**IN THE COURT OF APPEALS OF IOWA**

No. 1-167 / 10-1541
Filed April 27, 2011

**IN RE THE MARRIAGE OF KALEENA M. STEINKE AND DONALD J. STEINKE**

**Upon the Petition of**
**KALEENA M. STEINKE,**
Petitioner-Appellant,

**And Concerning**
**DONALD J. STEINKE,**
Respondent-Appellee.

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Appeal from the Iowa District Court for Muscatine County, Bobbi M. Alpers, Judge.

Kaleena Steinke appeals from the decree dissolving her marriage to Donald Steinke. **AFFIRMED IN PART AND MODIFIED IN PART.**

Roger A. Huddle of Weaver & Huddle, Wapello, for appellant.

Robert Dekock of Dekock Law Office, P.C., Muscatine, for appellee.

Heard by Sackett, C.J., and Doyle and Danilson, JJ.

**DOYLE, J.**

Kaleena Steinke appeals from the decree dissolving her marriage to Donald "D.J." Steinke. She contends the district court erred in establishing D.J. to be the equitable father of a child who was born during the parties' marriage but is not the biological child of D.J. Additionally, Kaleena asserts the district court erred in granting D.J. "extensive visitation" with the children, imputing a minimum wage salary to her for child support purposes, and in its distributions of certain marital property. Although D.J. claims no error on the part of the district court, he requests shared physical care of the children or, at the very minimum, extraordinary visitation. Upon our review, we affirm in part and modify in part.

***I. Background Facts and Proceedings*.**

Both Kaleena and D.J. were born in 1986. Kaleena, a year ahead of D.J. in school, began dating D.J. in high school. In 2004, when D.J. was a senior and Kaleena had already graduated, Kaleena became pregnant. The two married on March 12, 2005, after the child was conceived but before the child's birth.

K.S. was born in May 2005, and D.J.'s name was listed on her birth certificate as her father. However, D.J. at some point learned K.S. was not his biological child. Kaleena testified D.J. knew at the time of the parties' marriage K.S. was not his biological child. Conversely, D.J. testified Kaleena told him she was pregnant and he was made to believe he was K.S.'s father. He testified he turned down a college wrestling scholarship to "[do] the right thing" and marry Kaleena and after K.S. was born he began working full-time to support his wife and child. D.J. asserted he first learned K.S. may not be his biological child in approximately 2008, when Kaleena casually mentioned it to him.

During the parties' marriage, D.J. continued to work full time and took college courses. Kaleena stayed home and cared for K.S., except for a brief period when Kaleena worked part-time as a veterinary assistant, earning eight dollars an hour. A second child, M.S., was born to the parties in December 2006 with special needs. Kaleena continued to stay home and care for the children.

In April 2009, Kaleena moved out of the parties' home with the children, and she subsequently filed her petition for dissolution of marriage in May. Her petition stated that both children might be affected by the controversy, and she requested the parties be awarded joint legal custody of the children, with physical care of the children to be placed with her. Thereafter, D.J. filed his answer requesting the parties be awarded joint legal custody with primary physical care[1] with him, or alternatively, shared physical care of the children. In June 2009, the parties agreed to a temporary order providing the parties have joint legal custody of the children with shared physical care.

In August 2009, D.J. sent Kaleena several text messages begging her to come back home. D.J. testified he was despondent over the parties' separation and the fact that Kaleena had begun seeing another man. He also sent numerous text messages threatening to commit suicide after he learned Kaleena was pregnant. Kaleena called the police and D.J.'s parents over D.J.'s suicide threats. D.J.'s parents rushed D.J. to the hospital, and D.J. was voluntarily hospitalized for a few days. He then began seeing a therapist and was prescribed medication. At the time of trial, D.J. testified that he was no longer

[1] Although the term "primary physical care" is not defined in Iowa Code chapter 598 (2009), we nevertheless use the term in this opinion since it was used by the parties.

taking medication, as known by his therapist, and he had the ability to contact his therapist at any time if needed. He testified that he had matured after the hospitalization, having hit rock bottom and then receiving treatment he needed. After the incident, the temporary custody order was changed to require D.J. have only supervised visitation with the children.

