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Recent Developments: Coy v. Iowa: Placing Screen between Defendant and Witness in Criminal Trial Vioiates the Right to Face-to-Face Confrontation

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> No person shall be imprisoned for debt, but a valid *decree* of a court of competent jurisdiction *or agreement approved by decree* of said court for the support of a spouse... *shall not constitute a debt* within the meaning of this section.

Md. Const. art III, § 38 (emphasis added). The aforementioned section of the code also states that contractual spousal support is subject to modification unless the parties provide otherwise. *Mendelson* at 497, 541 A.2d at 1336.

With recognition of the plain language of the statutes, the court determined that

> [d]espite the amended language of article III, § 8-103(b) of the Family Law Code, unless the separation agreement is *made part of* the divorce decree, it cannot be enforced by imprisonment for contempt. There being no order to pay the support, *failure to pay would merely be a breach of contract* and not contemptuous disobedience of a court order.

Mendelson at 497-98, 541 A.2d at 1337 (emphasis added). The court concluded that the separation agreement was separate from the decree of divorce despite the clear language of the statute. There was therefore no basis from which to modify the agreement. *Id.*

The *Mendelson* court then examined the case law regarding non-merger clauses and the attendant beliefs held by members of the legal community resulting therefrom. The court recognized that prior to 1983 it was commonplace for attorneys to insert non-merger clauses in separation agreements. Judge Bloom then cited two cases which discussed the effect of non-merger clauses, *Id.* at 1337 *(citing Johnston v. Johnston,* 297 Md. 48, 465 A.2d 436 (1983); *Hamilos v. Hamilos,* 297 Md. 99, 465 A.2d 445 (1983)), and reasoned that:

> [i]t was apparently believed that incorporation would make the agreement part of the decree while non-merger would preserve its contractual status. Thus, in the event of a breach, it was thought, the aggrieved party would have the choice of enforcing the decree or suing on the contract. Since such language is still being inserted in separation agreements, we suspect that *Johnston* has been *ignored or misread.*

Id. at 495, 541 A.2d 1336 (emphasis added).

Mendelson relied primarily on the rationale of *Johnston,* which concerned the question of whether a separation agreement incorporated but not merged into a divorce decree was subject to *collateral attack. Johnston* explained the difference between the terms "incorporation" and "merger." Whereas "incorporation" is the mere identification and approval of the validity of a separation agreement, "merger" is a substitution of rights and duties. *Id.* at 498, 541 A.2d 1337. The separation agreement is said to be superseded by the decree when the agreement is merged into the decree, and when the agreement fails to indicate whether it should be merged. As such, the agreement would be enforceable through contempt proceedings. Alternatively, if the separation agreement contains a non-merger clause, the agreement is not superseded by the decree and retains its "life" as a contract. But, because the agreement is a contract, it is not enforceable through contempt proceedings. In applying *Johnston* to the facts in *Mendelson,* the court held that since the separation and property settlement agreement was not made part of the decree, the agreement remained separate from the decree and thus could not be enforced through contempt proceedings. *Id.* at 499, 541 A.2d 1338.

The court then turned its attention to the question of whether the separation agreement *sub judice* could be modified or terminated by the court. By the terms of the agreement, modification of spousal support could take place only upon appellant's disability or retirement at age 60 or thereafter. Since the separation agreement was not merged, the agreement and not the decree dictated the conditions under which modification could be compelled. Due to the rule foreclosing collateral attack on agreements approved by a court of competent jurisdiction, "[t]he circuit court that issued that decree lost its continuing jurisdiction over it and thus any power to modify it when the decree became enrolled." *Id.* at 500, 541 A.2d 1338.

The court held that the separation agreement was unambiguous regarding the terms under which spousal support could be terminated. The conditions precedent to the termination of spousal support were remarriage of appellee, or the death of either party. Since neither event occured, the court held that the termination provisions had not been activated. *Id.*

The holding in *Mendelson v. Mendelson* will affect many areas of domestic practice in Maryland. Those who entered into separation agreements with non-merger clauses might refuse to pay spousal and perhaps even child support—the only recourse being an action for breach of contract. Cases concerning these and similar issues will undoubtedly lead to a review of *Mendelson* by the Court of Appeals of Maryland. In subsequent actions. *Mendelson* may be attacked as inconsistent with the intent of *Johnston, Hamilos,* the Family Law Article and the Maryland Constitution. Additionally, since the issue of non-merger clauses was clearly not the subject of appellant's action, the court's analysis regarding non-merger clauses may be considered *dicta* and given less weight. Finally, there lies the question of the potential liability of attorneys who inserted non-merger clauses in separation agreements, erroneously assuring clients that, in the event of breach, an action either for breach or contempt of court could be maintained.

