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Recent Developments: Lack of Jury Impartiality Required for New Trial

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points in relationship to the number of instructions in the program." *Apple*, 714 F.2d at 1245. Franklin defended, however, that the operating programs were not copyrightable; first, because they are embedded on a micro-chip and are therefore a form of machinery and second, because they cannot be distinguished from the concept of operating the computer system, they are more than the mere expression of an idea. Copyright Act of 1976, 17 U.S.C. § 102 (1976).

Both of Franklin's arguments were rejected by the court which reasoned that the programs do not meet the requirements of the Copyright Act of 1976, 17 U.S.C. §§ 101 *et seq.* The programs are "literary works," and they are "fixed in [a] tangible medium of expression." *Id.* at § 102(a). The court went on to hold that "the medium is not the message" and the fact that a program is recorded on a device which is part of the machinery is a mere change in the tangible form. *Apple*, 714 F.2d at 1251. In response to Franklin's second argument that an operating system is a mere method of operation and not protected, the court relied on Congress's Commission on New Technological Uses report which stated "[t]hat the words of a program are used ultimately in the implementation of a process should in no way affect their copyrightability." *id.* The court also found that Apple was seeking only to copyright the instructions and not the computer operating method.

With the growing number of personal computers in businesses and private homes throughout the United States, this decision protects not only large computer companies such as Apple, but also the individual computer operator who creates his/her own operating program.

by Sylvia Halkousis

LACK OF JURY IMPARTIALITY REQUIRED FOR NEW TRIAL

In *McDonough Power Equipment, Inc. v. Greenwood*, ___ U.S. ___ (1984), the United States Supreme Court clarified the bases upon which a motion for new trial made as a result of a juror's failure to disclose information on voir dire will be granted. To prevail upon such a motion, a party must show that a juror's answer to a material question on voir dire was dishonest and that had the juror answered honestly, grounds establishing a challenge for cause would have been present.

In *McDonough Power*, Billy Greenwood and his parents brought suit against McDonough Power Equipment Incorporated to recover damages for injuries sustained by Billy when his feet came in contact with the blades of a riding lawn mower manufactured by McDonough, Inc. During voir dire, prospective jurors were asked if they or any of their family members had ever sustained a severe injury. One individual, who eventually became a member of the jury, failed to respond to this question. After the trial, the United States District Court entered judgment upon a jury verdict for McDonough, Inc.

After entry of the judgment, the Greenwoods requested and received permission to approach the jurors in an attempt to elicit information regarding injuries sustained by them or members of their families. Despite discovery of evidence that a juror had not disclosed information regarding such injuries, the district court denied the Greenwood's motion for a new trial, stating that the jury verdict was fair and well-supported.

The Greenwoods appealed to the Court of Appeals for the Tenth Circuit which reversed the district court judgment. In *Greenwood v. McDonough Power Equipment, Inc.*, 687 F.2d 338 (10th Cir. 1982), the court of appeals held that the Greenwood's right of per-emptory challenge had been prejudiced because of the juror's failure to respond to a question on voir dire. To cure the error of the juror's "probable bias," a new trial was granted. The Supreme Court however, reversed, holding that a new trial will not be granted unless a juror's nondisclosure results in a partial jury.

The court's opinion begins by tracing the legislative and judicial history of the harmless error rules. These rules were adopted to curb the abuses of appellate review procedures because at one time "courts of review tower[ed] above the trials... as impregnable citadels of technicality" with trials representing attempts to get reversible error on the record. *Kotteakos v. United States*, 328 U.S. 750, 759 (1946). The effect of the harmless error rules is that courts, in their judgment, can disregard errors in the proceeding which do not interfere with the fairness of the trial.

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RAPE TRAUMA SYNDROME

For the first time in Maryland, a trial court has held that expert testimony on the victim's emotional trauma is admissible in a rape case to show the victim did not consent to intercourse. *State v. Allewalt*, docket No. 83-CR-2517 (Circuit Court for Baltimore County November 4, 1983). Relying on consent as his defense, Allewalt was convicted of rape after a psychiatrist described the symptoms the complainant suffered, and testified that they were attributable to the emotional condition known as rape trauma syndrome.

