IN THE COURT OF APPEALS OF IOWA

No. 6-648 / 96-0113

IN RE THE MARRIAGE OF NICALA E. INGLEBRIGHT AND DENNIS L. INGLEBRIGHT

Upon the Petition of
NICALA E. INGLEBRIGHT,

Petitioner-Appellee,

And Concerning
DENNIS L. INGLEBRIGHT,

Respondent-Appellant.

FILED
DEC 20 1996
CLERK SUPREME COURT

Appeal from the Iowa District Court for Linn County, Larry J. Conmey, Judge.

Dennis Inglebright appeals from the district court's order granting Nicala Inglebright primary physical care of their two children. **AFFIRMED.**

Franklin R. York, Cedar Rapids, for appellant.

Stephen B. Jackson and Stephen B. Jackson, Jr., Cedar Rapids, for appellee.

Heard by Sackett, C.J., and Cady and Huitink, JJ.

SACKETT, C.J.

Respondent-appellant Dennis Inglebright appeals from the district court's order dissolving his marriage to petitioner-appellee Nicala Inglebright. Dennis contends he, not Nicala, should have primary physical care of their two children. He also contends the trial court did not make an equitable division of the property. Nicala requests we award her appellate attorney fees. We affirm.

Dennis and Nicala were married in 1986. Their children are Joshua, born in 1988, and Allison, born in 1990. At the time of trial, Nicala was thirty-four years of age and Dennis was thirty-five. Nicala was employed in the cardiac rehabilitation center at Mercy Medical Center and Dennis was employed by the City of Hiawatha Water Department.

The court granted Nicala primary physical care of Joshua and Allison and granted Dennis liberal visitation. The trial court found Nicala and Dennis had both performed the duties connected with raising the children and were dedicated and capable parents. The court concluded, because the children had a very stable living environment in Nicala's care, they should remain with her. The trial court cautioned Nicala the placement could be in jeopardy if she attempted to control the visitations to the detriment of Dennis.

The trial court considered the Super Valu stock owned by Dennis and Nicala and certain Oppenheimer and John Hancock investments were inherited by Nicala and these assets should be set aside to her. The trial court awarded Nicala the parties'

home, subject to a lien in favor of Dennis. The lien, originally in the amount of $25,020, was reduced to $11,687.13 after Nicala filed a 179(b) motion.

Dennis first contends he should have been awarded primary physical care of the children. Dennis advances he was the primary caretaker of the children and he should be granted primary physical care. Nicala contends she was the primary caretaker. Both parents have been actively involved in their children's upbringing. Nicala was granted temporary physical care. The trial court gave consideration to this factor. Dennis contends he left the home to make it easier for the children and this should not be held against him. We agree and do not give weight to this factor in our custody assessment. Dennis contends during that time Nicala interfered with his visitation.

We review de novo to determine from the evidence which parent appears to have the abilities to be the better custodian following the dissolution. *See In re Marriage of Pothast*, 539 N.W.2d 199, 200 (Iowa App. 1995); *In re Marriage of Riddle*, 500 N.W.2d 718, 719 (Iowa App. 1993). Both parents have worked outside the home and both assumed a portion of the children's primary care.

Nicala has not been flexible and agreeable with respect to visitation, hiring young child care providers rather than allowing Dennis to extend his visitation. We look with disfavor, as did the trial court, at Nicala's failure to be flexible with visitation.

Dennis and Nicala having similar strengths as parents, we find no reason to disturb the custody decision of the trial court. We caution Nicala, as did the trial court, that further efforts to thwart Dennis's contact with the children could result in a modification of the custody award.

Dennis next contends the trial court should not have considered the Super Valu stock and the Oppenheimer and John Hancock investments an inheritance and set it aside as Nicala's inheritance. He argues the Super Valu stock was a gift to both of them. While recognizing the mutual funds were purchased with Nicala's inheritance, Dennis argues they both owned the investments and they were able to keep them by utilizing his income for other expenses. Dennis further argues the court failed to consider Nicala's jewelry and computer and his guns. Additionally, he contends the court applied incorrect values for his 1992 Chevrolet pickup, 1988 Harley motorcycle, and his IPERS account. Dennis contends his lien on the house should be $21,605.86.

Nicala and Dennis received two hundred shares of Super Valu stock from her great uncle as a gift during their marriage. Nicala also received a $5000 inheritance from him which was spent on a gun, diamond earrings, a microwave, a desk, and two mutual funds, Oppenheimer and John Hancock.

Generally, gifts or inheritances received by a party during the marriage are not subject to a property division unless the failure to do so would be inequitable to the other party or the children of the marriage. *In re Marriage of Oler*, 451 N.W.2d 9, 10-11 (Iowa App. 1989). We agree the Oppenheimer and John Hancock funds were

purchased with Nicala's inheritance and we agree with the trial court they should be set aside to her. Setting aside the inherited and gifted property to Nicala, when considered with the other economic provisions of the decree, was equitable. *See In re Marriage of Gordon*, 540 N.W.2d 289, 291 (Iowa App. 1995); *In re Marriage of Hardy*, 539 N W.2d 729, 732 (Iowa App. 1995).

Nicala requests appellate attorney fees. The issue on custody is close. Nicala has received more assets than Dennis. The parties shall pay their own appellate attorney fees. Costs on appeal are taxed to Dennis.

AFFIRMED.

Cady, J., concurs; Huitink, J., dissents.

HUITINK, J. (dissenting)

I respectfully dissent

The rights and responsibilities of joint custody include, but are not limited to, equal participation in decisions affecting the child's legal status, medical care, education, extracurricular activities, and religious instruction. Iowa Code §598.41(4). Nicala's repeated interference with Dennis' access to the children is an indication that she does not understand or appreciate these fundamental notions of joint custody. As a result, the probability of a successful joint custody experience in this case is greater if Dennis is awarded physical care.