— Jules R. Bricker

Coy v. Iowa: PLACING SCREEN BETWEEN DEFENDANT AND WITNESS IN CRIMINAL TRIAL VIOLATES THE RIGHT TO FACE-TO-FACE CONFRONTATION

In *Coy v. Iowa,* ___ U.S. ___, 108 S. Ct. 2798 (1988), the Supreme Court of the United States, in a plurality opinion, held that the Confrontation Clause of the Sixth Amendment to the United States Constitution gives a defendant the right to literal face-to-face confrontation with the witnesses against him. The plurality arrived at its decision by emphasizing that a fair trial requires face-to-face confrontation between the accused and the accuser in a criminal prosecution.

In August of 1985, the appellant, John Avery Coy, was charged with sexually assaulting two minor girls while they were camping out in the backyard of the house next door to his. The girls claimed that Coy came into their tent, with a stocking over his head, while they were sleeping. Coy shined a flashlight in their eyes and told them not to look at him. Consequently, the girls could not identify his face.

At the beginning of the trial, the prosecution moved, pursuant to Iowa Code Ann. § 910.A14 (West 1987), to allow the complaining witnesses to testify either by closed circuit T.V. or behind a screen. The statute was enacted in an effort to make child witnesses more comfortable while giving testimony. The trial court allowed a large screen to separate the appellant from the witnesses during their testimony. By adjusting the lighting in the courtroom, the appellant was barely able to see the witnesses and they were not able to see him at all.

Coy objected vehemently to the use of the screen on two theories. First, he claimed that the sixth amendment gives criminal defendants the right to literal face-to-face confrontation regardless of whether the complaining witness is uncomfortable while giving testimony. Second, Coy claimed that his due process right was violated since the screen would make him appear guilty even though the jury was instructed not to infer a presumption of guilt.

The trial court rejected Coy's constitutional objections and simply instructed the jury not to draw an inference of guilt from the screen. Coy was found guilty of two counts of lascivious acts with a child. On appeal, the Supreme Court of Iowa rejected Coy's constitutional arguments and affirmed the result of the trial court. *Coy v. State*, 397 N.W.2d 730 (1986). The Iowa Supreme Court found that Coy's right to confrontation was not violated since his ability to cross-examine the witnesses was not disturbed. The court also found that the screen was not unfairly prejudicial to Coy. *Id.*

Coy appealed to the United States Supreme Court. With Justice Scalia writing for the plurality, the Court reversed the Iowa Supreme Court holding that a criminal defendant has a right to literal face-to-face confrontation of complaining witnesses. The plurality traced the right to confrontation to the beginnings of Western legal traditions, Roman law and early English law. *Coy*, ___ U.S. at ___, 108 S. Ct. at 2800 *(citing California v. Green*, 399 U.S. 149, 174 (1970) (Harlan, J., concurring)). Justice Harlan felt that the right to confrontation "'[s]imply as a matter of English' ... confers at least 'a right to meet face to face all those who appear and give evidence at trial.'" *California v. Green*, 399 U.S. 149, 175 (1970) (Harlan, J., concurring).

In *Green*, the Court "described the 'literal right to 'confront' the witness at the time of trial' as forming 'the core of the values furthered by the Confrontation Clause.'" *Coy*, ___ U.S. at ___, 108 S. Ct. at 2801. The plurality in *Coy* agreed, holding that the Confrontation Clause guarantees the defendant a face-to-face encounter with the witnesses in front of the trier of fact. *Id.* at 2800. A fact can only be proved against a defendant by witnesses who confront the defendant at trial. *Id. (citing Kirby v. United States*, 174 U.S. 47, 55 (1899)).

