

IN THE COURT OF APPEALS OF IOWA

No. 4-460 / 94-0220

FILED

DEC 14 1994

CLERK SUPREME COURT

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**IN RE THE MARRIAGE OF MICHAEL GERALD HAVLIK AND
TRACY KAY HAVLIK**

Upon the Petition of
MICHAEL GERALD HAVLIK,

Petitioner-Appellee/Cross-Appellant,

And Concerning
TRACY KAY HAVLIK,

Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Linn County,
William L. Thomas, Judge.

Tracy appeals and Michael cross-appeals from the decree
dissolving their marriage. **AFFIRMED AS MODIFIED AND
REMANDED.**

Janice R. McCool of McCool & McCool, P.C., Cedar
Rapids, for appellant.

Kenneth F. Dolezal of Dolezal & Lindeman, Cedar Rapids,
for appellee.

Heard by Sackett, P.J., and Habhab and Huitink, JJ.

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SACKETT, P.J.

Respondent-appellant/cross-appellee Tracy Kay Havlik appeals and petitioner-appellee/cross-appellant Michael Gerald Havlik cross-appeals from an order establishing physical care, custodial care, and child support. We agree with Tracy that the split-care arrangement should not have been approved. We agree with Michael that he is the better custodian. We modify to award physical care to Michael and remand to consider child support. We do not retain jurisdiction.

Michael and Tracy lived in the same apartment complex and developed a relationship when Tracy was in the final stages of her dissolution from her first husband, Mr. McNeal. Tracy and McNeal had a daughter, Amber, born May 22, 1981. Michael and Tracy moved to Texas in 1985. They were married in Cedar Rapids in November 1986, but continued living in Texas. After Heather was born on May 28, 1987, Michael has had substantial involvement in Heather's care, although prior to the temporary order, Tracy assumed more of Heather's care than did Michael. Both Michael and Tracy are loving and concerned parents. Michael and Tracy have different parenting styles but, clearly, Heather has thrived in their joint care.

The marriage did not go well. There were periods of separation. During separation, on at least two occasions, Michael had sole control of their daughter. There were moves between Iowa and Texas.

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The trial court dissolved the marriage and awarded the parties joint physical care of Heather. Tracy was designated as the primary care person but actual physical care of Heather was divided equally between Michael and Tracy. They were to have Heather for alternating seven-day periods. Tracy was awarded the dependency exemption. Michael was required to maintain Heather's medical insurance. The trial court allocated the debts and made provisions for costs, including Tracy and Michael pay their own attorney fees.

Michael advances in his brief that a special child advocate in Linn County by the name of Kathy Ruyle met with the children, assessed the situation, and delivered an oral opinion to the judge at the time of both the temporary custody award and the final hearing, and her opinion was for joint physical custody. The record does not contain evidence of Ruyle's recommendation. Neither party attempts to make a record in the trial court as to the advocate's testimony. The trial court's opinion should be based only on evidence in the record. If recommendations are to be made to the court by the advocate, they should be made a part of the record. Because there is no record of any recommendations of the advocate, we cannot ascertain with certainty what they are and we give them no weight. We are limited to the record before us and any matters outside the record on appeal are disregarded. In re Marriage of Keith, 513 N.W.2d 769, 771 (Iowa App. 1994).

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Divided or shared custody of children has consistently been looked upon with disfavor and there is no precedent for the acceptance of it where the parties challenge its being allowed. See In re Marriage of Burham, 283 N.W.2d 269, 272 (Iowa 1979); In re Marriage of Coulter, 502 N.W.2d 168, 171 (Iowa App. 1993); In re Marriage of McElroy, 475 N.W.2d 221, 223 (Iowa App. 1991); In re Marriage of Muell, 408 N.W.2d 774, 776 (Iowa App. 1987).

Looking to this precedent, we feel compelled to reject the split-care arrangement in this case.

The next question we must address is whether Tracy should have been awarded physical care.

We are impressed with Michael's willingness to maintain the shared custody which would give Tracy and Michael both substantial contact with Heather. The custody was the basis of a temporary order that was entered over a year before the dissolution decree. Heather had grown used to and accepted the arrangement and its continuation provided her with stability.

Michael has had substantial contact with Heather and has actively participated in her care. Michael also has shown more stability in his life than has Tracy. Prior to commencing the dissolution, Tracy sought to take Heather out of school and take her to Texas without considering Michael's right of visitation. Evidence from Heather's teacher is she is well adjusted to her situation with her parents.

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A very strong factor for Tracy's position is she has two half siblings of Heather in her care. One child was born to her first marriage and one child was born during her marriage to Michael, but is not Michael's child. This child was born in May 1992, and Tracy terminated her relationship with this child's father when she was seven months pregnant.

There is a strong preference siblings and even half siblings be kept together. See In re Marriage of Orte, 389 N.W.2d 373, 374 (Iowa 1986); In re Marriage of Holcomb, 471 N.W.2d 76, 80 (Iowa App. 1991). Heather is close to her half-sisters. Clearly, Heather gets divided attention in Tracy's home where Tracy assumes the responsibility not only for Heather's half-sisters but also for a number of other children Tracy cares for during the course of a day. In Michael's care, his attention is less divided and obviously Heather benefits from this, too. Obviously, the trial court gave very serious consideration to both of these factors in arriving at its decision.

We consider Tracy's unwillingness to continue a split-custody arrangement that is working well with Heather. We look at Tracy's instability. We look at Michael's support for Heather to spend half the time with Tracy. We name Michael physical custodian. Michael has indicated a current willingness to allow Heather to be with Tracy half the time. We find it unnecessary to determine Tracy's visitation. We remand to the trial court to determine child support.

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Costs on appeal are taxed one-half to each party.

AFFIRMED AS MODIFIED AND REMANDED.