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Recent Developments: Niroo v. Niroo: Anticipated Renewal Commissions on Insurance Policies Sold by a Spouse during the Marriage Are Marital Property

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sexual acts, the Court of Special Appeals of Maryland has clearly stated that no such right exists for the sexual acts of consenting, unmarried, heterosexual adults. According to the court, the right to privacy for sexual acts applies only to married adults.

— *Leo J. Keenan, III*

Niroo v. Niroo: ANTICIPATED RENEWAL COMMISSIONS ON INSURANCE POLICIES SOLD BY A SPOUSE DURING THE MARRIAGE ARE MARITAL PROPERTY

In *Niroo v. Niroo,* 313 Md. 226, 545 A.2d 35 (1988), the Court of Appeals of Maryland held that anticipated renewal commissions on insurance policies sold by a spouse during the marriage but accruing after the marriage are marital property within the meaning of the Property Disposition in Divorce Annulment Act (the Act), Md. Fam. Law Code Ann. §8-201(e) (1984).

The Niroos were married in 1977. In 1978, Mr. Niroo became an insurance salesman for Pennsylvania Life Insurance Company (Penn Life), where he received commissions on individual policies sold. In 1980, he entered into agency manager agreements with Penn Life and the Executive Fund Life Insurance Company. Under these agreements, Mr. Niroo shared in the profits and the losses of the company. The agreements entitled him to receive income derived from net profits generated from the renewal of insurance policies. Furthermore, the contracts specified that the husband's right to these renewal commissions "shall be vested in him even if he is permanently and totally disabled, or after his death in his heirs and assigns." 313 Md. at 229, 545 A.2d at 36.

At trial, Mr. Niroo contended that the commissions were not marital property as defined by the Act. Alternatively, he contended that if the commissions were deemed marital property, then the value of the commissions were offset by advances he had drawn against future commissions which should properly have been construed as marital property. The trial judge disagreed on both counts, holding the commissions were marital property and that the debt he had incurred could not be offset against the commissions. The court awarded Mrs. Niroo a $200,000 monetary award. *Id.* at 229-30, 545 A.2d at 37.

The Court of Appeals of Maryland granted certiorari in this case prior to the case's consideration by the Court of Special Appeals of Maryland in order to "consider the important question involved in this case." *Id.* at 230, 545 A.2d at 37. On appeal, Mr. Niroo asserted that the "speculative and contingent nature of these commissions" rendered him a tenuous property interest which was not within the definition of marital property as contemplated by the legislature in section 8-201(e). *Id.* at 232, 545 A.2d at 38. Because he had to "work" these accounts through activities which would take place after the marriage was dissolved, Mr. Niroo argued that the commissions were not "acquired" during the marriage. He therefore contended that "the classification of renewal commissions as marital property would improperly give his former wife the fruits of his future efforts and would penalize him if the renewal commissions were not realized." *Id.*

The court of appeals did not agree, and it affirmed the holding of the trial court that the commissions were marital property. It reiterated its conclusion that the Act significantly changed traditional notions of property rights between spouses and broadened the concept of marital property. *Id.* at 229, 545 A.2d at 37. Marital property may be "'construed to include obligations, rights and other intangibles as well as physical things.'" *Id.* at 233, 545 A.2d at 38 (quoting *Bouse v. Hutzler,* 180 Md. 682, 686, 26 A.2d 767, (1942)). The proper analysis to determine marital property was, "first, to decide whether the property right was acquired during the marriage and second, whether it is equitable to include it as marital property, without regard to whether the right is vested or not." *Niroo* at 233, 545 A.2d at 38-39 (citing *Deering v. Deering,* 292 Md. 115, 437 A.2d 883 (1981)). Despite Mr. Niroo's claim that after the dissolution of the marriage he must still "service" these accounts in order to realize the renewal commissions, the court held that "[t]he husband's primary effort was expended in acquiring the original policies." *Niroo* at 235, 545 A.2d at 40. Furthermore, the court of appeals referred to the evidence presented at trial which showed that the commissions were not found to be speculative. Evidence showed that "72% of existing policies will be automatically renewed after the first year; 82% ... the second year; and 88% will be renewed thereafter." *Id.* Thus, the court held that the property right to these commissions was manifestly vested during the marriage, and was, therefore, enforceable as marital property.

