

IN THE COURT OF APPEALS OF IOWA

No. 7-786 / 97-0963

000295

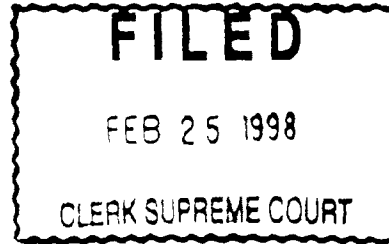
**IN RE THE MARRIAGE OF KENNETH P. SCHMITZ
AND AUDREY M. SCHMITZ**

**Upon the Petition of
KENNETH P. SCHMITZ,**

Petitioner-Appellant,

**And Concerning
AUDREY M. SCHMITZ,**

Respondent-Appellee.



Appeal from the Iowa District Court for Woodbury County, Michael S. Walsh,
Judge.

Petitioner appeals the provisions of the parties' dissolution decree.

AFFIRMED.

Elizabeth A. Rosenbaum, Sioux City, for appellant.

Francis L. Goodwin of Baron, Sar, Goodwin, Gill & Lohr, Sioux City, for
appellee.

Considered by Cady, C.J., and Sackett and Mahan, JJ.

MAHAN, J.

Kenneth Schmitz appeals the provisions of the parties' decree of dissolution. He contends the trial court erred in: (1) awarding Audrey Schmitz primary physical care of the parties' minor children; (2) allowing Catherine Alexandra to testify and placing weight on that testimony; and (3) awarding the parties' home to Audrey. We affirm.

Kenneth and Audrey married in October 1982. They have two minor children, Louis, who is 13, and Michelle, who is 12. Kenneth also has custody of Eric, his son from a previous marriage, and Audrey has custody of Heather, her daughter from a previous marriage. Kenneth is sixty-two and Audrey is forty-two.

Kenneth alleges he assumed approximately seventy-five percent of the parenting responsibilities because Audrey was irresponsible. Kenneth contends Audrey is not close with either of their children. He claims Audrey's relationship with Louis is quite volatile and her relationship with Michelle is one of spending, entertainment, and watching television. He claims Audrey spent an average of only forty-five minutes per day with the children. Kenneth claims he is the one who woke the children, fed them breakfast, and got them ready for school. Kenneth also claims Audrey is severely financially irresponsible.

Audrey contends Kenneth's allegations are false. She claims Kenneth withdrew from their relationship, including a period following the discovery of her second pregnancy, when Kenneth and Audrey did not have a meaningful conversation

for six months. Audrey claims she did not fail to take care of the children; Kenneth took away her responsibilities and attempted to push her out of the family. She alleges Kenneth would try to get out of bed before her so he could cook breakfast, and he would cook dinner and the children would eat at four in the afternoon so that they had already eaten when she arrived home from work. She claims Kenneth began to undermine her discipline by reversing and setting aside her decisions. She asserts many of Kenneth's actions were identical to the type of behavior pattern Kenneth displayed in his first marriage to Catherine Alexandra.

I. STANDARD OF REVIEW. Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

II. TESTIMONY BY CATHERINE ALEXANDRA. Kenneth contends Catherine Alexandra, his first wife, should not have been allowed to testify and the trial court erred in placing weight on her testimony. Audrey argues Kenneth has failed to preserve error on this issue.

At the hearing, Kenneth's counsel objected to Audrey's testimony, "Your Honor, excuse me. If you could strike the witness's answer. I'm going to object for the record to this line of testimony in that it's not pertinent to the dissolution at hand."

Counsel later renewed her objection because the marriage between Catherine and Kenneth was a different marriage. In his brief, Kenneth complains about Catherine's testimony because she has a long history of mental difficulties and because her testimony made it clear she harbored a great deal of animosity toward Kenneth. He alleges Catherine has been unable to accept the fact primary physical care of Eric was taken away from her and given to Kenneth.

We find these are different objections and Kenneth failed to preserve the issues he argues in his brief. It is our function to review a trial court's consideration of arguments raised before it. *Podraza v. City of Carter Lake*, 524 N.W.2d 198, 198 (Iowa 1994). It is not our function to hear arguments counsel chooses to raise for the first time in this forum. *Id.*

However, assuming arguendo that error had been preserved, this is an equity case involving the best interests of the children. We find the trial court properly admitted the testimony of Catherine Alexandra subject to objection.

III. PRIMARY PHYSICAL CARE. The critical issue before us is the best interests of the children. *Heyer v. Peterson*, 307 N.W.2d 1, 7 (Iowa 1981). This must, of necessity, be the first and controlling consideration in our discussion. The factors the court considers in awarding custody are enumerated in Iowa Code section 598.41; *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983); *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). The issue in determining the best interests of the children 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 attempting to gain custody in a dissolution proceeding. *In re Marriage of Ullerich*, 367 N.W.2d 297, 299 (Iowa App. 1985). This decision requires selection of a custodial parent who can minister more effectively to the long-range best interests of the children. *Winter*, 223 N.W.2d at 167. The objective should always be to place the children in the environment most likely to bring them to a healthy physical, mental, and social maturity. *In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa App. 1996). Each custody decision is based on its own particular facts. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992).

The allegations made by both parties are serious. The determination of which party is telling the truth depends largely upon credibility and believability. The trial court had the ability to see the witnesses and their demeanor. Most importantly, the trial court saw Kenneth and Audrey. In its ruling, it is clear the trial court believed Audrey's version of events. We find nothing in the record to demonstrate the trial court was incorrect in its determination. We affirm the trial court's award of primary physical care to Audrey.

IV. OWNERSHIP AND POSSESSION OF THE FAMILY HOME.

Kenneth contends the trial court erred in awarding the family home to Audrey because he made all of the house payments, cared for the home, maintained its upkeep, and undertook remodeling projects. At the dissolution hearing, Kenneth

argued he should be awarded the home even if he was not awarded primary physical care of the children.

When dividing property, Iowa courts are directed to consider, “the desirability of awarding the family home or the right to live in the family home for a reasonable period to the party having . . . physical care of the children.” Iowa Code § 598.21(1)(g) (1997). The parties had virtually no equity in the home. The trial court found it would be in the best interest of Louis and Michelle to remain in the same home they live in now because it would provide stability to their lives, having grown up in the home. The trial court awarded Audrey the home and ordered her to be solely responsible for the mortgage and any other expenses. We agree with the trial court’s award.

V. ATTORNEY FEES. Both parties request appellate attorney fees. In determining whether to award attorney fees on appeal, our decision is guided by the needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal. *In re Marriage of Geil*, 509 N.W.2d 738, 743 (Iowa 1993). We award Audrey \$500 in appellate attorney fees and deny Kenneth’s request.

For these reasons, we affirm the decree of dissolution as entered by the trial court.

AFFIRMED.