In September 2009, D.J. was arrested following a confrontation during a custody exchange with Kaleena. When D.J. arrived with his aunt to pick up the children, Kaleena was in her vehicle with her sister, Kelsie, and the children. Kelsie was holding a video camera recording the exchange. D.J. became unhappy about the camera and smacked Kelsie's arm holding the camera. Kelsie reported that when she continued to film, D.J. again hit her arm, knocking the camera into her face. Kaleena stated D.J. then took M.S. from the car. Kaleena said she got out of the car to take M.S. back, and D.J. shoved her to the ground, causing her to scrape her arm. D.J. admitted to pushing Kaleena away from him, but claimed Kaleena's fall was acting. D.J. was ultimately arrested and charged with assault causing bodily injury for the incident with Kelsie and domestic abuse assault causing bodily injury for shoving Kaleena. A criminal no-contact order was put in place between D.J. and Kaleena. Kaleena initially did not allow D.J. to have contact with the children; however the court continued supervised visitation for D.J. D.J. later pled guilty to the amended charge of simple assault, and the domestic assault charge was dismissed.

The custody exchange confrontation was reported to the Iowa Department of Human Services (Department). After opening an assessment, the Department found D.J. failed to provide proper supervision, as a "reasonable and prudent

person would not engage in physical altercations with children present," and it confirmed the child abuse report. Although the report was determined to be founded, the Department found the incident was "minor, isolated, and less likely to reoccur" because it was the first time a physical altercation had occurred between D.J. and Kaleena, steps had been taken to prevent it from reoccurring again, including receiving a no-contact order, and the incident was "minor as D.J. pushed Kaleena away from him during the incident while holding [M.S.]."

In January 2010, DNA testing confirmed D.J. was not the biological father of K.S., and a guardian ad litem (GAL) was appointed for the children. Thereafter, D.J. filed an amended answer continuing to request joint legal custody of the children with him having primary care of the children. However, his answer further requested "that he should be designated as the equitable father of [K.S.]." In April 2010, Kaleena gave birth to her third child, I.B. DNA testing established D.J. was not the biological father of that child.

In May 2010, the GAL filed her report to the court, recommending that D.J. and Kaleena have shared physical care with joint legal custody of K.S. and M.S. The GAL opined that D.J. should be treated as K.S.'s equitable and legal father, explaining:

> I realize that the case law does not find in favor of equitable parenthood. However, . . . I do believe it is in [K.S.'s] best interests that [D.J.] is treated as "Daddy." He married Kaleena in high school when Kaleena was pregnant with [K.S.]. The assumption was that [D.J.] was the biological father of the then unborn [K.S.]. They lived together as father, mother, and child through pregnancy, birth, and until approximately May 2009, when this divorce action was filed. [D.J.] is the father that [K.S.] grew up with. He is the father that she relates to as "Dad." Plus, the biological father is unknown and has never been involved with [K.S.]. It would be unconscionable to remove the child from [D.J.] in that way. In essence, it would

> bastardize the child. Furthermore, if it wasn't for a DNA test taken during the course of this divorce, everyone would still believe that [D.J.] was the biological father of [K.S.].

Trial was held on May 18 and 19, 2010. Kaleena requested joint legal custody of the children with primary physical care placed with her. Additionally, Kaleena asked the court to find that both K.S. and I.B. were not D.J.'s biological children, despite the fact that those children were born during the parties' marriage. D.J. agreed he should be disestablished as the father of I.B., but requested he be found to be K.S.'s equitable parent. Both parties requested certain property be returned to them.

Following trial, the district court entered its findings of fact, conclusions of law, and decree of dissolution. The court found D.J. should be disestablished as the legal father of I.B.[2] As to K.S., the court recognized the DNA testing established D.J. was not the biological father of K.S. The court then went on to consider whether D.J. should be considered K.S.'s "equitable father." The court, relying on *In re Marriage of Gallagher*, 539 N.W.2d 479 (Iowa 1995), found that "[e]quity in this case require[d] that D.J. be determined to be [K.S.'s] legal father as originally established on her birth certificate," and that it "must provide D.J. the full rights connected with that paternity." The court then awarded the parties joint legal custody of the children, and it designated Kaleena as the primary provider of the children's physical care with visitation for D.J. The court also found that although Kaleena indicated her intention to continue to be a stay-at-home mother, she should be imputed with minimum wage income for purposes of child

[2] The disestablishment of D.J.'s paternity to I.B. is not challenged by the parties, and we accordingly do not address the issue on appeal.

support. The court further found that Kaleena was required to reimburse $831 to D.J. for a refrigerator she took belonging to D.J.

Thereafter, Kaleena filed a motion to enlarge or amend the district court's decree. Kaleena argued the court's visitation arrangement allowing D.J. to have visitation with the children every weekend instead of every other weekend was not consistent with the parties' previous arrangement and requested his visitation be reduced. Regarding the refrigerator, Kaleena requested to simply return the refrigerator rather than reimburse D.J. for the appliance. Kaleena further requested that the court address two issues it did not include in the decree: the parties' 2008 tax refund and the cost of the paternity testing, asserting D.J. should reimburse her half of the amount of the refund and half of the costs of the paternity testing.