Aside from precedent, the plurality also used numerous references to, and quotations from, antiquity to elaborate on the proposition that to have a fair criminal trial, human nature dictates the necessity of face-to-face confrontation between the accused and the accuser. *Coy*, ___ U.S. at ___, 108 S. Ct. at 2801 *(citing Pointer v. Texas*, 380 U.S. 400, 404 (1965)). Confrontation has continued over time because a witness will feel differently when confronted with the defendant whom he could harm with his testimony. *Coy*, ___ U.S. at ___, 108 S. Ct. at 2802. The plurality noted that "[i]t is always more difficult to tell a lie about a person 'to his face' than 'behind his back.'" *Id.* If the witness does lie, his testimony is not as convincing when he is confronted by the defendant he is accusing. *Id.*

The plurality recognized that while a witness might be upset by the face-to-face confrontation, the confrontation is likely to undo the false accuser. Consequently, when the sides are weighed, the constitutional protection of a right to literal face-to-face confrontation outweighs the uneasiness the witness may experience by the confrontation. *Id.*

Applying these principles to *Coy*, the plurality concluded that the screen used at Coy's trial was an obvious violation of his right to confront the witnesses since it prevented the witnesses from viewing Coy. *Id.* Thus, the right to confrontation includes literal face-to-face confrontation along with the opportunity to cross-examine. The State of Iowa argued that the right to confrontation was outweighed by the need to protect the two victims of sex abuse. The plurality disagreed with this argument when applying it to the facts of this case and the statute involved; however, they did indicate that the right to confrontation is not absolute. *Id.* There are certain interests that may outweigh rights which are implicit in the confrontation clause, namely, the right to cross examine the witness, *see Chambers v. Mississippi*, 410 U.S. 284, 295 (1973); the right to exclude hearsay, *see Ohio v. Roberts*, 448 U.S. 56, 63-65 (1980); and the right to face-to-face confrontation with the witness at some time during the proceedings other than at trial. *Kentucky v. Stincer*, 482 U.S. 730 (1987).

The plurality felt that there may be explicit exceptions to the right to face-to-face confrontation, though the exceptions would only exist in the furtherance of important public policy. *Coy*, ___ U.S. at ___, 108 S. Ct. at 2803. Expanding on this, the Court noted that the exception must be something "firmly ... rooted in our jurisprudence." *Id. (quoting Bourjaily v. United States*, 483 U.S. 171 (1987) *(citing Dutton v. Evans*, 400 U.S. 74 (1970))). The plurality felt that the criterion of being "firmly rooted" was not met in this case since the Iowa legislature only made a generalized finding of necessity to allow the screen to be used. There were no findings that the specific witnesses in this case needed to be protected by the screen. *Id.*

As a final point, the plurality said that it was not necessary to discuss Coy's due process argument since his right to face-to-face confrontation was violated.

Justice O'Connor, joined by Justice White, wrote a concurring opinion agreeing with the plurality that Coy's right to confrontation was violated in this case. *Id.* (O'Connor, J., concurring). She wrote separately to express that an appropriate case could provide the necessary interests

to allow the use of some device to protect the witness from viewing the defendant. In such a case, the interest would outweigh the defendant's right to face-to-face confrontation.

The interest to protect child witnesses from literal face-to-face confrontation would be a proper compelling interest to allow something other than direct face-to-face confrontation. *Id.* Justice O'Connor continued noting that the confrontation clause "reflects a *preference* for face-to-face confrontation at trial...." *Id.* Furthermore, the *Coy* decision should not be read to discourage state legislatures from protecting child witnesses. Even if certain legislation is judged to run contrary to the confrontation clause, it might fall within an exception and thus the protection device may be used.

In a bitter dissent, Justice Blackmun, joined by the Chief Justice, felt that neither Coy's right to confrontation nor his due process right was violated.The dissent believed that the right to confrontation gives the defendant a "right to be shown that the accuser is real and the right to probe [the] accuser and [his] accusation in front of the trier of fact." *Id.* (Blackmun, J., dissenting). Justice Blackmun believed that these criteria were met in Coy's case. He noted that Coy could see the girls through the screen, the girls could see the judge, jury and counsel, and they could see the girls, the jury could see Coy while the girls testified, and the girls were told that Coy could see and hear them while they testified. *Id.* at 2806. The dissent argued that Coy's objection that the girls could not see him while they testified was too narrow. Justice Blackmun felt that the plurality's holding that the witness must have the ability to see the defendant will put a roadblock in front of state legislatures trying to protect child witnesses.

