**IN THE SUPREME COURT OF IOWA**

NO. \*\*\*\*\*\*\*\*

**JOHN DOE,**

*Petitioner-Appellant,*

v.

**JANE DOE,**

*Respondent-Appellee.*

On Appeal from the Iowa District Court for Polk County

The Honorable \*\*\*\*\*\* \*\*\*\*\*\*\*, Presiding Judge

**APPELLANT’S PROOF BRIEF**

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**STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

1. **STANDARD OF REVIEW AND PRESERVATION OF ERROR**

*In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006)

*In re Marriage of Fynaardt*, 545 N.W.2d 890, 892 (Iowa Ct. App. 1996)

*In re Marriage of Beecher*, 582 N.W.2d 510, 512-13 (Iowa 1998)

*In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983)

*In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa Ct. App. 1996)

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1. **THE DISTRICT COURT ERRED BY FAILING TO GRANT JOHN PRIMARY PHYSICAL CUSTODY OF J.J.D.**

Iowa R. App. P. 6.14(6)(o)

*In re Marriage of Vrban*, 359, N.W.2d 420, 424 (Iowa 1984)

*In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974)

*In re Marriage of Courtade*, 560 N.W.2d 36, 37-38 (Iowa Ct. App. 1996)

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Iowa Code section 598.41(3)(2015)

1. **The District Court Erred by Placing J.J.D. in Jane’s Primary Physical Care**

Iowa Code section 598.41(3)(2015)

Iowa Code §598.41(4)(2015)

Iowa Code §598.1(1) (2015).

*In Re Marriage Wilson,* 532 N.W. 2d 493, 495 (Iowa App. 1995)

*In Re Marriage of Brainard,* 523 N.W.2d 611, 614-15 (Iowa App. 1994)

*In Re the Marriage of Daniels,* 568 N.W.2d 51, 56 (Iowa App. 1997)

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*In re Marriage of Winter*, 223 N.W.2d 165, 166-167 (Iowa 1974)

*In re Marriage of Courtade*, 560 N.W.2d 36, 37-38 (Iowa Ct. App. 1996)

1. **The District Court Erred by Placing J.J.D. in Jane’s Primary Physical Care**

*In re Marriage of Amenell*, 2007 WL 2257082 (Iowa Ct. App. 2007)

*In re Marriage of Courtade*, 560 N.W.2d 36, 37-38 (Iowa Ct. App. 1996)

*In re Marriage of Winter*, 223 N.W.2d 165, 166-167 (Iowa 1974)

**ROUTING STATEMENT**

 This case should be transferred to the Court of Appeals because no basis exists for the Supreme Court to retain it for review. Iowa R. App. P. 6.1101 (2015). Transferring this case to the Court of Appeals is warranted because it involves questions that can be resolved by applying existing legal principles. Iowa R. App. P. 6.1101 (3)(a) (2015).

**STATEMENT OF THE CASE**

This is a divorce case concerning John Doe Petitioner/Appellant (hereinafter “John”), and Jane Doe, Respondent/Appellee (hereinafter “Jane”). (January 01, 2016, Petition for Dissolution of Marriage, p. 1) The parties tried this matter in the Iowa District Court of Polk County presided by the honorable \*\*\*\*\*\*\*\*\*\* on April 6-7, 2017. (April 15, 2017, Decree, p. 1) The dissolution decree, filed on April 15, 2017, is a final judgment under Iowa Appellate Procedure Rule 6.1. John appeals the physical custody arrangement decreed by the district court, as well as the decree’s provisions concerning support and visitation.

**Course of Proceedings and Disposition of Case in District Court**

Jane and John married on January 01, 2000 (January 01, 2016, Petition for Dissolution of Marriage, p. 1) They have one child, J.J.D. born January 01, 2006, who was seven years-old at the time of trial. (Tr. p. 42) At trial, John was forty-three years-old and Jane was thirty-nine years-old. (Tr. p. 12, 149)

 During their marriage, John was a selfless father and J.J.D.’s primary caregiver. (Tr. p. 37, 155, 161, 318, 325, 326, 478) As Jane’s own witness Jane Smith testified, from 2009 to August of 2014, Jane was “not too active” in J.J.D.’s life. (Tr. p. 478) John primarily cared for J.J.D. until August of 2014 when the parties’ decided to relocate to New Jersey for John’s new job. (Tr. p. 98, 188, 297, 300; Exhibit K) Until he could get settled the parties agreed that J.J.D. would stay in Iowa with Jane. (Tr. p. 211) Unbeknownst to John, Jane had already consulted with her divorce attorney when she encouraged him to relocate to New Jersey. (Exhibit 14) Jane then failed to relocate with J.J.D. to New Jersey. (Tr. p. 188-189) During this case’s pendency, the court awarded the parties shared physical care with no set visitation schedule. (February 3, 2016, Temporary Order)

After trial, the court ordered that Jane have primary physical care of J.J.D. . (April 15, 2017, Decree, p. 9) John was granted visitation with J.J.D. John was granted visitation with J.J.D. one 4-day weekend per school quarter, and from the second week of summer break until 14 days before school starts. (April 15, 2017, Decree, p. 14) On May 5, 2017, John timely filed his notice of appeal.

