

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

VERMONT SUPREME COURT
FILED IN CLERK'S OFFICE

SUPREME COURT DOCKET NO. 2009-377

FEB 25 2010

FEBRUARY TERM, 2010

Ana Martinez-Lage	}	APPEALED FROM:
	}	
	}	
v.	}	Addison Family Court
	}	
	}	
David Herren	}	DOCKET NO. 198-10-08 Andm

Trial Judge: Cortland Corsones

In the above-entitled cause, the Clerk will enter:

Both husband and wife appeal the family court's divorce order granting wife legal rights and responsibilities with respect to the parties' two children, dividing the marital property, and declining to make a maintenance award. We affirm in all respects, except that we remand the matter for the family court to require that husband pay wife her interest in the property by a specified date, with interest to accrue at a reasonable rate from the date of decision following remand until the payment is made.

The parties were married in August 1997 and separated in April 2008. They have two children, born in June 1999 and March 2001. At the time of the family court's final order, husband was fifty-two years old and a Spanish teacher in the local public high school, earning approximately \$57,000 per year. Wife was forty-five years old and suffering from terminal cancer, which was first diagnosed in the spring of 2005 and took a turn for the worse in the fall of 2007. The median length of survival of someone in wife's condition is one-to-two years, although some persons can live many years, and a slight percentage can make a full recovery. Before her illness, wife had been a tenured full-time professor at Middlebury College. At the time of the divorce hearing, she was working at the College part-time and earning \$95,000 annually, including \$47,000 in salary, \$26,000 in disability payments, and \$22,000 in book royalties. The parties stipulated that they be awarded joint physical responsibility for the children, but did not agree on legal responsibility or the specific amount of time that they would have the children.

Following an evidentiary hearing, the trial court awarded wife sole legal responsibility for the children and split the children's time: four days with wife and three days with husband. The court awarded the marital home to husband, but indicated its intent to divide the marital property equally. To accomplish this, the court ordered husband to pay wife \$90,000 within sixty days of the order or list the marital home for sale at a price reasonably reflecting its fair market value.

On appeal, both husband and wife challenge the court's order concerning the children. Husband argues that the court assigned legal responsibility of the children to wife and gave her more parent-child contact solely out of sympathy for her condition. According to husband, he

should be assigned legal responsibility and at least fifty-fifty contact because he needs to maintain his bond with the children, considering the inevitable loss of their mother. Wife, on the other hand, argues that because of the possibility that her future time with her children will be limited, the court should have given her five days, rather than four days, of contact per week. We find no abuse of discretion in the court's award of parental rights and responsibilities. See Chick v. Chick, 2004 VT 7, ¶ 10, 176 Vt. 580 (mem.) (stating that family court has broad discretion in awarding parental rights and responsibilities and that its findings will not be overturned unless they are clearly erroneous). Although the court recognized wife's desire to have the children spend more time with her because of her prognosis, that was only one of the many factors considered by the court. The court carefully went through each of the statutory factors, concluding that four of them favored wife and the rest of them favored neither party. Husband does not challenge any of the court's findings or conclusions, which amply support the court's order. Regarding wife's argument, while we understand her desire to see her children as much as possible given her prognosis, she has failed to identify any legal basis to conclude that the court abused its broad discretion in establishing the amount of parent-child contact for each parent.

Next, husband argues that the family court erred by equally dividing the marital property and not awarding him maintenance. He contends that wife's terminal condition should be a factor that compels an unequal division of property in his favor. He further claims that his income will leave him with an annual \$20,000 shortfall, given his substantial expenses, most of which are related to the marital home. We find no merit to these arguments. The court acted well within its broad discretion, given the circumstances, in dividing the marital property equally between the parties. See Wade v. Wade, 2005 VT 72, ¶ 13, 178 Vt. 189 (stating that family court has broad discretion in analyzing and weighing statutory factors and dividing marital property). After carefully reviewing the statutory factors, the court noted that (1) husband's desire to remain living in a house with considerable expenses does not trump a fair and equitable division of property; (2) husband's current standard of living greatly exceeded wife's; and (3) wife's higher income did not compel giving husband more marital assets because wife's medical condition and greater time with the children increased her living expenses and because her ability to continue to earn income at the same level in the future was doubtful. By the same token, the court also declined to award husband maintenance because wife's needs were greater and it was likely that her income would be reduced in the near future.