On September 9, 2010, the court entered its order further clarifying the parties' visitation schedule, but it did not reduce the amount of D.J.'s visitation. The court denied Kaleena's other requests. The court expressly awarded D.J. the full amount of the tax refund as "reimbursement for the costs he bore during the separation for the monthly mortgage and utility costs of the [parties'] two homes until that real property could be sold."

Kaleena now appeals.

***II. Scope and Standards of Review.***

As an equitable action, we review dissolution proceedings de novo. Iowa R. App. P. 6.907; *In re Marriage of Fennelly*, 737 N.W.2d 97, 100 (Iowa 2007). We examine the entire record and decide anew the legal and factual issues properly presented and preserved for our review. *In re Marriage of Rhinehart*,

704 N.W.2d 677, 680 (Iowa 2005). We accordingly need not separately consider assignments of error in the district court's findings of fact and conclusions of law but make such findings and conclusions from our de novo review as we deem appropriate. *Lessenger v. Lessenger*, 261 Iowa 1076, 1078, 156 N.W.2d 845, 846 (1968). We, however, give weight to the district court's findings of fact, especially when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 6.904(3)(*g*); *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006). A district court "is greatly helped in making a wise decision about the parties by listening to them and watching them in person." *In re Marriage of Vrban*, 359 N.W.2d 420, 423 (1984). "In child custody cases, the first and governing consideration of the courts is the best interests of the child[ren]." Iowa R. App. P. 6.904(3)(*o*); *see also Lambert v. Everist*, 418 N.W.2d 40, 42 (Iowa 1988).

***III. Discussion*.**

On appeal, Kaleena contends the district court erred in finding D.J. to be the equitable father of K.S. Additionally, Kaleena asserts the district court erred in granting D.J. "extensive visitation" with the children and in imputing a minimum wage salary to her for child support purposes. She also argues the district court erred in requiring her to reimburse D.J. for the refrigerator rather than returning the appliance and in denying her requests for reimbursement for half of the parties' tax refund and her costs of the paternity testing. D.J. requests he receive shared physical custody of the children or extraordinary visitation rights. We address their arguments in turn.

***A. Equitable Parent Doctrine*.**

The equitable parent doctrine refers to the "principle that a spouse who is not the biological parent of a child born or conceived during the marriage may, in a divorce action, be considered the child's natural father or mother . . . ." Black's Law Dictionary 579 (8th ed. 2004); *see also* 67A C.J.S. *Parent and Child* § 345, at 426-27 (2002). One of the first courts to adopt the doctrine was the Michigan Court of Appeals in *Atkinson v. Atkinson*, 408 N.W.2d 516, 519 (Mich. Ct. App. 1987). In *Atkinson*, the court developed a three-part test to determine whether a husband should be granted parental status in a custody dispute. 408 N.W.2d at 519. Under that test,

> a husband who is not the biological father of a child born or conceived during the marriage may be considered the natural father of that child where (1) the husband and the child mutually acknowledge a relationship as father and child, or the mother of the child has cooperated in the development of such a relationship over a period of time prior to the filing of the complaint for divorce, (2) the husband desires to have the rights afforded to a parent, and (3) the husband is willing to take on the responsibility of paying child support.

*Id*.

The Iowa Supreme Court first considered whether to adopt the equitable parent doctrine in Iowa in *In re Petition of Ash*, 507 N.W.2d 400 (Iowa 1993). In *Ash*, the district court, relying heavily on *Atkinson*, determined Ash was the "equitable parent" of a child despite the fact he was not the child's biological parent nor was he married to the child's mother. *Ash*, 507 N.W.2d at 402. On appeal, our supreme court reversed the district court's determination and rejected the adoption of the equitable parent doctrine in Iowa, explaining:

Iowa case law recognizes that a stepparent cannot be considered a natural parent against the stepparent's will and cannot be required to pay child support. The logical extension of our case law is that a stepparent is not treated as a natural parent and is, therefore, not entitled to visitation.

Second, in the legal sense, [Ash] is a stranger to the child. He is an interested third party. He is not the child's biological father. He is not her adoptive father. He is not her stepfather. He is not her foster parent. He never married the child's mother. He is merely a man who lived with—and cared for—her mother, and who, understandably, became smitten with fatherhood after the child's birth. So [Ash] does not even meet the *Atkinson* definition of equitable parent.

