

IN THE COURT OF APPEALS OF IOWA

No. 2-375 / 11-1635
Filed June 13, 2012

**IN RE THE MARRIAGE OF
CHRISTOPHER A. DIETER AND
EMILY J. DIETER**

**Upon the Petition of
CHRISTOPHER A. DIETER,**
Petitioner-Appellee,

**And Concerning
EMILY J. DIETER,**
Respondent-Appellant.

Appeal from the Iowa District Court for Carroll County, Gary L. McMinimee, Judge.

A mother appeals the physical care provision of a dissolution decree.

AFFIRMED.

Julie G. Mayhall of Green, Siemann & Greteman, P.L.C., Carroll, for appellant.

Vicki R. Copeland of Wilcox, Polking, Gerken, Schwarzkopf, Copeland & Williams, P.C., Jefferson, for appellee.

Considered by Vaitheswaran, P.J., and Doyle and Danilson, JJ.

VAITHESWARAN, P.J.

Emily Dieter appeals the physical care provision of a dissolution decree.

I. Background Facts and Proceedings

Emily and Christopher Dieter married in 2001 and had three children. Emily stayed at home with the children for most of the marriage, with the exception of a few brief periods of employment at part-time, minimum wage jobs.

In 2010, she began a relationship with a man named Jacob Davis. The same year, Christopher petitioned to dissolve the marriage. The district court entered a temporary order granting the parents joint physical care of the children, pending trial.

At trial, Christopher offered a document purporting to be an online summary of court proceedings involving Davis. The district court accepted the document, subject to Emily's foundational objection. Following trial, the court entered a dissolution decree that made reference to the exhibit. The court placed the children in Christopher's physical care, reasoning as follows:

Emily has far more experience providing the children's physical care, but Christopher has demonstrated during these proceedings that he has the capacity and interest to do so. . . . Ultimately, this court concludes that the scales tip in favor of Christopher because of Emily's relationship with Davis. There is little doubt that Emily is convinced that Davis is the right person for her and that she intends to pursue that relationship. What concerns the court about her relationship with Davis is that Emily seems more concerned about protecting that relationship than she is about the impact of that relationship on the children. If Emily were awarded physical care of the children, Davis would necessarily be intimately involved with them. This court does not question Emily's sincerity when she says that Davis would be a good stepparent and role model, but it cannot rely on her feelings and unsupported belief in Davis when all objective evidence suggests that his extensive involvement with the children would not be in their best interests.

On appeal, Emily contends the district court should not have (1) admitted Davis's online records or (2) relied on the information about Davis in denying her physical care of the parties' children. We need not address the first issue because there is enough other evidence to affirm the district court's physical care determination. See *In re Marriage of Anliker*, 694 N.W.2d 535, 539–40 (Iowa 2005) (noting question of admissibility of evidence is not controlling if the appellate court can, under its de novo review, arrive at the same result with or without that evidence).

II. Analysis

In deciding who should exercise physical care, the court is guided by the factors set forth in Iowa Code section 598.41(3) (2009), as well as those identified in *In re Marriage of Winter*, 223 N.W.2d 165, 166–67 (Iowa 1974). See *In re Marriage of Hansen*, 733 N.W.2d 683, 696 (Iowa 2007) (stating the custodial factors in section 598.41(3) apply equally to physical care determinations).

The district court found this to be a “very close case,” with two capable parents. We agree. In this type of situation, we typically defer to the district court's decision. See *In re Marriage of Roberts*, 545 N.W.2d 340, 343 (Iowa Ct. App. 1996) (“However, in the end we determine this to be a close case, for both parents love their children very much and each is capable of providing for their long-range best interests. In situations such as this, we note the district court had the parties before it and was able to observe and evaluate the parties as custodians.”); accord *In re Marriage of Vrban*, 359 N.W.2d 420, 423 (Iowa 1984). We believe deference is warranted here.

This court has recognized that “if a parent seeks to establish a home with another adult, that adult’s background and his or her relationship with the children becomes a significant factor in a custody dispute.” *In re Marriage of Decker*, 666 N.W.2d 175, 179 (Iowa Ct. App. 2003).

There are two reasons for this: (1) because of the place the companion will have in the child or children’s lives, and (2) not less significantly, because the type of relationship the parent has sought to establish and the manner he or she has established it is an indication of where that parent’s priority for his or her children is in his or her life.

Id. Even without consideration of Christopher’s exhibit concerning Davis’s court proceedings, Emily’s involvement with Davis raised red flags.

Christopher’s sister, who cared for the children in the afternoons, related a disturbing incident involving Davis and the parties’ son. She testified that when she picked up the children from Emily’s house, she saw Davis squeeze the child’s head with both hands, causing the child to cry. The child told his sibling, in Emily’s presence, that Davis “squeezed my head and it hurts really badly.” Emily told her son, “[O]h, well, it probably didn’t mean anything or he was just joking around or wrestling or something like that.” Christopher’s sister said that when they got to Christopher’s house, the child had to lie down because his head hurt so badly.

When asked about this incident at trial, Emily did not deny that it occurred, stating instead that Christopher’s sister could not have seen it. Her acknowledgement that the child told her of Davis’s act, the fact that Christopher’s sister was surprisingly supportive of Emily in other respects such as her

housekeeping habits, and the district court's inclusion of this incident in its findings, lead us to give weight to the sister's testimony.

At a minimum, the incident reflected inappropriate, if not abusive conduct. The incident also highlighted Emily's propensity to minimize Davis's faults and the extent of his involvement with the children.

We turn to Christopher's caretaking abilities. Christopher conceded that Emily was the children's primary caretaker up to the year preceding trial. After the temporary joint physical care order was implemented, he necessarily became more involved in the children's day-to-day activities. Christopher performed well in a joint custodial role, establishing a routine for the children, and taking an active interest in the extracurricular events of the older two children. He also recognized the importance of Emily in the children's lives and appeared more willing to actively preserve her parental relationship than she did of his relationship.

On our de novo review, we conclude the district court acted equitably in granting Christopher physical care of the children.

III. Appellate Attorney Fees

Emily requests an award of appellate attorney fees in an unspecified amount. An award rests within this court's discretion. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). As Emily did not prevail, we decline her request.

AFFIRMED.