISHED

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

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

WHITE, J. (concurring in part, dissenting in part).

I concur in the majority's determinations with the exception of section II, from which I respectfully dissent.

Regarding section II.A., while I agree with the majority that the instant case is distinguishable from *Theroux v Doerr*, 137 Mich App 147; 357 NW2d 327 (1984), and its progeny, and that the asserted agreement in the instant case would not be binding, I nevertheless conclude that the agreement, the existence of which was supported by the great weight of evidence,[1] is a relevant consideration in weighing the best interest factors.

The agreement sheds light on the parties' attitudes regarding their relationships with Ryan at the time of the separation. It also should be considered in assessing defendant's choice to live temporarily in Mt. Pleasant, and provides additional context in evaluating the weight to be accorded the continuity factor. Additionally, it may be relevant to the moral fitness of the parties, to the extent the court may conclude that such an agreement was made, but its existence later denied, as distinguished from acknowledged, but later repudiated because found to be ill-advised or lacking in foresight.

Regarding sections II.C. and D., addressing defendant's arguments that the trial court erred by ignoring Ryan's stated preference, and that the trial court abused its discretion by placing too much weight on defendant's decision to return to college, my conclusions differ from the majority's. I conclude that the court erred in dismissing Ryan's stated preference altogether. The record establishes that Ryan expressed a preference to live with defendant to the trial court in chambers and expressed the same preference twice to Paul Cronstrom, the court-appointed psychologist. The trial court concluded,

based on its meeting with Ryan and Cronstrom's recommendations, 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," and did not have "any understanding that" "if he lives with the mother" "that would result in him not being able to see his father, and vice versa."

Although Cronstrom's reports were not admitted into evidence and are not before us, it appears from his testimony and excerpts of his reports read into the record during his testimony that he was operating under several significant misimpressions.[2] It also appears from Cronstrom's trial testimony that he was disinclined to believe that any seven year old's preference should be given weight by the court, and that he believed that in order to give Ryan's preference any weight, Ryan had to "substantiate" why he preferred to live with his mother:

> Q Okay. So as I understand what you're saying then, it's just based on your observation in the play room. You checked the bonding and observed their bonding; and based on that, your decision was that they both bonded well with Ryan; is that correct?
>
> A Yes.
>
> Q And he bonded well with both of them?
>
> A Yes.
>
> Q Okay. And I guess, then, knowing that and knowing that Ryan expressed that he wanted to be with his mother on two occasions to you, and had expressed it also to the Court before this proceeding started, you still recommended that Ryan be with his father?
>
> A Yes.
>
> Q Okay. And as I see part of your reasoning, and correct me if I'm wrong, is that Ryan wasn't really able to substantiate in terms satisfactory to you as to why he wanted to be with his mother?
>
> A Ryan stated to me that he misses his mother, he wants to be with his mother. He also stated, though, in very concrete terms, or he was able to explain his feelings and thoughts on to these words – and I think that this is important – is that he wanted to be with his mother and father an equal amount of time. That, while he misses his mother, he loves his father very much. That – and I based my decision on that, that you have a child who misses his mother, he's seven years old, but has probably – not probably, does have a longer history of being with his father, and his father demonstrating that he is a competent custodial parent.
>
> Q Well, I guess, Paul, in your recommendations – number two, of your recommendation, you say, "If the situation continues where Ryan is still stating a strong

preference for living with his mother and is able to substantiate why, that this again be further explored." And I'm asking you, what do you mean when you say, "and is able to substantiate why"? What are you looking for?

A If, after a period of time, you know, that he is still wanting to live with his mother more than –than his father, and he – and there's probably a better history of perhaps some of the things that you're saying; that if the father is too busy to be with the child, that there's a – that the mother has been able to establish her career now away from an area that won't accommodate a joint physical custody situation, can she – you know, is she more involved in her career right now where she would be able to take care of the child? And after a period of time, that that could be, you know, again explored by the Friend of the Court.

Q But, you know, I'm looking – I guess, Paul, maybe I'm not making myself clear.

As I read your statement here, you say, "and is able to substantiate why." I read that to believe that you were looking for some reasoning from Ryan as to why, and to substantiate why he wants to – further substantiate why he wants to live with his mother. Is that correct or incorrect?

A That's correct.

Q Okay. And so, again, my question to you is, what were you looking for from this young seven-year-old boy?

A **I think things that one cannot really find from a seven-year-old boy. That's why you would probably want to ask maybe a ten-year-old boy those types of questions.**

You have a situation where he has been living with his father, and now his mother is back. "I want to see my mother. I want to be with her." Does he fully understand what that means in terms of the situation that he would have, where he would be with his mother in the Lansing area and not see his father, who he has been with and who has been taking care of him? Does he fully understand that?