It is apparent that [Ash] loves the child. He treats her like his daughter. He has, since her birth, assumed the responsibilities and—until his visitation was cut off—enjoyed the privileges of fatherhood. Up to the time visitation was interrupted, [Ash] and the child unquestionably enjoyed an appropriate, nurturing, father-daughter relationship.

Nevertheless, [Ash] has no legal basis for asserting parental status. This conclusion is consistent with our recent holdings in the three visitation cases cited earlier, [*Lihs v. Lihs*, 504 N.W.2d 890, 891 (Iowa 1993) (minor children of deceased's second marriage have no common law or statutory right to visitation with minor children of deceased's first marriage), *In re Marriage of Freel*, 448 N.W.2d 26, 27-28 (Iowa 1989) (woman who had lived with child and his father for five years but was not child's biological mother had no common law or statutory right to visitation with child after ceasing to live with father), and *Olds v. Olds*, 356 N.W.2d 571, 574 (Iowa 1984) (maternal grandparents were without any common law or statutory right to petition for visitation with grandchildren when their own daughter had custody of grandchildren)]. In those cases, several third parties outside the realm of legitimate claimants sought visitation with children with whom they had some special relationship. And, while we sympathized with their plight, we consistently refused to grant visitation. The reason was simple: absent any statutory or common law authority authorizing such relationships, our courts lack the power to order visitation in such circumstances.

The same constraints and policy reasons cited earlier in *Olds* and *Lihs* apply with equal force to questions of paternity. In the final analysis, we find no statutory or common law basis for [Ash's] paternity claim. Straining to legitimize such an action under current law would foster a superfluity of claims by parties who shared a special relationship with children based neither upon affinity nor consanguinity.

*Id*. at 404 (internal citations omitted).

The court again rejected the adoption of the equitable parent doctrine a year later in *In re Marriage of Halvorsen*, 521 N.W.2d 725 (Iowa 1994). The court noted it had previously rejected the doctrine in *Ash*, and further explained:

> Even if we were to recognize the doctrine as defined in *Atkinson*, [the husband] would not satisfy the definitional requirement because he was not married to [the child's mother] at the time the child was born or conceived.

*Halvorsen*, 521 N.W.2d at 728. The court also declined to apply the doctrine of equitable estoppel, noting it had not previously applied that doctrine where paternity was the issue. *Id*. In any event, the court further found the doctrine was inapplicable in that case because the husband could not demonstrate by clear and convincing evidence that he had a lack of knowledge of the true fact that he was not the biological father of the child. *Id*.

The equitable parent doctrine again came before the Iowa Supreme Court in *In re Marriage of Gallagher*, 539 N.W.2d 479 (Iowa 1995). In *Gallagher*, it was revealed a few weeks before the Gallaghers' dissolution of marriage trial that the husband was not the natural father of a child conceived and born during their marriage. *Gallagher*, 539 N.W.2d at 480. The husband sought custody, but the district court determined the husband, as neither biological nor adoptive father, had no parental rights, and it "also expressly rejected the theory of equitable estoppel . . . ." *Id*. On appeal, the supreme court, in a five to four decision, reversed and remanded, concluding "*Ash* [was] not controlling under the circumstances" in *Gallagher*. *Id*.

The majority in *Gallagher* distinguished *Ash*, reasoning:

> The facts assumed in the adjudication here are far different. Here the biological fact of nonpaternity appeared unexpectedly in contradiction of an existing family relationship. In every way, [the child] was received by both [the husband] and [the mother] as their daughter, and the family relationship developed accordingly. [The husband] was no stranger, or even a mere stepfather. The facts here demonstrate how different it is when a child is born into a marriage, even though (unknown to the [husband]) it is conceived outside it.
>
> The relationship between the husband and child in such a situation is highly likely to be much closer than those between a child and a man whose relationship is derived only as an adjunct to that man's relationship with the child's mother. Where both the child and the husband reasonably believe they share a biological relationship, the bonding should-and can be expected to-develop to such a stage that its rupture might be devastating to both. Devastation to the child is of course the first and paramount concern because the best interest of the child is the dominating consideration in all child custody disputes.
>
> *Ash* furnished no factual basis for adoption of the equitable parent doctrine in Iowa. Applying general equitable principles, however, we believe equitable parenthood may be established in a proper case by a father who establishes all the following: (1) *he was married to the mother when the child is conceived and born*; (2) he reasonably believes he is the child's father; (3) he establishes a parental relationship with the child; and (4) shows that judicial recognition of the relationship is in the child's best interest.