Moreover, the court of appeals stated that it was settled that an insurance agent has a vested right in renewal commissions. *Id.* at 234-35, 545 A.2d at 39 (citing *Travelers Ins. Co. v. Hermann,* 154 Md. 171, 185, 140 A. 64 (1928)). Thus, "contractually vested rights in renewal commissions are a type of property interest within the definition of marital property under section 8-201(e)." *Niroo* at 234, 545 A.2d at 39. This right was established in Mr. Niroo's agency contract with Penn Life, which provided that should he "die or become disabled, his right to receive the renewal commissions, as well as his heirs' rights thereto, would not be affected." *Id.* at 235, 545 A.2d at 39. The court reasoned that because the husband had a vested right in the commissions, they were a valuable asset "not separable from the original policies sold during the marriage, and thus properly a part of the couple's shared assets during the marriage." *Id.* at 237, 545 A.2d at 40.

Although the court of appeals noted that the Act expanded the concept of marital property, the court did note that some rights and interests were not includable as marital property. Among these are an inchoate personal injury claim arising from an accident during the marriage, which it considered as so "uniquely personal that it could not be considered marital property 'acquired' during the marriage ...." *Id.* at 234, 545 A.2d at 39. Also excluded from the definition of marital property was a medical degree or license, which the court considered a "mere expectancy of future enhanced income ... personal to the holder [and] cannot be transferred, pledged or inherited." *Archer v. Archer,* 303 Md. 347, 357, 493 A.2d 1074 (1985). Despite Mr. Niroo's contention that the renewal commissions were so uniquely personal as to disqualify them as

"marital property" under the statute, the court did not agree. *Niroo* at 237, 545 A.2d at 40.

Alternatively, Mr. Niroo aruged that the trial court erred in not finding that certain debt that he incurred — advances received in the form of a loan from Penn Life — should have been construed as marital debt, and thus offset against the present value of the commissions. This would possibly have had the effect of reducing Mrs. Niroo's monetary award. Although the court did not agree with Mr. Niroo's calculations, it did agree that the advances were marital debts and should be offset against the commissions. Subsequently, the case was remanded for further consideration in determining the proper monetary award.

The *Niroo* court is splitting judicial hairs on the definition of marital property. It has determined that the rights to renewal commissions that vested during the marriage are contractual rights and are, therefore, enforceable as a property right rather than as a mere conditional expectation. The distinction to be made is that the court refused to recognize as marital property earnings which were speculative and nontransferable, such as a medical degree or license; yet determined that the right to future earnings that vested during the marriage were marital property because they were less speculative and were transferable.

— *Peter T. McDowell*

Craig v. State: SIXTH AMENDMENT RIGHT OF CONFRONTATION IS NOT ABSOLUTE IN CHILD ABUSE CASES

In *Craig v. State,* 76 Md. App. 250, 544 A.2d 784 (1988), the Court of Special Appeals of Maryland held that the Maryland statute that allows alleged child abuse victims to testify over closed circuit television, if it is determined that testifying in the courtroom will so traumatize the child-witness that the child will be unable to reasonably communicate, does not violate the six amendment's confrontation clause.

Sandra Ann Craig was the owner and operator of a pre-kindergarten and kindergarten school in Howard County. Brooke Etze attended Craig's school for two years, had never complained to her parents of any abusive treatment, and her parents had expressed satisfaction with Craig and her school. After reading a newspaper account of complaints of abuse at Craig's school, Mr. and Mrs. Etze attended a meeting hosted by Howard County's social services and health departments. As a result of what they learned at the meeting, the Etze's had Brooke evaluated by a therapist. During conversations with the therapist and her parents, Brooke disclosed several incidents of abuse committed by Craig, two of Craig's children, and other children at the school. It was revealed that "[t]he direct abuse by Ms. Craig included kicking Brooke on the legs and in her 'private parts,' inserting a stick in her vagina, and threatening her with the loss of her parents' love." A medical examination confirmed sexual abuse. *Id.* at 255, 544 A.2d at 786.

