

**IN THE COURT OF APPEALS OF IOWA**

No. 3-1019 / 13-0535  
Filed December 5, 2013

**IN RE THE MARRIAGE OF GARY LEE RASMUSSEN  
AND TERESA ANN RASMUSSEN**

**Upon the Petition of  
GARY LEE RASMUSSEN,**  
Petitioner-Appellant,

**And Concerning  
TERESA ANN RASMUSSEN,**  
Respondent-Appellee.

---

Appeal from the Iowa District Court for Black Hawk County, Bradley J. Harris, Judge.

A husband appeals the district court's property division provision of the dissolution decree and the court's denial of his motion for a new trial.

**AFFIRMED.**

D. Raymond Walton of Beecher Law Offices, Waterloo, for appellant.  
David H. Correll of Correll, Sheerer, Benson, Engels, Galles & Demro, PLC, Cedar Falls, for appellee.

Considered by Vogel, P.J., and Mullins and McDonald, JJ.

**MULLINS, J.**

Gary Rasmusson appeals the district court's decree dissolving his nine-year marriage to Teresa Rasmusson. Gary claims the district court should not have awarded Teresa the full value of her 401(k) plan. He also claims the district court should have granted his motion for a new trial based on newly discovered evidence. Because we find the property division equitable in light of Teresa's disability, we affirm the district court's dissolution decree. We also affirm the district court's denial of Gary's motion for a new trial because the evidence he cites of his alleged post-decree disability is not newly discovered evidence.

**I. BACKGROUND FACTS AND PROCEEDINGS.**

Gary and Teresa married in December 2003. This was Teresa's second marriage and Gary's first. Teresa brought into the marriage a home she had been awarded in her previous dissolution. A little over a year before the marriage, she borrowed \$50,000 using the house as security. She also had approximately \$58,000 in a 401(k) plan through her employer before the marriage. Gary came to the marriage with little to no assets. During the course of the marriage, Teresa took care of most of the couple's finances. They signed an additional loan on the house during the marriage to pay off various debts. Both of the loans remained outstanding at the time of the dissolution, and one lender had initiated foreclosure proceedings.

In December of 2011, Teresa suffered a stroke. As a result she is no longer employed and is receiving social security disability along with disability benefits from a plan she maintained with her former employer. The employer

disability plan only provides benefits until Teresa reaches age sixty-five. At the time of the dissolution, Teresa was fifty-eight.

Gary was fifty at the time of the dissolution and remained employed earning \$12.10 an hour. He was contributing to a 401(k) through his employer, though the value of Gary's plan was substantially less than Teresa's.

Following the trial, the district court determined it was equitable to award Teresa the full value of her 401(k), approximately \$136,000 with a loan in the amount of \$17,000 against it. The court reached this conclusion because of Teresa's stroke and the fact she was no longer able to be employed. Her sole source of income for the remainder of her life would be her disability payments, social security, and her 401(k), which she will no longer be able to increase. Gary, on the other hand, was eight years younger, in good health, and still capable of saving his earnings for retirement. Gary was awarded his 401(k), which at that time had a balance of approximately \$17,000 with a loan in the amount of \$4400 against it.

The court also ordered the house to be sold and the proceeds, if any, divided equally between the parties. The court permitted Gary to live in the house and ordered him to make all mortgage payments except for the amount paid by Teresa's disability policy. Once that policy expired, Gary would then be responsible to make all mortgage payments.

The court divided the parties' personal property and liabilities, but because those items are not in dispute on appeal, we will not otherwise address them here.

A few days after the court's decree, Gary was involved in an altercation with a friend resulting in an injury to his eye. He has had several surgeries on his eye and at this point, it is unclear what his prognosis is. Gary filed a motion for a new trial with the district court asserting this eye injury should be taken into consideration by the court in determining how to divide Teresa's 401(k). Since Teresa's disability was a factor in the court's decision to award the plan entirely to Teresa, Gary argued his new potential eye disability should be taken into consideration it could affect his earning ability.

After accepting some medical records and a report from Gary's treating physician, the Court denied the motion for a new trial stating that the court's determination regarding property distribution is determined at the time of trial and injuries Gary sustained after the decree was filed are irrelevant to the court's determination.

Gary appeals both the court's award of the 401(k) to Teresa, and in the alternative, the court's denial of his motion for a new trial based on his eye injury.

## **II. SCOPE AND STANDARD OF REVIEW.**

Dissolution cases are equitable proceedings and as such our review is de novo. See Iowa R. App. P. 6.907; *In re Marriage of Williams*, 449 N.W.2d 878, 880 (Iowa Ct. App. 1989). We consider the entire record and decide the issues anew, giving weight to the district court's findings of fact. *Williams*, 449 N.W.2d at 800.

### III. ALLOCATION OF TERESA'S 401(K).

Pension benefits are treated as marital property and subject to equitable distribution. *Id.* at 882. The court should divide the marital property after considering all the factors in Iowa Code section 598.21(5) (2011).<sup>1</sup> In awarding the 401(k) to Teresa, the district court focused on factors (d)—“the age and physical and emotional health of the parties”—and (f)—“the earning capacity of

---

<sup>1</sup> Those factors include:

- a. The length of the marriage.
- b. The property brought to the marriage by each party.
- c. The contribution of each party to the marriage, giving appropriate economic value to each party's contribution in homemaking and child care services.
- d. The age and physical and emotional health of the parties.
- e. The contribution by one party to the education, training, or increased earning power of the other.
- f. The earning capacity of each party, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children, and the time and expense necessary to acquire sufficient education or training to enable the party to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage.
- g. The desirability of awarding the family home or the right to live in the family home for a reasonable period to the party having custody of the children, or if the parties have joint legal custody, to the party having physical care of the children.
- h. The amount and duration of an order granting support payments to either party pursuant to section 598.21A and whether the property division should be in lieu of such payments.
- i. Other economic circumstances of each party, including pension benefits, vested or unvested. Future interests may be considered, but expectancies or interests arising from inherited or gifted property created under a will or other instrument under which the trustee, trustor, trust protector, or owner has the power to remove the party in question as a beneficiary, shall not be considered.
- j. The tax consequences to each party.
- k. Any written agreement made by the parties concerning property distribution.
- l. The provisions of an antenuptial agreement.
- m. Other factors the court may determine to be relevant in an individual case.