*Id*. (internal citations omitted) (emphasis added). The court then remanded the case for further proceedings for the husband to establish the adjudication he sought was in the child's best interests. *Id*. at 482.

However, the majority in *Gallagher* observed that the Iowa legislature, a year after the court's decision in *Ash*, had enacted Iowa Code section 600B.41A (1994), which set forth the statutory procedure for the establishment and disestablishment of paternity. *Id*. at 483 (citing 1994 Iowa Acts, ch. 1171, § 48). It noted that although section 600B.41A was not argued in *Gallagher*, section 600B.41A "may control future cases presenting similar issues." *Id*. A vigorous

dissent followed the majority opinion, arguing that precedent and policy required the rejection of the equitable parent doctrine. *See id*. at 483-88.

In *Treimer v. Lett*, 587 N.W.2d 622 (Iowa Ct. App. 1998), the issue of overcoming paternity under Iowa Code section 600B.41A was raised before this court. In that case, a child was born during the marriage who was not the biological child of the husband. *Treimer*, 587 N.W.2d at 623. The wife and the child's biological father filed separate petitions to establish the biological father's paternity. *Id*. The husband filed motions to dismiss both petitions. *Id*. The district court sustained the husband's motions, finding the biological father did not have standing to bring the paternity action because he was not the "established father" or "legal representative," as required under section 600B.41A(3)(a)(1). *Id*. The court also dismissed the wife's cross-petition on grounds of issue preclusion/res judicata. *Id*.

On our review, we found "[t]he procedure to overcome paternity is strictly statutory," citing section 600B.41A. *Id*. Because that section did not give a biological father standing to overcome an established father's paternity, we affirmed the district court's dismissal of the biological father's petition. *Id*. However, we reversed the district court's dismissal of the wife's petition on the ground of issue preclusion, finding it was not necessary for the court to establish paternity in determining custody and support in the dissolution. *Id*.

The Iowa Supreme Court in *Callender v. Skiles*, 591 N.W.2d 182, 186 (Iowa 1999), recognized the legislative distinction between an action to establish paternity and an action to overcome paternity. In *Callendar*, a child was born and conceived during the Skiles's marriage that was not the husband's biological

child. *Callender*, 591 N.W.2d at 184. After the biological father learned he was the father of the child, he filed an application for visitation with the child, and he sought to have the husband's parental rights to the child terminated. *Id*. Like in *Treimer*, the district court dismissed the biological father's application because he lacked standing. *Id*.; *Treimer*, 587 N.W.2d 623.

Relevant here, the supreme court clarified on appeal:

> Paternity may be determined at law or equity in Iowa. *See In re Marriage of Stogdill*, 428 N.W.2d 667, 670 (Iowa 1988). Our statutes permit the issue to be determined in equity under Iowa Code chapter 252A or chapter 598. *Id*. It may be determined at law under chapter 600B. *Id*. At common law, an action to determine paternity was not recognized. *State ex rel. Bishop v. Travis*, 306 N.W.2d 733, 734 (Iowa 1981); 14 C.J.S. *Children Out of Wedlock* § 70, at 358 (1991) (right to determine paternity did not exist at common law, but is entirely statutory).

*Callender*, 591 N.W.2d at 185. However, once paternity has been established by operation of law, our legislature has set forth the procedure to overcome the established paternity in section 600B. *See id*. at 186. The court in *Callender* determined the husband to be the child's "established father," explaining:

> Although the term "established father" is not expressly defined by our legislature, companion statutes make it clear it refers to paternity which has been established by some means authorized by law. *See* [Iowa Code] § 600B.41A(1); *Dye v. Geiger*, 554 N.W.2d 538, 539 (Iowa 1996). The law deems [the husband] to be [the child's] father by virtue of his marriage to [the child's mother]. We acknowledge blood tests can lead to the establishment of paternity, but they do not establish paternity without a court order. *See id*. § 600B.41. Thus, [the biological father] does not become the established father by virtue of the blood tests that have been taken in this case. [The husband], not [the biological father], is the established father of [the child]. [The biological father] is not authorized under section 600B.41A(3) to commence an action to overcome paternity.

*Callender*, 591 N.W.2d at 185 (internal footnote omitted). Because there was no paternity to establish, and because section 600B.41A(3) did not authorize the biological father to commence an action to overcome paternity, the court determined the biological father was not an "interested person" under section 600B.8 such that he could file a petition to overcome the established father's paternity under that section. *Id*. at 186.

Based upon the foregoing principles, we agree with Kaleena that the district court erred in relying upon the *Gallagher* decision to recognize D.J. as K.S.'s equitable father.[3] For the following reasons, we modify the district court's conclusion.