Ultimately, a six-count indictment was returned in the Circuit Court for Howard County against Sandra Craig, who was tried and convicted of all counts in a jury trial. Craig appealed to the Court of Special Appeals of Maryland, raising seven issues. The court of special appeals found no merit in any of the complaints and affirmed the conviction. This article addresses Craig's complaint that "the court erred in allowing the children to testify on closed circuit television" in violation of the sixth amendment's confrontation clause. *Id.* at 257, 544 A.2d at 786.

The trial court applied section 9-102 of the Maryland Courts and Judicial Proceedings Code in allowing Brooke and several other children to testify during the trial through closed circuit television. Md. Cts. & Jud. Proc. Code Ann. § 9-102 (1984). Section 9-102 provides that in a case of child abuse, the court may allow a child's testimony taken outside the courtroom in a child abuse trial if "(i) the testimony is taken during the proceeding and (ii) the judge determines that the child testifying in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate." *Id.* at 275, 544 A.2d at 786. Craig's complaint was in effect a three-part issue. She contended that section 9-102 "violate[d] her Constitutional right of confrontation; (2) the court failed to follow the proper procedure in concluding that the children would suffer serious emotional distress such that they would be unable to reasonably communicate if required to testify in court; and (3) ... § 9-102 ... violated her right of presence." *Id.*

The *Craig* trial court did not have the benefit of an appellate decision concerning the construction of section 9-102. Consequently, the main thrust of Craig's attack focused on *Wildermuth v. State,* 310 Md. 496, 530 A.2d 275 (1987), which was decided after her verdicts were rendered. *Wildermuth* concerned a challenge that the procedure stated in section 9-102 contravened a defendant's right of confrontation and presence. However, subsequent to *Wildermuth,* the U.S. Supreme Court decided *Coy v. Iowa,* ___ U.S. ___, 108 S. Ct. 2798 (1988), which also "addressed the confrontation issues raised by procedures impairing face-to-face contact between child-witnesses and defendants on trial for having allegedly abused them." 76 Md. App. at 275-76, 544 A.2d at 796.

In *Coy,* the defendant was charged with having assaulted two 13-year old girls. The trial judge, without inquiring whether the assaulted children would be able to testify in Coy's presence and acting pursuant to a recently enacted state statute, permitted a semi-opaque screen to be placed in the courtroom between the witness stand and Coy. Coy was able to dimly see the witnesses but the witnesses were not able to see him. The state had sought to justify the procedure on the ground that there was a legislatively imposed presumption of trauma, thereby avoiding a specific finding of necessity for separating the victims from the defendant. The state also argued that there was no violation of Coy's right to confrontation since his right of cross-examination was left intact. *Id.*

Justice Scalia authored the Supreme Court's majority decision that rejected the state's two arguments. The Court held that the right of confrontation required more than just the ability to cross-examine but also included the right to meet one's accuser face-to-face. Additionally, the Court rejected the state's contention that its statute could, on its own, supply the necessity, and stressed the lack of individualized findings. Nevertheless, the Court did not completely rule out exceptions to this finding, but simply stated that the question of whether any exceptions may exist would have to wait for another day. *Id.* at 276-77, 544 A.2d at 797. In the concurring opinion, Justice O'Connor made clear, however, that the face-to-face confrontation requirement was "not absolute but rather may give way...to other competing interests so as to permit the use of certain procedural devices to shield a child witness from the trauma of courtroom testimony." *Id.* at 278, 544 A.2d at 797-98 (quoting *Coy,* ___ U.S. at ___, 108 S. Ct. at 2803).

The *Craig* court concluded that the *Coy* Court did not firmly rule out exceptions to the face-to-face confrontation clause requirement nor did it rule out as an exception a state's interest in protecting child-witnesses from being traumatized while testifying in a courtroom in the presence of the defendant. The court noted that, even though Justice Scalia's opinion may have