**STATEMENT OF THE FACTS**

Before presenting the facts applicable to this appeal, the court should be made aware that John is not appealing any orders of the court, except those involving physical care, visitation, and child support. As such, facts relating to all other issues will only be discussed to the extent they are relevant to issues that are the subject of this appeal.

For more than four years since his birth, John was the primary parent who cared for and raised J.J.D.. (Tr. p. 98, 188, 297, 300; Exhibit K; February 3, 2016, Temporary Order p. 2) He thrived in his father’s care, while maintaining a relationship with his mother. (Tr. p. 318, 409, 410) For the first four years of his life, Jane was an absent parent, deferring most rights and responsibilities of J.J.D. to John. (Tr. p. 37, 157, 161, 318, 325, 326, 478) As Jane’s own witness, Jane Smith, testified, for the first four years of J.J.D.’s life Jane was, “not too active.” (Tr. p. 478) Yet, the district court awarded Jane primary physical care of J.J.D. over John’s objections. (April 15, 2016, Decree, p. 9)

This is the second marriage for both. (Tr. p. 21) While J.J.D. is the first and only child for John, Jane has two children, Rachel, age 21, and Abigail, age 18, from her previous marriage. (Tr. p. 22) The parties’ met in 2000, while John was finishing law school at the University of Arkansas. (Tr. p. 26-27). They dated seven weeks prior to getting married. (Tr. p. 30). John then graduated from the University of Arkansas School of Law in 2001. (Tr. p. 32) After his graduation the parties lived in Missouri. Jane worked as a quality engineer at Eagle-Picher in Joplin, Missouri, while John worked as an attorney. (Tr. p. 17) During that time Jane had visitation with Abigail and Rachel every other weekend and some visitation during the week. (Tr. p. 150) Her ex-husband, Bob Smith, had custody of their daughters. (Tr. p. 389) During Jane’s limited visitation with her daughters, John provided the majority of their care. (Tr. p. 390) As John testified, “I was responsible for bathing them and fixing dinner; and, you know all the way through the time we left Missouri, I was responsible for helping them with homework, spelling, all of those kinds of things. I had them in activities like 4-H. We enjoyed doing together, playing outside. Jane would help from time to time, but most of that was me.” (Tr. p. 150)

Eventually the parties decided to move to Iowa from Missouri in 2005. (Tr. p. 17, 19, 168) John was offered and accepted a job as in house counsel at American Ordnance in Burlington, Iowa, as Director of Contracts, Proposals and Purchasing. (Tr. p. 34) Jane also obtained a job with American Ordnance in 2005 as a quality control engineer. (Tr. p. 34) After the move the parties went to great lengths to get pregnant with J.J.D. (Tr. p. 216) Jane had numerous miscarriages before his birth. (Tr. p. 216) The parties’ then went through two rounds of in vitro fertilization prior to Jane getting pregnant. (Tr. p. 216) J.J.D. was then born in the Winter of 2006. (Tr. p. 460) After J.J.D.’s birth the parties lived on their family farm in New London, Iowa. The parties officially separated in June of 2015, when John discovered that Jane was in a serious relationship with another man. (Tr. p. 110-111) Up until that discovery Jane and John shared the same bed when he returned home on the weekends. (Tr. p. 171) At the time of trial, J.J.D. attended kindergarten in Mediapolis. (Tr. p. 44)

Though both parents loved and cared for J.J.D., their respective priorities dramatically affected each’s ability to care for him. From November of 2009 till August of 2014, John was J.J.D.’s primary physical caregiver in addition to being a full-time in house counsel at the American Ordnance. (Tr. p. 98, 188, 297, 300; Exhibit K; February 3, 2016, Temporary Order p. 2) While he would make his meals, line up his care, transport him, and arrange his medical care, Jane was largely absent. (Tr. p. 318-319) Most nights Jane would retire to her sanctuary, the barn, or local tavern to drink alcohol and smoke. (Tr. p. 156, 468) When Jane was out drinking, John was the sole person responsible for all household chores, in addition to raising J.J.D. and Jane’s girls. (Tr. 155-156) Jane preferred it that way, as it allowed her the freedom to go out to bars and meet other men. (Tr. p. 162-163)