It is clear after *Ash* was decided our legislature enacted the exclusive procedures to overcome established paternity under chapter 600B, as confirmed by our supreme court. *See Callender*, 591 N.W.2d at 185-86; *Treimer*, 587 N.W.2d at 623; *see also Gallagher*, 539 N.W.2d at 480. Here, K.S. was born during the parties' marriage, and D.J.'s name was placed on K.S.'s birth certificate. Pursuant to Iowa Code sections 252A.3(4) and 144.13(2) (2009),[4]

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[3] Even if we were to decide that *Gallagher* permits district courts to establish a husband as an "equitable parent," the language of *Gallagher* is clear: "[E]quitable parenthood may be established in a proper case by a father who establishes all the following: (1) he was married to the mother when the child is conceived and born . . . ." *Gallagher*, 539 N.W.2d at 480. D.J. was not married to Kaleena when K.S. was conceived. We find the district court erred in determining *Gallagher* applied to establish D.J. as K.S.'s equitable father.

[4] Section 252A.3(4) provides:

> A child or children born to parents who, at any time prior or subsequent to the birth of such child, have entered into a civil or religious marriage ceremony, shall be deemed the legitimate child or children of both parents, regardless of the validity of such marriage.

Additionally, section 144.13(2) states in pertinent part: "If the mother was married at the time of conception, birth, or at any time during the period between conception and birth,

D.J. is K.S.'s established father by operation of law. *See also Callender*, 591 N.W.2d at 185 n.1. Because D.J. is K.S.'s established father, the statutory procedures of section 600B.41A must be followed to overcome his established paternity. Although Kaleena raised the issue of disestablishing D.J.'s paternity before the district court, Kaleena did not strictly follow the statutory procedures to overcome D.J.'s established paternity as provided in section 600B.41A(3). In fact, section 600B.41A(3) was never even raised nor considered by the district court.

Because the statutory procedure was not followed in this case, we find the district court erred in considering whether D.J.'s paternity should be disestablished and in proceeding to recognize D.J. as K.S.'s equitable father. The district court should have concluded that D.J. continued to be the established father of K.S. because Kaleena never disestablished D.J.'s paternity under section 600B.41A(3) as required. Accordingly, we modify the district court's decree to find that D.J. remains the established father of K.S. unless and until such time his paternity is overcome as set forth in section 600B.41A(3). Then, should D.J.'s paternity be overcome, D.J. may nevertheless attempt to preserve his paternity by satisfying the requirements of section 600B.41A(6)(a)(1) through (3).[5]

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the name of the husband shall be entered on the certificate as the father of the child . . . ."

[5] Section 600B.41A(6) provides that if established paternity has been overcome as authorized in section 600B.41A(3), the district court may nevertheless preserve the established paternity determination, but only if all of the following apply:

> (1) The established father requests that paternity be preserved and that the parent-child relationship, as defined in section 600A.2, be continued.

***B. Physical Care*.**

In child custody cases the first and governing consideration is the best interests of the children. Iowa Code § 598.41(3). Neither party disputes the award of joint legal custody, only physical care. *See In re Marriage of Hansen*, 733 N.W.2d 683, 690 (Iowa 2007) ("Legal custody" carries with it certain rights and responsibilities, including but not limited to "decision-making affecting the child's legal status, medical care, education, extracurricular activities, and religious instruction."). "Physical care" involves the right and responsibility to maintain a home for the minor child and provide for routine care of the child. *Id*. If joint physical care is awarded, "both parents have rights to and responsibilities toward the child including, but not limited to, shared parenting time with the child, maintaining homes for the child, [and] providing routine care for the child . . . ." Iowa Code § 598.1(4). Even though the parties disagree on some matters, these problems should be able to be resolved to the benefit of the children. *See In re Marriage of Gensley*, 777 N.W.2d 705, 716 (Iowa Ct. App. 2009).

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(2) The court finds that it is in the best interest of the child to preserve paternity. In determining the best interest of the child, the court shall consider all of the following:

(a) The age of the child.

(b) The length of time since the establishment of paternity.

(c) The previous relationship between the child and the established father, including but not limited to the duration and frequency of any time periods during which the child and established father resided in the same household or engaged in a parent-child relationship as defined in section 600A.2.

(d) The possibility that the child could benefit by establishing the child's actual paternity.

(e) Additional factors which the court determines are relevant to the individual situation.

(3) The biological father is a party to the action and does not object to termination of the biological father's parental rights, or the established father petitions the court for termination of the biological father's parental rights and the court grants the petition pursuant to chapter 600A.