In her cross-appeal, mother argues that the trial court erred by not treating as a marital asset Iowa real estate titled in husband's name and placing a value on it. We disagree. The court found that the real estate was the residence of husband's mother, which she had titled to husband in 1993 while retaining a life estate, for the sole purpose of estate planning purposes. The court found that, as a practical matter, husband had no actual interest in the property until and unless his mother predeceased him. Mother does not challenge these findings. Under these circumstances, although the court certainly had jurisdiction over the property, the court did not abuse its discretion in declining to assign any value to the property. See Mizzi v. Mizzi, 2005 VT 120, ¶ 6, 179 Vt. 555 (mem.) (upholding family court's decision not to award any portion of wife's property held partly in her name for estate planning purposes only).

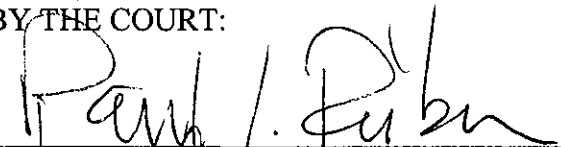
Finally, wife argues in her cross-appeal that the family court abused its discretion by failing to order husband either to liquidate his retirement account, award it to wife, or refinance the marital homestead to pay her \$90,000 share of the marital property. She also argues that the court abused its discretion by not awarding her interest at the legal rate of twelve percent on the \$90,000 award from the date of the court's decision until husband paid that amount to her. We agree that, under the circumstances, the court's order is inadequate to assure that wife receives

her share of the marital property. The court found that husband had the ability to pay wife the \$90,000 by cashing his retirement account, but acknowledged husband's desire not to do so because of the penalties and taxes involved. Accordingly, the court ordered husband to pay the \$90,000 within sixty days or place the marital home on the market at a fair market price. Wife points out, however, that a home in rural Vermont in a slow economy could conceivably take months, and even years, to sell, and that, notwithstanding the court's order that the value of the home "reasonably" reflect its fair market value, such value is variable and husband has no desire or incentive under the court's order to sell the home. Given the circumstances, including her medical prognosis, wife argues that the court abused its discretion by not issuing an order assuring that she would receive her property award in short order and that interest would accrue until she received it.

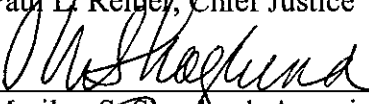
We conclude that, under the circumstances, the family court's order should have assured payment of wife's share of the property within a reasonable period of time. The court found that husband had the ability to pay the award; therefore, given wife's medical prognosis, the court should have unconditionally ordered husband to pay wife the award within a specified time. The court could have allowed husband the choice of how to abide by such an order—for example, by cashing out his retirement account, refinancing the marital home, or selling the home within a specified period of time with interest to accrue in the interim. Instead, the court's current order creates a distinct possibility that wife will never see the award because of potential delays in it becoming available. We do not require the court to impose interest from the time of its original award or to impose a certain rate of interest, but on remand it must require payment of the award within a specified and limited period of time that is reasonable under the circumstances and further must impose interest at a reasonable rate from the time of its amended award until the time of payment.

Affirmed in all respects except that the matter is remanded for the family court to require payment of the property award within a specified and limited time period and to impose a reasonable rate of interest from the time of the amended order until payment of the award.

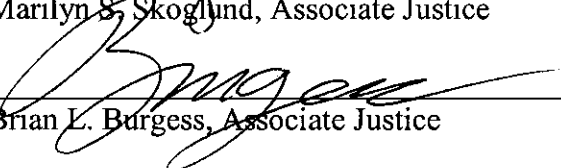
BY THE COURT:



Paul L. Reiber, Chief Justice



Marilyn S. Skoglund, Associate Justice



Brian L. Burgess, Associate Justice