Over the course of the parties’ sixteen year marriage Jane had no less than eight affairs on John. (Tr. p. 195) The parties’ relationship then started to really deteriorate in 2013 when Jane admitted to John that she was having an extra-marital fair on him with a man, John Smith. (Tr. p. 198, 200) As Jane testified, she met Mr. Smith when she was drinking at a bar. (Tr. p. 96) Meanwhile, John was at home taking care of the parties’ child. (Tr. p. 98) Jane testified that she only had the affair with John Smith from September of 2013 to November of 2013. (Tr. p. 93-94) However, her phone records demonstrate that she maintained significant daily contact with Mr. Smith through the better part of 2015. (Tr. p. 450-455) In 2014, after Jane’s affair, John emotionally checked out of the relationship and sought attention from other women. As he indicated, “I am not proud to say that I had an affair in the Spring and Summer of 2014. I was lonely and hurt. That is not an excuse. It was not right and truthfully I wanted Jane to hurt like she had hurt me over the years. “ (December 16, 2015 Affidavit of John p. 3)

In addition to Jane’s substance abuse and boundary issues, she has a history of poor anger management and domestic violence. (Tr. p. 203-204) As Jane’s own daughter Abigail testified, “I mean she has a temper a lot and so she – when she gets mad, she likes to call us names.” (Tr. p. 408) In support of his position that John should have primary physical care of J.J.D. Abigail further stated, “I mean I love my mom, but I just feel like for the sake of my little brother, you know, I don’t want him to have to deal with like what I did, especially by himself.” (Tr. p. 411) Unfortunately, Jane’s temper manifested itself in physical violence as well. As John noted,

“[sh]e’s, you know, slammed my head into walls, she’s punched me, she’s slapped me several times. Usually her punches are to my torso so there’s not any visible bruising. You know she’s slammed me to the ground and just pinned me there, pinned my face to the ground into – face-down into the ground till I, you know, tell her she’s right or agree with her, just because she can’t control her temper.”

(Transcript p. 203)

In 2013 when Jane’s daughter, Rachel, was at the parties’ residence Jane lost complete control. John testified,

“There was a time in 2013 where I had J.J.D. in my arms and she was screaming at me and hit me and I went to the ground and cradled J.J.D. underneath of me while she continued to hit me. Rachel came into the room to take J.J.D. out of my arms and she proceeded to lock herself in the room until the argument was over. And I tried to leave the house then with J.J.D. and Jane took all the keys and refused to let me leave.”

(Transcript p. 203)

John did not report any of the incidents of abuse, as it would have resulted in Jane losing her security clearance, required explosive handlers’ license and job. (Transcript p. 294) Further, Jane never refuted any of John’s allegations of abuse. In fact in her sworn affidavit she confirmed the history of violence when she stated, “[t]here was a time when John and I would regrettably enter into arguments that could become mutually physical… .” (Ex. U p. 31)

On January 01, 2016, Jane finally made the decision to divorce John. (Ex. 14 p. 2) From that date until the dissolution trial, Jane methodically setup John to obtain care of J.J.D. (Tr. p. 170-172) John was offered a very lucrative job as general counsel at a company in New Jersey in June of 2014. (Tr. p. 98, 169, 324) Jane met with her attorney and had the divorce papers drafted on December 01, 2016. (Ex. 14 p. 2) In July of 2014 she encouraged John to accept a job offer with Marotta Controls in New Jersey. (Tr. p. 324) As she told her friend on July 23, 2014, “I told him it’s too good of a job not to take.” Exhibit S at p. 7. Jane then led him to believe that she was relocating to New Jersey with him. (Tr. p. 315, 336-337) While already having divorce papers drafted, Jane travelled with John to look at places to live. (Tr. p. 336) As Jane put it, “I didn’t find a realtor, but I did go out there to help him. I mean that’s what a wife does. He relies on me to make tough decisions like that.” (Tr. p. 313-314) John then accepted the job offer with Marotta Controls on July 16, 2014. (Tr. p. 51-52) He relocated to New Jersey in August of 2014. (Tr. p. 51-52) He believed that Jane and J.J.D. would follow after he got settled. (Tr. p. 315, 336, 337) However, Jane continued to drag hER feet and make excuses. (Tr. p. 309) Had he known that Jane and J.J.D. weren’t coming to New Jersey he would have never accepted the new job. (John’s 12/16/15 Affidavit p. 7)

Unbeknownst to John when he accepted the job, Jane had already moved on from him. (Tr. 365-366) After she had the divorce papers drafted in December of 2015 she started actively seeking out men on the application Tinder. (Tr. p. 365) In October of 2014, while she was still having regular contact with Bob Smith, he started dating Bob Doe. (Tr. p. 365-366) Meanwhile, John split his time between Iowa and New Jersey, as Jane and J.J.D. still hadn’t relocated. (Tr. p. 310) Jane testified that John was aware of her relationship with Mr. Doe. However, the credible evidence demonstrates otherwise. Jane kept Mr. Doe a secret from her adult daughters. (Tr. p. 55-56) Further, she continued to share a bed with John when he returned from New Jersey. (Tr. p. 171) The parties continued this arrangement until June of 2015, when Jane’s friend accidentally posted a picture of Jane and her boyfriend, Bob Doe, on her Facebook profile. (Tr. p. 109-111) According to Jane, “John saw it and he blew up at me.” (Tr. p. 111) Jane panicked and immediately had the divorce papers filed on January 01, 2016. (Tr. p. 111) During the week of January 1st John was in Iowa. (Tr. p. 111) However, Jane waited until he returned to New Jersey on January 5th to have him served with the papers. (Tr. p. 111-112) She did this, as she believed that he would take J.J.D. with him to New Jersey had she served him while he was in Iowa. (Exhibit V at p. 48-49; Tr. p. 112)