Iowa Code § 598.21(5).

each party.” Teresa was no longer able to work or contribute to her retirement plan due to the disability resulting from the stroke. The monthly disability benefit from her private disability insurance plan would soon cease, and she will have to live off of her social security and the money in her 401(k) for the rest of her life. At the time of trial, Gary was healthy and younger than Teresa. He was employed full time and still capable of contributing to his retirement savings.

Gary asserts a more equitable division would be to set off \$50,000 of the 401(k) to Teresa as the premarital value of the asset and then divide the remaining amount between the parties after the loan is repaid. He would also be willing to divide his 401(k) with Teresa. This, he claims, would net him approximately \$28,500 from Teresa’s 401(k) and leave her with over \$108,000 to supplement her income.

We reject this proposal and conclude the district court’s decision to award the entire 401(k) to Teresa was more equitable in this case. *See In re Marriage of Crosby*, 699 N.W.2d 255, 259 (Iowa 2005) (concluding it was equitable to award the husband his disability benefits, which were at least part of his retirement income, where his wife was eight years younger, still employed, and healthy). We affirm the district court’s dissolution decree.

#### **IV. NEWLY DISCOVERED EVIDENCE.**

Next, Gary asserts the district court should have granted him a new trial. He contends he was assaulted a few days after the dissolution decree was filed. The assault severely damaged his left eye and now “his ability to continue to earn income and potentially fund a retirement plan is now in jeopardy.” Since

Teresa's disability was considered by the court in awarding the retirement plans, he contends his "potential" disability and the "potential" loss of his left eye should be considered by the court in a new trial.

Gary acknowledges that newly discovered evidence is defined under the rules and our case law to mean material evidence that existed at the time of trial but could not have been discovered with reasonable diligence. See Iowa R. Civ. P. 1.1012(6); *Benson v. Richardson*, 537 N.W.2d 748, 762–63 (Iowa 1995) ("Under Iowa law, 'newly discovered evidence' sufficient to merit a new trial is evidence which existed at the time of trial, but which, for excusable reasons, the party was unable to produce at the time."). Because the assault Gary endured did not occur until well after the trial and in fact after the decree had been filed by the district court, it does not qualify as "newly discovered evidence."

However, Gary claims there is an exception in our case law that permits a court to vacate a judgment or grant a new trial based on facts that occurred after the judgment which make enforcement of the judgment no longer just or equitable. See *Mulkins v. Bd. of Supervisors*, 330 N.W.2d 258, 261–62 (Iowa 1983) ("There is, however, authority that when it is no longer just or equitable to enforce a judgment, facts which occurred after its rendition may be considered in deciding whether it should be vacated or whether a new trial should be granted."). While we acknowledge that there may be "extraordinary" cases where enforcement of a judgment will result in an utter failure of justice, this is not such a case. See *id.* (citing 66 C.J.S. *New Trial* § 101, at 294 (1950)).

Gary offers no evidence of the long-term impact his eye injury will have on his employment. This is far from the facts in the *Mulkins* case, where the district court vacated a judgment requiring a county to rebuild a bridge on a road that the county had subsequently decided to vacate. *Id.* at 261. Because the court found that requiring the county to build a bridge was rendered vain and worthless by subsequent actions by the county, it did not enforce the judgment. *Id.* at 262. Gary, on the other hand, only offers potentialities as to his disability or employability as a result of his eye injury. There is nothing in the evidence he submitted that leads to a conclusion the dissolution decree will cause an “utter failure of justice” or be “vain and worthless.” We do not find the district court abused its discretion in denying Gary’s motion for a new trial.

He also asserts the district court should have granted his motion to extend the deadline to submit additional medical evidence of his injury and its effect on his earning capacity. We note the injury took place six days after the decree was filed in November of 2012. Gary filed his motion for a new trial eight days later, fourteen days after the decree was filed. The motion was not heard until February 7, 2013, almost two months after the decree was entered. The court granted Gary’s request for the record to remain open for ten days to provide a letter from his treating doctor. Two weeks after the hearing, Gary submitted a letter from his treating doctor and sought another thirty days to obtain another letter from a doctor at the University of Iowa.

We again see no abuse of discretion in the court’s denial of Gary’s request for additional time to submit evidence in support of his motion. He had adequate

time to prepare for the hearing and was given time to submit additional evidence. Neither the court nor Teresa should have to delay finality of the decision in this case, waiting for the possibility that Gary may be able to procure additional support for his alleged post-decree disability. “Society would be best served by resolving the economic issues in a dissolution by division of property and pension rights, giving finality to the parties and curtailing substantial future litigation.” *In re Marriage of Wendell*, 581 N.W.2d 197, 202 (Iowa Ct. App. 1998) (Sackett, J., concurring specially).

We affirm the district court’s denial of Gary’s motion for a new trial.

**AFFIRMED.**