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Recent Developments: Schochet v. State: Statute Prohibiting Unnatural and Perverted Sexual Practices Does Not Violate the Constitutional Right to Privacy When Applied to a Private Sexual Act between Consenting, Unmarried, Heterosexual Adults

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tee of trustworthiness of the record itself, and upon the inconvenience and well-nigh impossibility of producing witnesses who could from their own personal knowledge testify to the truth of the entries made." 152 Md. 439, 446, 137 A. 43, 45 (1925). *Globe* emphasized that from the hospital's standpoint

> there could be no more important record than the chart which indicates the diagnosis, the condition, and treatment of the patients.... It is difficult to conceive why this record should not be reliable. There is no motive for the person, whose duty it is to make the entries, to do other than record them correctly and accurately.

Id. at 446-47, 137 A. at 46.

This theory is codified as Md. Cts. & Jud. Proc. Code Ann. § 10-101 (1987 Repl. Vol.). This statute declares

> (a)..."Business" includes business, profession, and occupation of every kind.
> (b)...A writing or record made in the regular course of business as a memorandum or record of an event is admissible to prove the act, transaction, occurrence, or event.
> (c)...The practice of the business must be to make such written records of its acts at the time they are done or within a reasonable time afterwards.
> (d)...The lack of personal knowledge of the maker of the written notice may be shown to affect the weight of the evidence but not its admissibility.

In *Bethlehem-Sparrows Point Shipyard v. Scherpenisse,* the Court of Appeals of Maryland included hospital records within the scope of this statute, explaining that the statute's purpose was to broaden the rule of evidence that limited one's testimony to what was personally known or observed. 187 Md. 375, 381, 50 A.2d 256, 260 (1946). Some entries within hospital records, however, have been declared inadmissible. *Gregory v. State* held that this legislation did not extend to a document containing a psychiatrist's opinion of an individual's mental capacity or criminal responsibility. 40 Md. App. 297, 325, 391 A.2d 437, 454 (1978).

Based on its review of the aforementioned authorities, the *Garlick* court concluded that the "pathologically germane" entries in hospital records are generally admissible because they are part of a hospital's "regular course of business." 313 Md. at 223, 545 A.2d at 33. The U.S. Supreme Court declared in *Palmer v. Hoffman* that "regular course" of business finds "its meaning in the inherent nature of the business in question and in the methods systematically employed for the conduct of the business as a business." 318 U.S. 109, 115 (1943). The court of appeals cited with approval the dissenting opinion of *New York Life Ins. v. Taylor,* which reasoned that a hospital's "regular course of business" is the treatment of patients. In order to fullfill this obligation, a hospital methodically maintains a record. Otherwise, a hospital cannot render adequate treatment. 147 F.2d 297, 301 (4th Cir. 1945).

The court of appeals also relied upon the holding in *Pratt v. State* that the information within a hospital record is admissible "as long as it is pathologically germane." 39 Md. App. 442, 455, 387 A.2d 779, 787 (1978), *aff'd,* 284 Md. 516, 398 A.2d 421 (1979). It then determined that "'pathologically germane' ... includes facts helpful to an understanding of the medical or surgical aspects of the case, within the scope of medical inquiry." 313 Md. at 222, 545 A.2d at 33.

After establishing this premise, the court sought to determine whether Garlick's hospital record was prepared in the "regular course of business" and if its contents were "pathologically germane" to his condition. If so, the document could be admitted into evidence under the hearsay rule exception.

Therefore, the significant facts of the case were recounted. The emergency room doctor examining Garlick ordered the blood and urine tests to understand why the patient responded poorly in his neurological exam. The doctor was not present when the blood sample was taken, nor was he aware of the identity of the hospital employee who conducted the tests. In addition, he was not aware whether the equipment performing the tests had been recently inspected, nor was he aware if the testing procedure itself conformed with routine practice. Nonetheless, the doctor testified that he had every confidence in the veracity of the test results.

It was noted that the doctor did not have litigation in mind when he ordered the blood sample taken. The sample was tested by the hospital and not by the police. There was no reason to doubt the record on its face. Considerations of utility and convenience outweighed the probative value behind pursuing the testimony of every medical staff member who examined either Garlick or his blood. The court concluded, "The examining doctor relied on these objective scientific findings for Garlick's treatment and never doubted their trustworthiness. Neither do we." 313 Md. at 225-26, 545 A.2d at 35.