Jane went to extraordinary lengths to carry out her scheme. From 2014 up until at least March of 2016 she repeatedly impermissibly accessed all of John’s personal e-mail accounts. (Tr. p. 112-116; Ex. V p. 86-88) She also made numerous audio and video recordings of John when he was alone with J.J.D.. (Jane’s 12/14/15 Affidavit p. 5) When initially asked whether or not she had read confidential attorney client communications between John and his counsel or record Jane responded “no”. However, upon further pressing Jane responded, “I inadvertently opened one, yes, but I knew that we couldn’t do that. “ (Exhibit V at p. 88)

During this turbulent period for John, he was also facing troubles at the work place. (Tr. p. 217-221) As a result of this, he found a new job with ViaSat, Inc. as Corporate Counsel. (Tr. p. 221) He started that position in September of 2015. His position is based in Atlanta, Georgia. (Tr. p. 221) At the time of trial John resided in Loganville, Georgia, in a four bedroom rental house. (Tr. p. 151) He was actively negotiating to purchase a 2800 square foot home situated on 5.6 acres in Loganville on the date of trial. (Tr. p. 180-181)

Despite the chaotic nature of the situation John maintained daily contact with J.J.D. during the pendency of the action. (Tr. p. 154-155) In addition to Facetiming him on a daily basis, John traveled back to Iowa three times a month during the pendency of the case. (Tr. p. 310-311) His position as a Senior Executive affords him the freedom to go where he wants when he wants. (John’s 12/16/15 Affidavit p. 5) The trial court then relied on this information in granting the parties’ temporary shared physical care of J.J.D. on February 13, 2016. (2/3/16 Temporary Order) In reaching the twenty page temporary decision to grant the parties’ temporary shared physical care the court noted, “[i]t is interesting to the Court that John rather openly admits to at least some of his frailties and human weaknesses whereas Jane’s lacks even a small hint of apology for what John paints as a history of affairs, excessive drinking, and impulse control. “(2/3/16 Temporary Order p. 4)

Despite the dysfunction of his mother, J.J.D. is a well-adjusted child. (Tr. p. 176, 353, 412, 472) At the time of trial he was enrolled in the Mediapolis School District and was attending kindergarten. (Tr. p. 354) No parties involved expressed concern about J.J.D.’s ability to adjust to new surroundings. (Tr. p. 176, 410) As his kindergarten teacher Mrs. Teacher testified, “J.J.D. is a very outgoing little boy.” (Tr. p. 353) She further testified that he is able to adapt to new situations. (Tr. p. 362) Jane then corroborated her testimony when she herself testified that J.J.D. would be able to adjust to living with John in Georgia. (Tr. p. 83)

**ROUTING STATEMENT**

This case should be transferred to the Court of Appeals because no basis exists for the Supreme Court to retain this case for review. Iowa R. App. P. 6.401. Transferring this case to the court of appeals is warranted because it involves questions that can be resolved by applying existing legal principles. R. 6.401(3)(b).

**ARGUMENT**

1. **STANDARD OF REVIEW AND PRESERVATION OF ERROR**

Dissolutions of marriage are tried in equity and appellate review is de novo. *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006); see Iowa R. App. P. 6.4. The appellate court must weigh to the trial court’s fact findings, particularly when considering the credibility of witnesses, but the court is not bound by them. *In re Marriage of Fynaardt*, 545 N.W.2d 890, 892 (Iowa Ct. App. 1996). This court has the duty to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Beecher*, 582 N.W.2d 510, 512-13 (Iowa 1998). Prior cases have little precedential value, and the appellate court must base its decision primarily on the particular circumstances of the parties. *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983); *In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa Ct. App. 1996). All issues John raises in his appeal were tried to the district court and are properly preserved for review on appeal. *In re Marriage of Okonkwo*, 525 N.W.2d 870, 872 (Iowa Ct. App. 1994)(holding that an issue not presented to the trial court will not be considered for the first time on appeal).