And after a period of time and after this custody situation, he would realize that, yes, this would mean that I would live with my mother during the week and might see my dad every other weekend, and this is what I want because, perhaps, of some of the issues that you brought up, that Mom is able to give me more quality time, and Dad is not, or for some reason I just want to live with my mom. I think that's what I mean by "substantiate."

I – again, I did an assessment that probably lasted an hour-and-a-half to two hours with both parent and child. . . .

* * *

Q . . . . you didn't ask Ryan any of these – you didn't go to him and basically say to him that, "Ryan, do you understand that by wanting to live with your mother, that you're only going to see your father every weekend or every other weekend? You did not talk to him on that –

THE COURT: Well, let me interject. The requirement of the law is that the Court has to make a determination as to whether or not the child has sufficient abilities to be able to make a preference that is going to be considered by the Court. And I think that that's what we're all beating around here; **and what Mr. Cronstrom is saying is that at seven years old he doesn't believe he can do that.**

BY MR. JENNINGS [defendant's counsel]:

Q Is that what you're saying, Paul?

A With a seven-year old –

Q Well, not with a seven year old. I'm talking with Ryan Myers, not with any seven-year-old. I'm talking this particular boy, because that's what we're looking at.

A Sure. Sure. Yes, with this particular boy.

And, to answer your question, I think I was asking more specific questions like that, saying that you have been living with your father and, you know, now you're going to be seeing your mother, and I think that he could not really answer. "I don't know, I just miss my mother."

And then asking other questions, and I forget where it is or what report, asking, "Well, how often would you like to see your father?" And I think what I got is that, "I want to see my father an equal amount of time and my mother an equal amount of time."

And so when he says, "I want to live with my mother," and then says that statement, **that tells me that perhaps he is responding emotionally to a situation**. And what I mean by "substantiate," sort of to take away that emotional reaction of, "I want to live with my mom" and then be able to dictate some actual reasons for that. He sort of distances himself, and I think that's what I meant by "substantiate." **I think that's what you're going to get from a seven-year-old, and that's what you're going to get with Ryan**. [Emphasis added.]

In light of Ryan's ability to state to both the trial court and the psychologist that he preferred to live with his mother, there is merit to defendant's argument that the trial court, rather than giving Ryan's preference some weight in light of his ability to express a preference, enlarged the statutory factor to require that Ryan "substantiate" and "understand the consequences or impact of" his preference. If this

were the proper standard, the stated preferences of many children substantially older than Ryan would be disregarded by the courts. A preference can be reasonable without this level of substantiation and understanding. To be sure, like most children, Ryan is not old enough or sufficiently mature to be entrusted with the decision with which parent he will live. Further, his age and his inability to articulate the underlying reasons for his preference may justify giving less weight to his preference than the preference of an articulate ten or fifteen year old. Nevertheless, I conclude that the trial court erred in giving Ryan's repeatedly expressed preference no weight at all. Children often express their preferences by describing their emotions. "I miss my dad," or "I am happy with my mom" are expressions of valid emotions that are entitled to respect. Granted, the ability to articulate why "I miss dad" or why "I am happy with mom," lends weight and added validity to the emotion, but the emotion itself, if capable of articulation, often expresses important feelings and needs. Further, children often express a desire for equality of parenting time, especially when they perceive that the decision is somehow being left to them. Here, equality of parenting time was not possible, and it is not at all clear that Ryan was given an adequate opportunity to explore his feelings about living in DeWitt with his mother and seeing less of his father. In sum, the fact that Ryan stated that he missed his mother and wanted to live with her is not insignificant, although it can be assumed that he would miss his father as well.

I conclude that the trial court committed clear legal error in its application of factor (i), by giving Ryan's stated preference no weight at all, and that remand is therefore required.

Regarding section II.D., addressing defendant's argument that the trial court placed far too great weight on defendant's decision to return to school to complete her education in its consideration of best interest factors (b) and (l), I conclude that the court gave inordinate weight to this aspect of the case in its consideration of those factors.[3]

As the majority notes, defendant testified at trial that, in the face of several years of marital disharmony, she pursued finishing a bachelor's degree in order that she and Ryan could be self-sufficient, and with the understanding that defendant would not seek custody when she finished school. Defendant testified that she separated from plaintiff believing that the separation was temporary and could lead to a reconciliation, and that she was surprised when plaintiff filed for divorce in September 1993. Both parties testified that defendant requested to have Ryan every weekend during the separation period, and that plaintiff refused. Plaintiff himself testified that while defendant lived and worked in Mount Pleasant, she constantly complained that she did not have enough time with Ryan. The majority acknowledges that the parties agree that defendant had Ryan during this sixteen month period approximately thirty percent of the time, and that defendant wanted Ryan for additional time. However, I would go farther than the majority does, and conclude that the trial court disregarded this testimony in faulting defendant for not spending more time with Ryan.