Justice Blackmun also felt that the confrontation clause has as its essential purpose the right of cross-examination. *Id.* at 2808. This was based on Dean Wigmore's statement that "[t]here never was at common law any recognized right to an indispensable thing called confrontation *as distinguished from cross-examination.*" 5 J. Wigmore, Evidence § 1397, 158 (J. Chadbourn rev. 1974). This principle is supported by the fact that many hearsay statements may be admitted at trial even though the defendant does not get to confront the person who made the hearsay statement. *Coy*, ___ U.S. at ___, 108 S. Ct. at 2809. As a further explanation of this point, Justice Blackmun gave an example of a blind person who could not see the defendant. With a blind person, however, the defendant could not make the same objection that Coy did. Therefore, Justice Blackmun felt that the right to cross-examine a witness was the essential part of the confrontation clause.

Justice Blackmun believed that the protection of children was an extremely important public interest to protect. Recognizing this, he felt that the use of the screen outweighed Coy's right to face-to-face confrontation with the girls.

Finally, Justice Blackmun concluded that the screen did not unduly prejudice Coy such that his due process was violated. He noted that a screen does not imply guilt as do other things like shackles. *Id.* at 2810. Furthermore, the jury was given an instruction which told them explicitly not to draw any inferences of guilt from the screen. Justice Blackmun felt this was sufficient to overcome Coy's due process argument. *Id.*

The plurality in *Coy* concluded that a defendant in a criminal trial has the right to literal face-to-face confrontation of the witnesses against him except in certain situations. These situations arise when there is a strong public policy interest which outweighs the right to confrontation. The *Coy* Court concluded that when a legislature enacts a statute based on general findings, it will not be enough to show a public interest that outweighs the right to confrontation. It should be noted, however, that Justice Kennedy did not participate in this decision in any way.

— *Richard M. Goldberg*

Austin v. Thrifty Diversified: EMPLOYER'S LIABILITY EXPANDED WHILE EMPLOYEE ON EMPLOYER'S PREMISES

The Court of Special Appeals of Maryland in *Austin v. Thrifty Diversified*, 76 Md. App. 150, 543 A.2d 889 (1988), rejected a wrongful death claim, but found that an employee who was injured after normal working hours while using his employer's equipment, on the employer's premises, and with the employer's permission, was covered instead under the exclusive remedy of the Worker's Compensation Act. The court agreed with the trial court that the employee's death arose out of and in the course of his employment.

Thrifty Diversified hired John Douglas Austin to work as a certified welder. On the day of the accident he received permission to use the company's arc welding machine to repair the exhaust system on a friend's automobile. Austin was to perform the repairs on the employer's premises after his regular shift ended. While using the arc welding machine to make the repairs, Austin was electrocuted.

Austin's parents instituted a wrongful death action. The employer moved for summary judgment on the grounds that the exclusive remedy was under the Worker's Compensation Act ("the Act"). The Act lists the duties that employers owe to their employees. It provides, in pertinent part, that:

> [e]very employer subject to the provisions of this article, shall pay or provide as required herein compensation according to the schedules of this article for the disability or death of his employee resulting from an accidental personal injury sustained by the employee arising out of and in the course of his employment without regard to fault as a cause of such injury....

Md. Ann. Code art. 101, §15 (1957). Therefore, the question addressed was whether this accident arose out of and in the course of the decendent's employment.

In answering this question, the court first looked at the causal connection between the injury and the employment. The court reasoned that but for his employment, Austin's death would not have ensued. Because he was an employee of Thrifty, Austin was allowed to use the company's arc welder for a personal project on their premises. "Moreover, the instrumentality of the death, the place where it happened, and the activity giving rise to it were the same as those he [Austin] encountered in his employment;" 76 Md. App. at 159, 543 A.2d at 894. The court concluded that the accident arose out of the deceased's employment.

The difficulty facing the court, however, was the question of "in the course of employment." Section 15 of the Worker's Compensation Act requires both "arising out of" and "in the course of employment." It is not an either/or test. Both factors must be present in order to apply the exclusive remedy of the Act.

To determine if the activity meets the "in the course of employment" test, it must be shown that the activity is sufficiently work-related to be an incident of employment. An activity is an incident of employment if "the employer expects or receives substantial benefit" from his employees participating in that activity. Md. App. at 160, 543 A.2d at 894.

The court found that compensation ben-