**II. THE DISTRICT COURT ERRED BY FAILING TO GRANT JOHN PRIMARY PHYSICAL CUSTODY OF J.J.D.**

In child custody cases, the best interest of the child is the first and governing consideration. Iowa R. App. P. 6.14(6)(o); *In re Marriage of Vrban*, 359, N.W.2d 420, 424 (Iowa 1984). Iowa Code section 598.41(3)(2015) enumerates the factors the court must consider in awarding custody. *Weidner*, 338 N.W.2d at 355-56; *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). “The critical issue in determining the best interests of the child is which parent will do better in raising the child; gender is irrelevant, and neither parent should have a greater burden than the other.” *In re Marriage of Courtade*, 560 N.W.2d 36, 37-38 (Iowa Ct. App. 1996). “ In determining which parent serves the child’s best interests, the objective is to place the child in an environment most likely to bring the child to healthy physical, mental, and social maturity.” *Id.* at 38. Selection of the custodial parent hinges on “who can minister more effectively to the long range best interest of the child.” *Kunkel*, 555 N.W.2d at 253. “The court should also consider the characteristics and needs of the child, the characteristics of the child with each parent, the nature of each proposed environment and the effect of continuing or changing an existing custodial status.” *Id.* (*citing Winter* at 167). This court should modify the lower court’s decision to return J.J.D. to his Father’s primary care.

1. **The District Court Erred by Placing J.J.D. in Jane’s Primary Physical Care**

In placing J.J.D. in the primary physical care of Jane, the trial court ignored the factors to be considered under Iowa Code §598.41(3) when making a custodial determination. Rather, the District Court employed its own unique child custody test, “if it’s not broke don’t fix it.” (April 15, 2016 Decree p. 9) Despite a significant history of domestic abuse, a significant history of John being the child’s primary physical caregiver, and a significant history of Jane minimizing John as a parent, the court granted Jane primary physical care of the parties’ minor child.

 The district court did exactly what Iowa Code §598.41(c)(2015), strongly disfavors. The District Court minimized Jane Doe’s unrebutted history of domestic violence in the decision granting her primary physical care of the parties’ minor child. In addition to the Iowa Code, public policy strongly disfavors the awarding of child custody to the parent who is the abuser.

Iowa case law also has addressed the importance of considering domestic abuse as a factor in determining child custody. *In Re Marriage Wilson,* 532 N.W. 2d 493, 495 (Iowa App. 1995). The Court has recognized the problems which occur as a result of domestic violence. *In Re Marriage of Brainard,* 523 N.W.2d 611, 614-15 (Iowa App. 1994).

Additionally, Iowa case law has addressed the weight to assign evidence of domestic abuse in designating the primary caretaker. In the case of *In Re the Marriage of Daniels,* 568 N.W.2d 51, 56 (Iowa App. 1997), the Court overturned a lower court decision which awarded child custody to a father who committed domestic abuse against his ex-wife. A lower court awarded the parties joint legal custody, and gave the abuser primary physical care of the couple's two children. The appellate court overturned this decision and granted primary physical care of the children to the mother. The Court held that while a parent's denial of visitation without just cause is a significant factor in determining the proper custody arrangement, the evidence of domestic violence operates to diminish the significance of this factor in awarding custody. *Id.* at 56. The Court found that the detrimental effects of family violence were a more compelling factor than the mother's eleven month denial of the father's visitation with the children when considering what custody decision is in the best interest of the child. *Id.*

In the case at bar, the decision of the District Court sends a message to abused women that if they leave their marriage they still very well may lose custody of their children. This message and result is exactly what Iowa Code §598.41 (1)(c) was created to prevent. A person who threatens and physically assaults another should not be granted permanent physical custody of their minor child. As the legislature dictated, “[a] finding by the court that a history of domestic abuse exists, as specified in subsection 3, paragraph “j”, which is not rebutted, shall outweigh consideration of any other factor specified in subsection 3 in the determination of the awarding of custody under this subsection.” Iowa Code §598.41 (1)(c)(2015)

In light of the standard used to determine child custody and visitation, the evidence shows that Jane Doe perpetrated significant acts of domestic abuse against John during the parties’ marriage. In 2013, while John was holding the parties’ minor child, she hit him with enough force to make him fall to the ground. (Tr. p. 203) She then continued to punch him while he cradled the parties’ minor child. (Tr. p. 203) Jane’s oldest daughter then took the minor child and locked herself in the bathroom with the child. (Tr. p. 203) Jane then took John’s keys, so he could not leave. (Tr. p. 203) In addition, John credibly testified that Jane would routinely hit him in his torso during arguments, as this resulted in no visible bruising. (Tr. p. 203) On other occasions she has pinned his head to the ground or slammed hishead into the wall. (Tr. p. 203) John then testified that the assaults went unreported, as Jane would have lost her national security clearance upon an arrest for domestic violence. (Tr. p. 294) Jane’s explosive temper was confirmed by her own eighteen year-old daughter, Abigail, who testified that she didn’t want her little brother to have to go through what she did as a child with Jane. (Tr. p. 411) Jane then failed to provide any rebuttal evidence to John’s or Abigail’s testimony.