In determining whether to award joint physical care or physical care with one parent, the district court is guided by the factors enumerated in section 598.41(3), as well as other nonexclusive factors enumerated in *Hansen*, 733 N.W.2d at 696-99, and *In re Marriage of Winter*, 233 N.W.2d 165, 166-67 (Iowa 1974). *See Hansen*, 733 N.W.2d at 698 (holding that although section 598.41(3) does not directly apply to physical care decisions, "the factors listed [in this code section] as well as other facts and circumstances are relevant in determining whether joint physical care is in the best interest of the child"). Although consideration is given in any custody dispute to allowing the children to remain with a parent who has been the primary caretaker, *see id*. at 696, the fact that a parent was the primary caretaker of the child prior to separation does not assure an award of physical care. *See In re Marriage of Toedter*, 473 N.W.2d 233, 234 (Iowa Ct. App. 1991). The ultimate objective of a physical care determination is to place the children in the environment most likely to bring them to healthy physical, mental, and social maturity. *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999); *In re Marriage of Courtade*, 560 N.W.2d 36, 38 (Iowa Ct. App. 1996). As each family is unique, the decision is primarily based on the particular circumstances of each case. *Hansen*, 733 N.W.2d at 699.

In this case, it is clear both parties love and care for the children, and both parents are willing and able to serve as care providers for the children. However, Kaleena has been the primary caregiver for the children throughout their lives, while D.J. has been the breadwinner of the family. Although the GAL recommended joint physical care, the district court found, after considering the evidence and applicable law, the best interests of the children were served by

designating Kaleena as the primary provider of the children's physical care, with D.J. receiving liberal visitation. The court reflected that this arrangement "more closely mirror[ed] the way the children had been cared for during the marriage and the separation periods."

Where the children would flourish in the care of either parent, the choice of physical care necessarily turns on narrow and limited grounds. In close cases, we give careful consideration to the district court's findings. *In re Marriage of Wilson*, 532 N.W.2d 493, 495-96 (Iowa Ct. App. 1995). Upon our de novo review of the facts and circumstances in this case, we find no reason to disturb the district court's award of primary physical care of the parties' children to Kaleena. Accordingly, we affirm the physical care decision of the district court.

***C. Visitation*.**

In establishing visitation rights, our governing consideration remains what is in the best interests of the children. *In re Marriage of Stepp*, 485 N.W.2d 846, 849 (Iowa Ct. App. 1992). When determining the proper amount of visitation in a given case, we are guided by the principle that a court should order the amount of visitation that will ensure the children the "opportunity for the maximum continuing physical and emotional contact with both parents." Iowa Code § 598.41(1)(a).

The court's ruling provides that when D.J. does not work on Friday, he shall have the children from 3:30 p.m. on Thursday until 8:30 p.m. on Saturday. When D.J. works on Friday, he shall have the children on Thursday from 3:30 p.m. until 8:30 p.m., and then again Friday from 3:30 p.m. until noon on Sunday. The decree further allocates visitation for holidays and summer vacation.

Kaleena complains the number of visits allowed under the visitation schedule is excessive, while D.J. maintains the number of visits is not enough.

Upon our de novo review of the record, we conclude the provision establishing D.J.'s weekly visitation with the children strikes the proper balance and is in the children's best interests. We find no merit in Kaleena's argument that "D.J. has shown a total inability to have safe and stable parenting . . . time with the [children]" such that the court should limit his visitation to every other weekend. We agree with the district court, which had the opportunity to observe the parties and hear their testimony, that "D.J. has addressed the depression issues which initially caused difficulty between him and Kaleena at the time of the parties' separation." The schedule allows D.J. to have the children for two overnights a week, and it allows both parents to each have an opportunity to take the children to church. This arrangement is similar to the parties' stipulated arrangement during the course of these proceedings, and it affords the children stability. We find no reason to disturb the visitation schedule set by the district court. We affirm on this issue.

***D. Imputed Income to Kaleena.***

Kaleena argues the district court improperly imputed income to her. We disagree.

"In setting an award of child support, it is appropriate to consider the earning capacity of the parents." *In re Marriage of Flattery*, 537 N.W.2d 801, 803 (Iowa Ct. App. 1995). However, before the court utilizes earning capacity rather than actual earnings, a finding must be made that if actual earnings were used, a substantial injustice would result or that adjustments would be necessary to

provide for the needs of the child and to do justice between the parties. *Id*.; *see also* Iowa Ct. R. 9.11(4). Although Kaleena is correct that the district court did not make explicit factual findings in this regard, because our review is de novo we may make our own findings and conclusions on the issues properly raised before us. *See Lessenger*, 261 Iowa at 1078, 156 N.W.2d at 846. In making this determination, we examine not only present earnings but also such things as employment history, earnings history, and reasons for the parties' current employment situation. *In re Marriage of Nelson*, 570 N.W.2d 103, 106 (Iowa 1997).