The Court of Appeals of Maryland paid particular attention to the facts in distinguishing Garlick's situation from that in *Moon.* It recognized that Garlick's test results constituted "pathologically germane" entries in a hospital record prepared within the hospital's "regular course of business." This information, in light of the circumstances, satisfied the *Moon* requirement of substantial reliability. The *Garlick* court, therefore, understood that *Moon* was unique in its facts, and reinforced the trend that existed before the *Moon* decision. Thus, Maryland continues to recognize that one's right to confront his accuser is not violated by admitting into evidence a hospital record containing laboratory test results, even though the technician administering those tests is not called to testify.

— *Gregory R. Smouse*

Schochet v. State: STATUTE PROHIBITING UNNATURAL AND PERVERTED SEXUAL PRACTICES DOES NOT VIOLATE THE CONSTITUTIONAL RIGHT TO PRIVACY WHEN APPLIED TO A PRIVATE SEXUAL ACT BETWEEN CONSENTING, UNMARRIED, HETEROSEXUAL ADULTS

In *Schochet v. State,* 75 Md. App. 314, 541 A.2d 183 (1988), the Court of Special Appeals of Maryland recently held that a statute which prohibits unnatural and perverted sexual practices, Md. Ann. Code art. 27, §554 (1957), does not violate the constitutional right to privacy when it is applied to private acts of fellatio between consenting, unmarried, heterosexual adults.

Eight separate charges were filed against Steven Adam Schochet based upon three alleged sexual episodes stemming from an alleged rape. Schochet was acquitted of all six charges involving force and the lack of consent of the victim and of a seventh charge of sodomy. He was convicted only of a violation of Article 27, §554, which prohibits among other things, the act of fellatio, which is considered an "unnatural and perverted sexual practice." Schochet appealed the conviction on the issue of the constitutionality of §554 as applied to consenting, unmarried, heterosexual adults.

To begin its analysis, the court of special appeals examined whether Schochet had standing to raise the constitutional issue of whether there is some substantive due process right of privacy shielding him from

state regulation of noncommercial, consensual, private and adult sexual activity. The court held that the appellant was not disentitled to raise the issue in any regard, because there is no suggestion that the act of fellatio in question was commercial, public or involved a minor. In addition, the evidence clearly permitted a finding that the act was consensual; thus, the appellant was entitled to a ruling on the constitutionality of the statute as applied to a private act between consenting, unmarried, heterosexual adults. *Schochet*, 75 Md. App. at 319, 541 A.2d at 185.

Next, the court examined into which class of persons the appellant would fall. They stated that there are three significant classes: 1) a homosexual couple (male or female), 2) an unmarried heterosexual couple, or 3) a married heterosexual couple. They then noted that one class has been found to have no constitutional right of privacy in their sex lives. "It is now clear beyond room for disagreement that the Supreme Court has announced that there is no constitutional right of privacy to engage in homosexual acts." *Id.* at 319-20, 541 A.2d at 185 (citing *Doe v. Commonwealth's Attorney for City of Richmond*, 425 U.S. 901 (1986), and *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

Since the issue before the court of special appeals concerned unmarried heterosexuals, and because there has been no direct statement concerning a right of privacy for such a class, the court undertook an analysis of the development of the right to privacy to determine if the Supreme Court has stated anything that would suggest that §554 is unconstitutional as applied to unmarried heterosexuals.

The court found that the scope of the right to privacy and the limitations upon the right have been enumerated in a few key cases. The forerunner of the newly recognized right of privacy stressed the intimacy of the marital relation as the basis of the protection and "identified the institution of marriage as 'a relationship lying within the zone of privacy created by several fundamental constitutional guarantees.'" *Schochet* at 323, 541 A.2d at 187 (quoting *Griswold v. Connecticut*, 301 U.S. 479, 485 (1965)). The Court of Special Appeals of Maryland found that it is clear that, in reference to "the sacred precincts of marital bedrooms," the presence of the qualifying adjective "marital" by the Supreme Court was not inadvertent. The court concluded that the critical difference between the bedroom protected in *Griswold* and the bedroom not protected in *Bowers v. Hardwick* is that the bedroom in *Griswold* was a marital bedroom, while the bedroom in *Bowers* was not. *Schochet* at 324, 541 A.2d at 187-88.