Despite the overwhelming credible evidence demonstrating a significant history of domestic violence, the District Court concluded, “[t]here is no evidence that there was a pattern of physical abuse in this family. [a]ny incidents were isolated if they did occur.” (April 15, 2016, Decree, p. 14) In reaching this conclusion the trial court minimized and ignored the impact that domestic abuse has on children. John’s testimony not only confirmed that there was a history of domestic violence, but it showed that Jane even perpetrated it in the presence of the parties’ minor child. Jane then failed to rebut any of the allegations lodged by John or her own daughter.

In addition to ignoring the overwhelming credible evidence presented on the history of domestic violence, the trial court also completely ignored the directives of the Iowa legislature. Specifically, the trial court erroneously applied a “pattern” test for domestic abuse rather that the “history” test required by the Iowa Code. Pursuant to Iowa Code section 598.41 (2)(c), a trial court is to assess whether a “history of domestic abuse exists” when making a custodial determination. History is defined as events of the past. Merriam Webster’s Collegiate Dictionary (10th ed. 1998). Here the trial court erroneously assessed whether or not a “pattern” of domestic abuse existed. Unlike the history test, where one or two events suffice, pattern is defined as the regular or repeated way in which something happens or is done. Merriam Webster’s Collegiate Dictionary (10th ed. 1998). A woman does not need to be beat up or abused the same way or on a regular basis for a history of domestic abuse to occur. Accordingly, the trial court’s entire assessment, factual and legal, of the domestic abuse issue was erroneous.

In addition to failing to consider the history of domestic violence, the trial court failed to account for John’s historical role as J.J.D.’s primary caretaker. (Tr. p. 37, 157, 161, 318, 325, 326, 478) In making custody and physical care determinations, courts give significant consideration to placing the child to the parent who has historically been the primary caretaker, though it is not the sole factor to consider. *See In re Marriage of Bevers,* 326 N.W.2d 896, 898 (Iowa 1982) (noting who during the marriage provided routine care); *In re Marriage of Decker,* 666 N.W.2d 175, 178-80 (Iowa Ct.App.2003) (past primary caregiving a factor given heavy weight in custody matters); *In re Marriage of Roberts*, 545 N.W.2d 340 (Iowa Ct. App. 1996). Jane agreed that John was J.J.D.’s primary caretaker for his entire life except from August of 2014 to the date of trial. (Tr. p. 96-97) In that time John has devoted his life to J.J.D.’s care. He has been his primary support as well as his caregiver. His central role in life has been to help him healthily develop both physically and emotionally. In addition to serving as J.J.D.’s primary physical caregiver the unrebutted evidence demonstrated that John was the primary physical caregiver to Jane’s two daughters while they were in the parties’ care. (Tr. p. 388) Jane’s ex-husband stated in his testimony, “they (the girls) spent the majority of their time with John and that was their caregiver while they were with – in their presence.” (Tr. p. 388)

Despite the above undisputed facts, the district court made one of the more bizarre findings of fact when it stated “He (John) has done little to disrupt his life for the Jane of J.J.D.” (April 15, 2017, Decree, p. 14) Like the domestic abuse issue, the record simply does not support this finding. John’s entire life has been about disruption for the Jane of J.J.D. and his step-daughters. Jane had two miscarriages attempting to get pregnant with J.J.D.. J.J.D. is his only biological child. (Tr. p. 214) Jane went through two rounds of painful in vitro fertilization to get pregnant with him. (Tr. p. 214) For the first four years of his life Jane admittedly spent her evenings in the barn drinking and smoking. (Tr. p. 156, 468) When John took the girls and J.J.D. to town to get dinner in 2010 Jane stayed back and made unwelcome sexual advances to the parties’ friend. (Tr. p. 117-118, 417-418) When John was putting J.J.D. to sleep in 2013 in the evenings Jane was out at the bars drinking with her then girlfriend, Bob Smith. (Tr. p. 96) While he worked as a high ranking executive at a large corporation, he also served as J.J.D.’s exclusive caregiver for the first four years of his life. (Tr. p. 155, 161, 318, 325-326, 478) While he advanced his career by taking a new position in New Jersey, Jane was looking for a replacement husband on Tinder. (Tr. p. 107-108) Jane herself testified that she timed her serving of the divorce petition in the summer of 2015 to prevent John from taking the parties’ child with him. (Tr. p. 111-112, Exhibit V 48-49) This required John to have to fly back and return to New London three times a month, so he could spend time with J.J.D. (Tr. p. 310) According to Jane during the period of his absence the parties and minor child “rendezvoused in Ohio, Kansas City, Chicago, Disney, and flying to New Jersey. So there was travel facilitated by both parties.” (Exhibit U p. 34) As he was forced to eat alone in the evenings after work in New Jersey in May of 2015, Jane was taking J.J.D. out to a movie with her boyfriend. (Tr. p. 380) Despite Jane’s sworn testimony that she and J.J.D. traveled to New Jersey on multiple occasions, the trial court concluded that John, “never had the child visit him.” (Exhibit U p. 34) In sum, Jane’s disruptions pale in comparison to the disruptions John has and continues to make for J.J.D.

