

**IN THE COURT OF APPEALS OF IOWA**

No. 1-219 / 10-1594  
Filed May 25, 2011

**IN RE THE MARRIAGE OF KATHLEEN ZIERKE  
AND ERIC ZIERKE**

**Upon the Petition of  
KATHLEEN ZIERKE, n/k/a  
KATHLEEN SPENCER,**  
Petitioner-Appellee,

**And Concerning  
ERIC ZIERKE,**  
Respondent-Appellant.

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Appeal from the Iowa District Court for Hardin County, Carl D. Baker,  
Judge.

Respondent appeals from a district court order interpreting the parties'  
dissolution decree. **AFFIRMED IN PART AND REMANDED IN PART.**

Duane M. Huffer of Huffer Law, P.L.C., Story City, for appellant.

Lynn J. Wiese of Barker, McNeal, Wiese & Holt, Iowa Falls, for appellee.

Heard by Vogel, P.J., Vaitheswaran, J., and Huitink, S.J.\*

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

**HUITINK, S.J.****I. Background Facts & Proceedings.**

Eric Zierke and Kathleen Zierke were married in September 1989. During their marriage, a child, B.S., was born. Kathleen filed a petition for dissolution of marriage on October 26, 1992. During the dissolution proceedings, a paternity test revealed Eric was not the biological father of the child.<sup>1</sup>

On September 15, 1993, the parties entered into a partial stipulation which stated that Eric did not have a legal right to custody and “the court cannot legally order him to pay child support.” The stipulation also provided that Eric had offered to voluntarily pay child support in the event the court granted him visitation with the minor child. The parties thereafter entered into a second stipulation, on September 22, 1993, which provided Eric would have visitation with the child. This stipulation stated, “These visitations are not intended as parental visitations, but rather visitations reached by compromise of the parties.”

The stipulation also contained the following provision:

Gift to [B.S.]. Respondent [Eric] will pay \$150 a month, beginning October, 1993, to a Hardin County Bank as trustee for [B.S.]. The funds will be used for education beyond high school as defined in Section 598.1(6), Code of Iowa. If she does not attend college, it will be paid to her when she is 21 years old.

The district court issued a dissolution decree for the parties on September 22, 1993, which approved both of the stipulations.

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<sup>1</sup> Because B.S. was born during the parties’ marriage, she would be considered Eric’s legal child “unless the court shall decree otherwise according to the proof.” Iowa Code § 598.31 (1991); *see also* § 252A.3(4) (presuming the children of married parents are legitimate). The parties’ dissolution decree provided B.S. was not Eric’s child. The decree recognized Eric did not have a legal right to custody, and no legal obligation to pay child support. The parties proceeded on the assumption, and we agree, that the 1993 dissolution decree overcame the presumption of legitimacy, so Eric had no legal obligation to pay child support or a postsecondary education subsidy.

On July 19, 2010, Kathleen filed an application for accounting and distribution of trust proceeds. She asked for an accounting showing Eric's deposits into a trust account, the amount of interest earned, and any distributions previously made to the child. During a hearing on the matter Eric testified he did not have any objection to preparing an accounting. He also claimed, however, the provision in the decree concerning the amount and timing of the payments was not enforceable because he was not required to pay child support.

The district court determined the paragraph in the decree constituted a judgment against Eric for the payments. The court concluded Eric should be required "to provide an accounting of payments he had made and how the account was distributed." Eric appealed the decision of the district court.

## **II. Standard of Review.**

Our review in this equitable action is de novo. Iowa R. App. P. 6.907. We examine the entire record and adjudicate anew on the issues properly presented. *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1981). In equitable cases, we give weight to the factual findings of the district court, especially considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.904(3)(g).

## **III. Merits.**

Kathleen's application requested, "an accounting showing [Eric's] deposits of the monthly \$150.00 payments to the trust account, the amount of interest earned by the trust fund as invested by the trustee and any distributions made to [B.S.] for which [Eric] should receive credit." During the hearing on the

application, Eric testified he did not have any objection to preparing an accounting.

In final argument, Kathleen's counsel stated:

There are potentially some construction issues with that paragraph, but we need to move incrementally and not anticipate problems. That's why we asked for an accounting, to find out whether or not the monthly payments were made, whether or not tax returns were filed, whether or not there were distributions and the status of the undistributed balance, if any, of the trust. If that accounting discloses problems, then we may have to ask the Court to construe paragraph 3 to determine when the payments would end and whether or not, in fact, interest has been accumulated or if it's been siphoned off and whether or not there remains unpaid taxes on this money, but we can't tell that until we get to the accounting and deal with the accounting. That was the purpose of the application.

Mr. Zierke has said he has no objection to an accounting for that, and we simply ask the Court to order the production of a complete accounting of the account, apparently never a trust, so we can determine whether there are additional issues to bring before the Court. We simply ask for an accounting at this time.

We determine the district court exceeded the relief requested by Kathleen.

The court ordered that Eric should prepare an accounting. Eric has already complied with this order. On the same date the notice of appeal was filed, Eric filed a voluntary accounting showing the money placed in the bank account for B.S.. The court went beyond Kathleen's request for Eric to provide an accounting by construing the decree to rule "the entry of the decree constitutes a judgment against Eric for the payments." We believe this part of the ruling was premature because Kathleen's counsel stated, "*If* that accounting discloses problems, then we may have to ask the Court to construe paragraph 3 . . . ." (Emphasis added.)

Kathleen asked for an accounting, Eric agreed to provide one, and in fact, he has already provided an accounting. The separate question of whether the

paragraph of the dissolution decree titled, "Gift to [B.S.]," created a trust or is enforceable is a separate issue that has not has yet been raised by Kathleen.

We affirm the portion of the court's ruling requiring Eric to provide an accounting. On other matters, we remand for further proceedings as raised by the parties.

#### **IV. Attorney Fees.**

Kathleen seeks attorney fees for this appeal. Attorney fees may be awarded in an action to enforce the terms of a dissolution decree. See *In re Marriage of Leege*, 494 N.W.2d 453, 456 (Iowa Ct. App. 1992). An award of attorney fees rests within the sound discretion of the court. *In re Marriage of Wessels*, 542 N.W.2d 486, 491 (Iowa 1995). We consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the district court's decision on appeal. *In re Marriage of Romanelli*, 570 N.W.2d 761, 765 (Iowa 1997). We determine each party should pay his or her own appellate attorney fees. Costs of this appeal are assessed one-half to each party.

**AFFIRMED IN PART AND REMANDED IN PART.**