Rape trauma syndrome is a specific type of stress disorder which arises from the emotional impact of being raped. The symptoms most commonly associated with rape trauma syndrome include fear of men in general, fear of being alone, fear of being raped again, disturbance in sleep habits, loss of appetite, depression, and a sense of shame.

Without the support of expert testimony on rape trauma syndrome, the defense of consent was often difficult to disprove because of lack of physical evidence. Many times the decision in such a case would be based solely on the testimony of the complainant and defendant; therefore, the credibility of each testimony was critical in the determination of the outcome. By allowing the expert to testify, the complainant's testimony that she did not consent to intercourse can be corroborated by the testimony of a psychiatrist. Rape trauma testimony, therefore, could significantly strengthen the prosecution's case.

Only a handful of states have directly decided the issue of admissibility of rape trauma syndrome. Minnesota, the only state with more than one decision on point, has held that the admission of expert testimony on rape trauma syndrome is reversible error. *State v.*

Sex-Based Mortality Tables
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IV.

One of the main purposes of Title VII is to "make persons whole for injuries suffered on account of unlawful employment discrimination." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). *Moody* illustrated the existence of a strong presumption in favor of retroactive relief for Title VII violations, and *Manhart* stressed that the presumption was one that could seldom be overcome. Upon examination of the relief afforded Norris by the district court below, which affected only those benefit payments made *after* the date of its judgment, the Supreme Court found that such an award was inconsistent with the presumption elicited in *Moody* and recognized in *Manhart*.

Before remanding the issue to the district court, the Supreme Court suggested that the lower court give more attention to the fact that, before *Manhart*, the use of sex-based tables might reasonably have been assumed to be lawful. In addition, the Court noted that the decision in *Manhart* should have put the defendants on notice that a man and a woman who make the same contributions to a retirement plan must be paid the same monthly benefits. Therefore, the lower court should examine whether the defendants, after *Manhart*, could have applied sex-neutral tables to the pre-*Manhart* contributions made by the plaintiff, Norris, and a similarly situated male employee without violating any contractual rights that the latter might have had on the basis of his pre-*Manhart* contributions. *Norris*, 103 S.Ct. at 3503-04. If the defendants could have done this, they should have in order to prevent further discrimination, and it would therefore be equitable that defendants be required to supplement any benefits coming due after the district court's judgment by whatever sum necessary to "make Norris whole." *Id.*

V.

Justice Powell, joined by three other justices, dissented as to the defendants' liability, basing his assertation on the premises that sex-based mortality tables reflect objective actuarial standards and employee classification on the basis of sex in reference to life expectancy is a "nonstigmatizing factor that demonstrably differentiates females from males and that is not measurable on an individual basis...." *Norris*, 103 S.Ct. at 3509.

The dissent further warned that the potential effect of the majority's holding would be to: 1) deny employees the opportunity to purchase life annuities at lower costs because (a) the cost to employers of offering unisex annuities is prohibitive, or (b) insurance carriers would not choose to write such annuities; 2) inflict the heavy cost burden of equalizing benefits sustained by those insurance companies and employers choosing to offer such on current employees; and 3) have a disruptive impact on the operation of an employer's pension plan as an unforeseen contingency jeopardizing the insurer's solvency and the insured's benefits. *Id.*

The potential effect of the majority's holding on insurance companies and employers has yet to be fully observed. Nonetheless, it is now clearly established that an employer or insurer can no longer fashion his personal policies on the basis of assumptions about the differences between men and women previously believed to be valid.

by Robert J. Farley

Lack of Jury Impartiality
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In 1919, the Judicial Code, § 269 (28 U.S.C. § 391) espoused the principle that on any appeal, a court was to examine the trial record "without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." The essence of this provision was incorportaed in Rule 61 of the Federal Rules of Civil Procedure. This harmless error provision instructs the district courts that throughout a trial proceeding judges "*must* disregard any error which does not affect the substantial rights of the parties." (emphasis added). Support for this principle can be found in *De Santa v. Nehi Corp.*, 171 F.2d 696 (2d. Cir. 1948), where the court held that it is considered best practice for appellate courts to act in accordance with the mandate of Rule 61. The principle of Rule 61 was ultimately codified by Congress to be specifically applied to appellate courts in 28 U.S.C. §2111 (1949).