In addition to historically being J.J.D.’s primary caregiver, John is the parent who better supports the minor child’s relationship with the other parent. If one joint custodial parent is awarded physical care, the court shall hold that parent responsible for providing for the best interests of the child. Iowa Code §598.41(4)(2015). The best interests of the child are defined in terms of the maximum continuous physical and emotional contact with each of the parents and refusal by one parent to provide the opportunity without just cause shall be considered harmful to the best interests of the child. Iowa Code §598.1(1) (2015). Jane's beliefs about John’s ability to parent and her scheme to remain in Iowa with the parties’ minor child are critical considerations in placing primary physical care of J.J.D. with his father, John.

The trial court completely discounted Jane’s actions in enticing John to relocate to New Jersey. The credible evidence at trial established that Jane started having an affair on John in September of 2013. (Tr. p. 145) She continued to have regular contact with her paramour, Bob Smith, until the latter part of 2014. (Tr. 450-455) In July of 2014, John was offered the opportunity to take a job in New Jersey. In that same month Jane told him that it was too good of an opportunity to pass up. (Tr. p. 98, 169, 324) Prior to this, she met with her divorce attorney on December 01, 2016, and had divorce papers drafted. (Ex. 14 p. 2) Jane again met with her attorney in December 2016 prior to John leaving for New Jersey. (Ex. 14 p. 2) She then represented to John that she was relocating with the parties’ minor child to New Jersey. (Tr. p. 315, 336, 337) In October of 2014, she started dating her current boyfriend Bob Doe. (Tr. p. 365-366) In May of 2015 she introduced J.J.D. to her boyfriend. (Tr. p. 108) In January of 2016, she filed the divorce papers. (January 01, 2016, Petition for Dissolution of Marriage, p. 1) Over this period of time Jane was essentially reducing John’s time with J.J.D. to gain an upper hand in the dissolution action. This action was deceitful and contrary to the best interests of J.J.D.

In addition to her actions, her harsh rhetoric demonstrates her inability to value John’s role in J.J.D.’s life. While John conceded that Jane and J.J.D. are significantly bonded, and that Jane is able to address her physical needs, Jane stated that if J.J.D. was left in John’s care, “[h]e would be like a dog in a kennel. [h]e would be fed and watered. [h]e would have toys thrown over the fence at him but not be stimulated.” For these reasons she should not be J.J.D.’s primary caregiver.

1. **Placing J.J.D. in Jane’s Primary Care Is Not in J.J.D.’s Best Interests**

Jane’s poor moral fabric, lack of appropriate boundaries, and explosive temper are of extreme importance in determining J.J.D.’s best interests and should be primary considerations in awarding John primary physical care of J.J.D. Although these traits have not been shown to have a negative impact on J.J.D. to date, there is need for concern over J.J.D.’s long terms well-being as he has witnessed Jane’s violent outbursts in the past.

The Iowa Supreme Court has long held that the character traits of all of the parties involved and more importantly how those personal traits will affect the best interests of the child are extremely relevant factors in child custody decisions. *In re Marriage of Winter*, 223 N.W.2d 165, 166-167 (Iowa 1974). Character traits are specifically relevant to the issue of determining which parent’s “environment is most likely to bring the child to healthy physical, mental, and social maturity. .” *In re Marriage of Courtade*, 560 N.W.2d 36, 37-38 (Iowa Ct. App. 1996) A history of domestic abuse and alcohol abuse weigh heavily against a parent seeking primary care of a child. *In re Marriage of Amenell*, 2007 WL 2257082 (Iowa Ct. App. 2007). Jane’s history of emotional abuse, physical abuse, promiscuous behavior, impulse control, and lack of boundaries demonstrate that she is not a suitable long term primary caregiver for J.J.D.

Ironically, the case perhaps most directly on point in this matter was also decided by the Honorable Mary Ann Brown in Polk County. *Id.* In *Amenell*, the mother was historically the primary physical caregiver to the parties’ sole minor child. *Id.* However, she planned on moving out of the country. *Id.* In addition, there was a history of domestic abuse and alcohol abuse on behalf of the father. *Id.* Despite this, the trial court ultimately concluded that it was more important for the minor child to maintain his relationship with his father than to live with the person who has been his primary physical caregiver in his life. *Id.* at 3. The Court of Appeals shot down the trial court’s ruling and determined that the factors weighed in favor of awarding the mother physical care of the minor child. *Id*. at 5. In reaching that conclusion the appellate court noted that the father did not have significant primary care experience and his interest in providing primary care for the minor child was recently acquired. *Id.* Further, they reasoned that a history or abuse and alcohol abuse weighed heavily against the father. *Id.*