Upon our de novo review we conclude a substantial injustice would result to D.J. if Kaleena's actual earnings were used to determine his child support obligation rather than imputing to her at least minimum wage income. Clearly, Kaleena has the current capacity to earn at least minimum wage income. Although we recognize her desire to stay home and care for her children, and we in no way fault her for this decision, this does not preclude the imputation of income to her in order to do justice between the parties in setting child support. *See Moore v. Kriegel*, 551 N.W.2d 887, 889 (Iowa Ct. App. 1996) ("While we respect a parent's wish to remain at home with his or her children, we cannot look at this fact in isolation in determining earning capacity."). "Both parents have a legal obligation to support their children, not necessarily equally, but in accordance with his or her ability to pay." *In re Marriage of Blum*, 526 N.W.2d 164, 165 (Iowa Ct. App. 1994). Because we conclude it would be unfair and result in substantial injustice to D.J. to determine his support obligation based only on Kaleena's actual income when she has the ability to earn at least

minimum wage income, we conclude the district court did not err in imputing minimum wage income to Kaleena for purposes of determining D.J.'s child support obligation.

***E. Distribution of Marital Property*.**

Partners to a marriage are entitled to a just and equitable share of the property accumulated during the marriage through their joint efforts. *In re Marriage of Miller*, 552 N.W.2d 460, 463 (Iowa Ct. App. 1996). Iowa law does not require an equal division or percentage distribution, but rather merely requires us to determine what is fair and equitable under the circumstances. *In re Marriage of Russell*, 473 N.W.2d 244, 246 (Iowa Ct. App. 1991). In determining what division would be equitable, courts are guided by the criteria set forth in section 598.21(5). *In re Marriage of Goodwin*, 606 N.W.2d 315, 319 (Iowa 2000). We look to the economic provisions of the decree as a whole in assessing the equity of the property division. *In re Marriage of Dean*, 642 N.W.2d 321, 325 (Iowa Ct. App. 2002). The district court is afforded wide latitude, and we will disturb the property distribution only when there has been a failure to do equity. *In re Marriage of Schriner*, 695 N.W.2d 493, 496 (Iowa 2005).

The district court awarded Kaleena her vehicle, valued at $3380, and D.J. his two vehicles, their combined value at $1575. The district court equally divided the parties' remaining assets except for the amounts the court determined D.J. was entitled to for the improvement and upkeep of the parties' two houses. The court declined to award Kaleena half of the parties' 2008 tax refund, finding the tax refund was reimbursement to D.J. "for the costs he bore

during the separation for the monthly mortgage and utility costs of the [parties'] two homes until that real property could be sold." The court required Kaleena to reimburse D.J. for the refrigerator she took belonging to him rather than simply return the appliance, and it declined to require D.J. reimburse Kaleena for half of the paternity test costs.

Upon our de novo review, we find no error in the court's property distribution. Although D.J. testified that returning the appliance to him would be fine, we cannot say that the court failed to do equity in requiring Kaleena to reimburse D.J. for the appliance rather than simply return the appliance to him. The testimony indicates the appliance was working when Kaleena took it. Her testimony concerning the refrigerator after she took it was vague; Kaleena testified the refrigerator was in a shed in Illinois at the time of trial. Additionally, the district court found D.J. was entitled to the full tax refund because D.J. made all of the parties' house payments and utility payments during the pendency of the dissolution. Finally, given the results of the paternity tests, we agree Kaleena should bear the burden of their costs. We therefore affirm the district court on this issue.

***IV. Conclusion*.**

Because the statutory procedure concerning the disestablishment of paternity was not followed in this case, we find the district court erred in considering whether D.J.'s paternity should be disestablished and in proceeding to recognize D.J. as K.S.'s equitable father based upon the *Gallagher* decision. The district court should have concluded that D.J. continued to be the established father of K.S. because Kaleena never disestablished D.J.'s paternity

under section 600B.41A(3) as required. Accordingly, we modify the district court's decree to find that D.J. remains the established father of K.S. unless and until such time his paternity is overcome as set forth in section 600B.41A(3). We affirm the district court's decree in all other respects.

**AFFIRMED IN PART AND MODIFIED IN PART.**