In *McDonough Power*, the Supreme Court noted that a fair trial requires an impartial trier of fact—"[a] jury capable and willing to decide the case solely on the evidence before it," *Smith v. Phillips*, 455 U.S. 209, 217 (1982) and that an important safeguard of jury impartiality is the voir dire examination. The court held that in order to uphold the due process requirement of impartiality, prospective jurors must answer honestly questions posed to them.

With these principles in mind, the Supreme Court reviewed the varied responses given by prospective jurors in *McDonough* when the history of severe injuries question was posed. The range of responses indicated that each juror interpreted the question differently; some jurors' responses revealed injuries resulting from minor incidents while other jurors' responses failed to disclose injuries resulting from serious accidents. The court acknowledged that even though the jurors were mistaken by failing to disclose various injuries sustained by their family members, their responses were honest in light of their interpretation of the voir dire question.

The Supreme Court held that the policy of judicial management, evidenced by the harmless error rules of disregarding errors that do not interfere with the fairness of a trial, must be upheld because the importance of trial finality outweighs evidence of trial imperfection. To effect the policy behind the harmless error rules, the court adopted the following two-part test to evaluate the propriety of granting a motion for a new trial based on lack of information received from a juror on voir dire examinations: (1) "a party must first demonstrate that a juror failed to answer honestly a material question on voir dire" and (2) "that a correct response would have provided a valid basis for a challenge for cause." ___ U.S. ___, ___.

There are two concurring opinions in *McDonough Power*. Justice O'Connor concurred with the majority, holding that "honesty of a juror's response is the best initial indicator of whether the juror in fact was impartial." ___ U.S. ___, ___. However, Justice O'Connor's concurrence is written with the view that the ultimate determinations regarding the existence of juror bias and the need for a new trial remain within the trial court's discretion.

In the second concurrence, Justice Brennan, joined by Justice Marshall, agreed with the majority's result but asserted a different test to evaluate the granting of a motion for a new trial based on lack of information by a juror on voir dire examination. Justice Brennan's test focuses on a juror's bias, not his honesty, and requires a party seeking a new trial to demonstrate that: (1) "the

juror incorrectly responded to a material question on voir dire" and (2) "the juror was biased against the moving litigant." ___ U.S. ___, ___. In determining whether the juror was biased against the moving litigant, Justice Brennan wrote that the honesty or dishonesty of the response and whether the incorrect response was made intentionally or inadvertently are two factors that must be considered.

The Supreme Court's decision in *McDonough Power* places more importance on the value of trial finality than on the value of trial perfection through the adoption of its two-part test used in evaluating the granting of a motion for a new trial because of a juror's failure to disclose information on voir dire examination. By leaving room for harmless error at the trial level, the Court further eliminates the possibilities of battles of technicality as potential grounds for a new trial, promotes and upholds the policy of judicial efficiency, and ensures substantially just and equitable results in trial proceedings by demanding an impartial jury.

by Deborah Zgorski

Antenuptial Agreements

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consonant with the needs of contemporary society, a court... has... the duty to re-examine its precedents rather than to apply by rote an antiquated formula." *Id.* at 258-59, 462 A.2d at 514 (quoting *Lewis v. Lewis*, 370 Mass. 619, 351 N.E.2d 526, 532 (1976)). The court proceeded to evaluate precedent in light of Maryland's present public policy.