Like the father in *Amenell*, Jane’s character traits do not lend themselves to being a successful long term primary caregiver. Testimony presented uniformly points to a long term trend of Jane failing to manage her anger appropriately. (Tr. p. 203-204, 408) When she didn’t get the service she expected when she came home from work hse would yell and get uncontrollably angry. (Tr. p. 204) On Easter Sunday before trial, her twenty year-old daughter had to remove her from her house due to her temper. (Tr. p. 201)As her eighteen year-old testified, “she has a temper a lot and so she – when she gets mad she likes to call us names.” (Tr. p. 408) She further testified, “like recently she’s called – like called my sister a bitch and she always – I remember her always used to say, you know, damn you.” *Id.* She concluded by stating, “I mean I love my mom, but I just feel like for the sake of my little brother, you know, I don’t want him to deal with like what I did, especially by himself.” Tr. p. 411) Jane’s ex-husband testified that, “I don’t know that she ever hurt the children, but I know she did a lot of screaming and cussing at them.” (Tr. p. 389)

In addition to her anger issues, Jane demonstrated a consistent inability to understand or adhere to socially acceptable boundaries during the course of the parties’ relationship. As previously mentioned, the downfall of the parties’ relationship started in the Fall of 2013 when Jane started having an extra-marital affair with Bob Smith. (Tr. p. 145) When asked whether or not she thought this kind of action had an impact on J.J.D., Jane first responded with “zero.” (Tr. p. 147) He then paused and stated that J.J.D. benefited by becoming friends with Mr. Smith’s children. (Tr. p. 147-148) This total disregard for boundaries was also echoed by the testimony of the parties’ mutual friend, Johnathan Smith. (Tr. p. 416) She testified about how Jane made unwelcome advances to him in the parties’ marital home in 2010, while John, J.J.D., and Jane’s girls went to town to pick up dinner. (Tr. p. 417-418) Mr. Smith’s testimony corroborated John’s testimony that Jane had impulse control problems. John emotionally testified to the eight known affairs that Jane had on him over the course of the marriage. Jane did not rebut or deny any of these. Further, Jane herself testified to the affair she commenced in October of 2014 with Bob Doe. (Tr. p. 107) John credibly testified to the fact that Jane introduced J.J.D. to Mr. Doe before John was even aware of him. (Tr. 108-109) Again, Jane saw nothing wrong with introducing J.J.D. to her paramour. (Tr. p. 108) Both Jane and Mr. Doe confirmed that J.J.D. had fallen asleep while in bed with them. (Tr. p. 120) In fact, Jane didn’t think any negative consequences could flow from her having J.J.D. fall asleep in the same bed as her paramour and her. (Tr. p. 120) This complete lack of self-awareness and inability to adhere to appropriate boundaries is not in keeping with J.J.D.’s best interests.

The long term best interests of J.J.D. are not served by placing him in Jane’s care. Jane’s history of emotional abuse, physical abuse, promiscuous behavior, impulse control, and lack of boundaries demonstrate that she is not a suitable long term primary caregiver for J.J.D.

**CONCLUSION**

The district court’s grant of primary physical care of J.J.D. to Jane ignored the statutory factors, as well as the long established common law factors to be considered in custodial determinations. Rather, the trial court employed its own test, “if it’s not broke, don’t fix it.” While that test may be appropriate for temporary matters, it is not the well thought out analysis that will result in “placing the child in an environment most likely to bring the child to healthy physical, mental, and social maturity. .” *In re Marriage of Courtade*, 560 N.W.2d 36, 37-38 (Iowa Ct. App. 1996). A careful balancing of the factors laid out in Iowa Code §598.41(4) and *In re Winters*, reveals that J.J.D.’s best interests are served by placing him with John and granting Jane liberal visitation. This court should modify the dissolution decree to grant John primary physical care of J.J.D., and modify Jane’s visitation rights and child support obligation accordingly. Finally, the appellate court should award reasonable attorney fees.

**REQUEST FOR NON-ORAL SUBMISSION**

Counsel respectfully requests that this matter be submitted without oral arguments.

WHEREFORE, Appellant, prays that the District Court’s decision be overturned.

Respectfully submitted,

 /s/ Mark Hinshaw

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**ATTORNEYS’ COST CERTIFICATE**

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS**

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1), because this brief contains 7,654 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).
2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Cambria 14 point font.

/s/ Mark Hinshaw 7/5/16

Mark R. Hinshaw AT0009119 Date

**CERTIFICATE OF FILING**

 The undersigned hereby certifies that on the 7th day of July of 2016, one (1) copy of Appellant’s proof brief was filed via EDMS with the Clerk of the Iowa Supreme Court.

 /s/ Mark Hinshaw

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**PROOF OF SERVICE**

 I certify that on , 20 , I e-mailed a copy of this document to the attorneys of record who are listed below.

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