University of Baltimore Law Forum

Volume 19
Number 2 *Winter, 1989*

Article 14

1989

Recent Developments: Craig v. State: Sixth Amendment Right of Confrontation Is Not Absolute in Child Abuse Cases

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"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

suggested "that a closed circuit television arrangement based on a 'case-specific finding of necessity' would be regarded as impermissible under the Confrontation Clause, that view was not shared by more than four of the justices who sat on the case." *Id.* at 280, 544 A.2d at 798.

Therefore, the *Craig* court felt compelled by necessity to decide the issue of exceptions to the confrontation clause that the Supreme Court had chosen to reserve for another day. The court, taking guidance from the Court of Appeals' of Maryland analysis in *Wildermuth* and following Justice O'Connor's lead in her concurring opinion in *Coy,* held that:

> (1) the requirement of a face-to-face meeting in court is *not* absolute, but *does* admit of exceptions; (2) where a face-to-face meeting would, in fact, so traumatize a child-witness as to prevent him or her from reasonably communicating, the State may provide for the testimony to be taken in a setting that, as nearly as practicable, preserves all other aspects embodied in the right of confrontation, but does not require the witness to look directly upon the defendant or to testify in his direct physical presence; and (3) if § 9-102 is implemented in the manner prescribed by *Wildermuth,* the implementation will not be deemed so violative of the defendant's right of confrontation as to constitute reversible error.

Id. at 280-81, 544 A.2d at 799 (emphasis in the original).

The procedure authorized in the Maryland statute and used in this case did not amount to the kind of face-to-face confrontation that the Supreme Court held was envisioned by the sixth amendment. The child-witnesses testified from the judge's chamber in the presence of a prosecutor, the lead defense attorney, and a technician, while the judge and everyone else remained in the courtroom. The proceedings were broadcast through a closed circuit television setup, with Craig having access to her attorney through a private telephone line. The court of special appeals conceded that if the confrontation requirement were absolute as interpreted by Justice Scalia, the "procedure [used in *Craig*] would not pass muster." *Id.* at 281, 544 A.2d at 799. However, the court emphasized that the requirement was not so rigid since "neither the Supreme Court nor the Maryland Court of Appeals—the two courts that bind us—has ever held any aspect of the Confrontation Clause...to the absolute." *Id.*

In *Wildermuth,* the court of appeals held that the right to face-to-face confrontation was to be tempered by public policy considerations by which the state has a legitimate and compelling interest in authorizing the procedure stated in section 9-102. Articulating that interest more specifically, the *Craig* court held that the state has a two-fold interest in allowing the testimony of a child abuse victim to be given over closed circuit television. Foremost is the fact that if the child-witness is so traumatized by the confrontation so as to be unable to testify, the truth of the matter may never be revealed. Secondly, the state has a legitimate interest in protecting children generally from such trauma. *Id.* at 282-83, 544 A.2d at 800.

Craig's second argument was that the trial court failed to follow the proper procedure stated in section 9-102. Citing *Coy,* the court reemphasized that no individualized findings were made that the child-witnesses needed special protection in providing face-to-face testimony when the Supreme Court overturned that decision. The court distinguished *Wildermuth* in that that court's finding was based on testimony as to general perceptions on the difficulty children may have had testifying in court with the alleged abuser's presence. *Id.* at 285, 544 A.2d at 801. In the instant case, there was specific, focused testimony on each child by trained personnel that the child-witnesses would have extreme difficulty testifying in the presence of Craig which satisfied the requirements of the statute.

Finally, the court addressed Craig's assertion of right of presence. The *Wildermuth* court had also considered the argument that the closed circuit television procedure authorized by section 9-102 violated the defendant's common law and due process right of presence, because the witnesses and defendant were separated during testimony. The *Wildermuth* court rejected that contention since the defendant could hear the questions being asked and answered, could see the proceedings, and could readily communicate with his attorney. Thus, the *Wildermuth* court held that "[t]he statutory procedure did not thwart a fair and just hearing in terms of due process' and there was 'no violation of [the defendant's] due process right to be present.'" *Id* at 287-88, quoting *Wildermuth,* 310 Md. at 529, 530 A.2d at 291. Craig had essentially the same setup and was given ample opportunity to cross-examine the witnesses. Also, there was no violation of the common law right of presence since it had been modified by statute.

The Court of Special Appeals of Maryland has carved out an exception in the sixth amendment's confrontation clause concerning child abuse cases. Citing strong public policy and the state's legitimate interest in protecting children generally from abuse, the court has made a strong statement in both upholding the accused's rights but also protecting child-witnesses from being traumatized by the courtroom experience.

— *George I. Cintron*

Geisz v. Greater Baltimore Medical Center: SURVIVAL ACTIONS BASED ON MEDICAL MALPRACTICE ACCRUE UPON DISCOVERY AND FRAUD STATUTE TOLLS TIME FOR FILING WRONGFUL DEATH CLAIMS

In *Geisz v. Greater Baltimore Medical Center,* 313 Md. 301, 545 A.2d 658 (1988), the Court of Appeals of Maryland held that a wrongful death and survival action, based on medical malpractice, accrues upon discovery of fraud and that Md. Cts. & Jud. Proc. Code Ann. §5-203 (1984 Repl. vol.) operates to toll the time for filing a wrongful death claim.

Plaintiff Elaine Geisz (Elaine), as personal representative of the estate of Steven F. Geisz (Geisz) and as mother and next friend of Steven Geisz, II, brought a survival action and a wrongful death claim against Greater Baltimore Medical Center (GBMC) and Dr. George J. Richards, Jr., alleging medical malpractice ten years after Geisz died of Hodgkin's disease. The Circuit Court for Baltimore County entered summary judgment in favor of the defendants finding that the survival action accrued, as a matter of law, upon the death of Geisz and that the Plaintiff failed to show facts to support a finding of fraud to toll the general three year statute of limitations to bring a wrongful death claim.

Assuming that the summary judgment record could support a finding of fraud, the Court of Special Appeals of Maryland nevertheless held that Elaine and Geisz "by the exercise of ordinary diligence should have discovered the fraud" more than three years prior to the filing of the wrongful death claim. *Geisz v. GBMC,* 71 Md. App. 538, 526 A.2d 635 (1987). The Court of Appeals of Maryland granted certiorari to address the issue of whether the survival claim and the wrongful death action were time barred pursuant to §5-203.

In 1971, Geisz had been diagnosed as suffering from Hodgkin's disease and had been referred to Dr. Richards, who was chief of radiation therapy at GBMC. At