The court noted that antenuptial agreements in contemplation of death were treated differently from antenuptial agreements in contemplation of divorce; the former is permitted when validly executed. For an agreement which contemplates death to be valid several factors must be considered; these will be discussed later. *See Hartz v. Hartz*, 248 Md. 47, 234 A.2d 865 (1967). However, in *Cohn v. Cohn*, 209 Md. 470, 121 A.2d 704 (1956), the court held that antenuptial agreements in contemplation of separation or divorce were void as against public policy. This holding was based on two reasons. The first was that the state's interest in preserving the marriage would be defeated by an antenuptial agreement which would induce divorce. *Id.* at 475-76, 121 A.2d 706-07. The wife might become a ward of the state if the agreement did not satisfy the husband's obligations. The second reason was that the agreement would be abused in states where divorce was based on marital fault because the husband could force his wife to bring an action by abusing her and thus limiting the amount he would have to pay. *Crouch v. Crouch*, 53 Tex. App. 594, 385 S.W.2d 288 (1964). Maryland has both fault and no fault divorce but followed this reasoning because it was unanimously accepted by other states. In evaluating these rationales the *Frey* court looked to other jurisdictions and current Maryland law.

In other jurisdictions, the prohibition against antenuptial agreements has been abandoned. These jurisdictions assert that there is little evidence to support the view that antenuptial agreements induce divorce. *Volid v. Volid*, 6 Ill. App.2d 386, 286 N.E.2d 42 (1972).

The courts also recognize that the roles of husband and wife have changed over the years. The wife is now less likely to become a ward of the state since women have become more prevalent in the work place and have the necessary skills to carry on after a divorce. Another reason for abandoning the prohibition is that the state has no interest in preserving a marriage which has deteriorated to a point beyond hope. In addition, a majority of the states allow no-fault divorces including Maryland under Md. Ann. Code art. 16, § 8824-25 (1981).

Furthermore, the Maryland General Assembly has indicated that Maryland's present public policy recognizes these agreements, and therefore they cannot be against public policy. The General Assembly enacted the Marital Property Act, 11978 Md. Laws 794, which pertains to property distribution upon divorce. Maryland Code (1974, 1980 Repl. Vol.) Cts. & Jud. Proc. Article, 3-6A-01(c), (e) allows the parties to determine what will be considered marital property. Since the General Assembly permits antenuptial agreements that dispose of property upon divorce and since the state law's function is to express public policy, the *Frey* court decided that *Cohn v. Cohn*, 209 Md. 470, 121 A.2d 704 (1956), must be overruled.

However, antenuptial agreements in contemplation of divorce are not automatically valid. *Hartz v. Hartz*, 248 Md. 47, 234 A.2d 865 (1967), sets out the tests and factors to be used in determining whether the agreement is valid. *Id.* at 56-59, 234 A.2d 870-73. It must be fair and equitable. There also must be full and truthful disclosure of all assets. *Id.* at 56, 234 A.2d 871. The parties must enter into the agreement voluntarily and fully realize its meaning and effect. *Id.* at 56-57, 234 A.2d 870-71. Independent legal advice is also important. *Id.* at 60, 234 A.2d 873. In determining if there is overreaching, the court should look at the following factors: ages of the parties, income, obligations and ties, needs of the relinquishing party, and circumstances leading to the execution of the agreement. *Id.* at 58-59, 872. The agreement will be valid only if these tests have been met.

Justice Smith concurred in part and dissented in part. He dissented from the holding that the agreement was not valid. Justice Smith believes that public policy allows premarital agreements but only to the extent that they do not waive alimony. In his opinion, Maryland Code (1974, 1980 Repl. Vol.), Cts. & Jud. Proc. Article, 3-6A-01(c), (e) does not concern alimony, but only such property acquired during the marriage-family use personal property. Justice Smith stated that the state's interest is to make sure the marriage tie is not "lightly" broken; and now that either spouse may be required to pay alimony, the public policy is needed more than ever.

The court's decision does not apply to all antenuptial agreements but it is limited to those agreements which concern property and financial obligations. Agreements which attempt to limit the duty of a spouse to support the other spouse or which provide that the spouse does not have to support the children may be against public policy.

by Kathleen Runyon