The reasoning of the court was that the right to sexual privacy should be applied only to married couples. The court went on to state that:

> On the basis of *Griswold v. Connecticut* and (the dissenting opinion of Justice Harlan in) *Poe v. Ullman*, the possibility arises that the reason the plaintiffs in *Bowers v. Hardwick* were barred from the coverage of the right to privacy was because their sexual intimacy lacked the unique imprimatur of the marital union, not because it lacked the quality of heterosexuality.

Id. at 325, 541 A.2d at 188.

The Court of Special Appeals of Maryland further examined these Supreme Court cases and found that the majority had tightly narrowed the right of privacy "to a few select subjects, which did not include sexual relations of any sort by anyone outside of marriage..." *Id.* at 327, 541 A.2d at 189.

> Our prior decisions recognizing a right to privacy guaranteed by the Fourteenth Amendment included only personal rights that can be deemed fundamental or implicit in the concept of ordered liberty.... This privacy right encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing.

Id. at 327, 541 A.2d at 189 (quoting *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 65 (1973)).

The court went on to examine the pivotal case of *Eisenstadt v. Baird*, 405 U.S. 438 (1972), which appellant Schochet argued as holding that whatever right of privacy was recognized for married couples in *Griswold* is to be extended broadly to unmarried persons as well. The court concluded that "the opinion, on careful reading, simply does not stand for that." *Schochet*, 75 Md. App. 327-28, 541 A.2d at 189. In the court's opinion, the language of *Eisenstadt v. Baird*, relied on by the appellant, deals not with a broad right to privacy, but is limited to matters concerning the decision of whether to have a child: "'If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.'" *Schochet*, 75 Md. App. at 328, 541 A.2d at 189-90 (quoting *Eisenstadt v. Baird*, 405 U.S. at 453).

The court of special appeals went on to conclude that *Eisenstadt* is not primarily a due process case, but an equal protection case, and that "it strongly suggests that if the purpose of the law was to discourage sexual relations outside of marriage, a legislative discrimination between married persons would be a rational one..." *Schochet* at 331-32, 541 A.2d at 191-92.

Based on the readings of these cases, the court found that there was no evidence that the right to privacy covers the sexual activity of consenting, unmarried, heterosexual adults. "That right covers the intimacy of the marital union; and decisions dealing with procreation, contraception and abortion. There is not the remotest allusion to any constitutional protection for sexual activity... outside of marriage." *Id.* at 339, 541 A.2d at 198. The court held that in the absence of any such indication, Article 27, §554 is constitutional as applied to unmarried persons.

The Court of Special Appeals of Maryland went on to find that their holding was fully consistent with their own prior rulings and the prior rulings of the Court of Appeals of Maryland as to the constitutionality of §554.

> It is thus clear that the Supreme Court has yet to extend the right to privacy much beyond the context of intimate relationships. It is not, therefore, coextensive with every intrusion actionable under the tort of invasion of privacy, nor does it protect rights merely important and not fundamental.

Id. at 349, 541 A.2d at 200 (quoting *Montgomery County v. Walsh*, 274 Md. 502, 512-13, 336 A.2d 97, 105 (1975)).

Appellant also attempted to argue that due to the "sexual revolution," modes of sexual expression that were once thought to be "unnatural" are now part of everyday life with a significant majority of Americans, married and unmarried, heterosexual and homosexual. The court agreed that may be true, but suggested that such an argument should be delivered to the legislature rather than the court. "Unless we are to usurp the legislative function under the guise of constitutional interpretation, we refer such basic policy decisions to the branch that is more competent to make them and, is furthermore constitutionally authorized to make them." *Schochet* at 350, 541 A.2d at 201.

The decision handed down by the Court of Special Appeals of Maryland in *Schochet* narrows the right to privacy in sexual acts as applied by the Supreme Court. Where the Supreme Court has held that there is no right to privacy to engage in homo-

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