The trial court also concluded that plaintiff should have moved to an apartment in Gladwin and continued to see Ryan on a daily basis, although the record supports that defendant's priority was to get through college as quickly as possible so that she could support herself and Ryan. The testimony in the record on this issue was that while defendant was finishing college, she was financially dependent on plaintiff and her parents for support, and that her job was in Mount Pleasant.

Defendant's uncontroverted testimony regarding the reasons that she chose to work in DeWitt rather than Bay City also strongly indicate that Ryan's needs were paramount in her determination of which job offer to accept. Defendant testified that there were no jobs available in her field (environmental geology) in Gladwin or the neighboring towns, and that she limited her job search to cities within two hours of Gladwin to be near Gladwin. Defendant testified that she chose to accept the job offer in DeWitt, rather than the offer in Bay City, because the DeWitt position did not involve overtime, did not require her to travel overnight, would permit her to drive Ryan to school every morning because her school and employer were within minutes of her house, and the DeWitt employer understood the situation with Ryan and would allow her to work 8:00 to 5:00 p.m. In addition, defendant testified that she had investigated DeWitt schools and they were good, while she was unsure of the Bay City school system. Further, defendant testified that the Bay City job required overtime, would have entailed her traveling to the Brighton and Flint areas during the day, paid $4,000 less a year, and would not have permitted her to take Ryan to school because she would have had a longer commute (from Midland to Bay City).

All of this testimony was uncontroverted, yet the trial court effectively disregarded it, ruling that plaintiff had "many choices" as to where she could work, that defendant disregarded Ryan's needs when she chose to accept the DeWitt job offer, and that it was clear that Ryan was defendant's secondary priority at the time of trial.

In response to the majority's acceptance of the trial court's assessment that defendant ignored Ryan's important needs in making her decision to accept employment in DeWitt by effectively eliminating the possibility that both parents could be involved in Ryan's life on a daily or near daily basis, I note that there is no indication in the record that defendant did not consider Ryan's need for considerable contact with plaintiff. Defendant geographically limited her job search to areas within two hours of Gladwin, a small town where no employment opportunities existed in her field. Moreover, defendant's testimony indicated that she had thought about ways to facilitate visitation exchanges and lessen the impact of the distance between DeWitt and Gladwin on Ryan and defendant, such as for the parties to meet halfway between the two cities for visitation exchanges, or meet at her parents' home in Alma. There was no evidence presented at trial that the parties had problems regarding visitation or visitation exchanges.

I conclude that remand is necessary because of clear legal error in the trial court's application of factor (i), *Ireland v Smith*, 451 Mich 457, 463-464 n 6; 547 NW2d 686 (1996), and because the court abused its discretion in placing too much weight on defendant's pursuit of an education, and incorrectly declared that her taking the position in Dewitt was in disregard of Ryan's best interest. *Id.* at 468, quoting *Fletcher v Fletcher*, 447 Mich 871, 889; 526 NW2d 889 (1994). I conclude that these errors were not harmless because this was a close case and the court's errors may have been pivotal. I would direct that the trial court on remand consider up-to-date information and review the entire question of custody, considering all the statutory factors, and conduct whatever hearings or other proceedings are necessary to allow it to make an accurate decision concerning a custody arrangement that is in the best interests of the child. *Ireland*, *supra* at 468-469.

Accordingly, I would affirm in part, reverse in part and remand for further proceedings.

/s/ Helene N. White

[1] As the majority notes in n 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. I would add, however, that the overwhelming weight of evidence, considering plaintiff's testimony as well, supports the existence of such an agreement, or at a minimum, a finding that plaintiff permitted defendant to believe that he would not seek custody.

[2] Defense counsel quoted from Cronstrom's report several times during the trial. The report contained several significant errors, including that the parties had separated and defendant had moved to Mount Pleasant in February 1992, when they, in fact, separated in February 1993. Cronstrom also erroneously concluded that Ryan had "a longer history of being with his father, and his father demonstrating that he is a competent custodial parent," when it is undisputed that defendant was Ryan's primary caretaker from his birth in May 1987 until at least the fall of 1992. The trial court concluded, and defendant agrees, that defendant was Ryan's primary caretaker until February 1993. Plaintiff argues that the trial court should have concluded that he became Ryan's primary caretaker in the fall of 1992, or at least should have concluded that the parties shared caretaking equally from that point until February 1993, when he became the primary caretaker. Even accepting plaintiff's conditions, I conclude that Cronstrom's assumptions were erroneous.

[3] I also cannot agree with the trial court's conclusion that defendant's comment at a party to a mother who was chasing her 1½year old that defendant was glad that she did not have that responsibility anymore was significant and indicated "where defendant's priorities were." Most parents who have been the primary care-taker of a toddler would understand and agree that no longer having to chase after a toddler is a relief. This comment is not indicative of defendant's not considering Ryan a priority in her life or of inadequate parenting.