

## **An Unnecessary Gray Area: Why Courts Should Never Consider Race in Child Custody Determinations**

Kathryn Beer

Follow this and additional works at: <https://scholarship.law.stjohns.edu/jcred>

---

This Note is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in Journal of Civil Rights and Economic Development by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact [selbyc@stjohns.edu](mailto:selbyc@stjohns.edu).

**AN UNNECESSARY GRAY AREA:**

**WHY COURTS SHOULD NEVER CONSIDER RACE  
IN CHILD CUSTODY DETERMINATIONS**

KATHRYN BEER\*

INTRODUCTION

Imagine, for a moment, that you are the parent of an energetic and cheerful two-year-old girl.<sup>1</sup> From the day that your daughter is born, you are a co-parent in every respect: you help care for her physically and emotionally – playing with her, feeding her, bathing her, and preparing her for bed. You provide your daughter with a safe home, surround her with caring relatives, and attempt to build a loving nuclear family in which she may be raised. Soon, however, your marriage begins to deteriorate. Your spouse leaves, taking your daughter to another state, miles away. You fly out whenever possible, dropping everything in order to be with your daughter for mere weekends at a time. Although your marriage has been lost, your daughter is the driving force in pushing you through an emotionally taxing custody battle.

You are a good parent. You have a full-time job, allowing you to provide your daughter with not only necessities, but luxuries as well, including a private school education. You are physically and psychologically healthy, and enjoy the support of a large extended family. You are moral and honest, planning to raise your child to be an accepting woman by immersing her in a spiritual and religious environment. Licensed psychologists believe that your daughter would thrive under your care. Perhaps most importantly, your little girl adores you, constantly smiling as you play with her and read to her.

\* J.D. Candidate, St. John's University School of Law, June 2010; B.A., *cum laude*, Psychology, Loyola College in Maryland, May 2007.

<sup>1</sup> The following hypothetical is based upon the facts of *In re Marriage of Gambla*, 853 N.E.2d 847 (Ill. 2006), *cert denied*, 128 S. Ct. 693 (2007).

Secure in the belief that you are the more qualified parent to raise your daughter in a way that serves her best interests, imagine your shock when the judge awards sole custody of your daughter to your former spouse. In disbelief, you cannot understand how the court could reach such a determination.

In its written decision, the court makes crystal clear its rationale: your ex-wife is the better parent because she is black and you are not. It is in your daughter's best interest, the court writes, to reside with her black mother because your spouse would be better able to teach your daughter, who is biracial, "to learn to exist . . . in a society that is sometimes hostile to such individuals."<sup>2</sup> Additionally, the court reasons, your spouse would be "better able to provide for [your daughter's] emotional needs in this respect."<sup>3</sup> Incredibly, such race-based determinations are not uncommon in jurisdictions across the country.

"Despite proclamations that we don't see race, racism continues to construct divergent social, political and economic realities in America."<sup>4</sup> Even as the historic election of Barack Obama swept away "the last racial barrier in American politics,"<sup>5</sup> deeply-rooted concerns about the role of race in our society permeate laws in ways both obvious and subtle in twenty-first century America. Race still matters.<sup>6</sup> Although significant limits have been placed on racial discrimination within the family law arena, throughout the years,<sup>7</sup> state courts across the country have decided

<sup>2</sup> In re Marriage of Gambla, 853 N.E.2d at 868.

<sup>3</sup> *Id.*

<sup>4</sup> Tanya Washington, *Loving Grutter: Recognizing Race in TransRacial Adoptions*, 16 GEO. MASON U. CIV. RTS. L.J. 1, 4 (2005).

<sup>5</sup> Adam Nagourney, *Obama Elected President as Racial Barriers Fall*, N.Y. TIMES, Nov. 5, 2008, at A1, available at [http://www.nytimes.com/2008/11/05/us/politics/05elect.html?\\_r=1&scp=1&sq=Barack%20Obama%20Elected%20President&st=cse](http://www.nytimes.com/2008/11/05/us/politics/05elect.html?_r=1&scp=1&sq=Barack%20Obama%20Elected%20President&st=cse) (stating that the last racial barrier in American politics has been swept away with ease after Barack Obama was elected President).

<sup>6</sup> See, e.g., Siri Carpenter, *Buried Prejudice: The Bigot in Your Brain*, Scientific Am. Mind, Apr. 2008, available at <http://www.scientificamerican.com/article.cfm?id=buried-prejudice-the-bigot-in-your-brain> (demonstrating that even a black civil rights leader like Jesse Jackson cannot escape the implicit bias that unwittingly exists within people despite efforts to quell explicit displays of prejudice); Nicholas D. Kristof, *What? Me Biased?*, N.Y. TIMES, Oct. 30, 2008, at A39, available at <http://www.nytimes.com/2008/10/30/opinion/30kristof.html> (suggesting that "while the vast majority of Americans truly believe in equality and aspire to equal opportunity for all, our minds aren't as egalitarian as we think they are.").

<sup>7</sup> See, e.g., *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (declaring a state statute that prohibits people of different races from marrying unconstitutional under both the Equal Protection Clause and Due Process Clause); *McLaughlin et al. v. Florida*, 379 U.S. 184, 195, 196 (1964) (holding that a Florida law prohibiting cohabitation between two individuals of different races violates the Equal Protection Clause of the Fourteenth Amendment). *But see* Chip Chiles, *A Hand to Rock the Cradle: Transracial Adoption, the Multiethnic Placement Act, and a Proposal for the Arkansas General Assembly*, 49 ARK. L. REV. 501, 502-03 (1996) (noting that although the number of transracial adoptions rose in the 1960's, this trend was shattered when the National Association of Black Social Workers "derided transracial adoption as 'genocide' against black people and asserted its categorical opposition to

many custody cases based on race.<sup>8</sup> These courts have justified their decisions by rationalizing that the child's best interests are served by awarding custody to a parent whose race matches that of the child,<sup>9</sup> and by downplaying an overt reliance on race in favor of other, more socially acceptable factors.<sup>10</sup>

This Note proposes that the "best interests" standard should be tailored to prohibit courts from considering race in custody determinations. Although race undoubtedly plays a significant role in an individual's emotional development and acceptance of self, such development and self-acceptance is not secured – nor is a child's best interest served – simply by awarding custody to a guardian with whose race the child can more readily identify. Rather, best interests custody decisions must be made by determining which guardian will provide a more loving and supportive environment in which the child can thrive; not simply one in which members of the household share similar physical characteristics.

While state statutes requiring children to be placed with same-race guardians have been held unconstitutional,<sup>11</sup> state courts have consistently held that the mere consideration of race in custody determinations is

transracial adoption . . .").

<sup>8</sup> See Eileen M. Blackwood, Note, *Race as a Factor in Custody and Adoption Disputes*, *Palmore v. Sidoti*, 71 CORNELL L. REV. 209, 217 (1985) (stating that many trial courts determine child custody cases solely on racial factors and some appellate courts use race as a factor to be considered); see also Myriam Zreczny, Note, *Race-Conscious Child Placement: Deviating from a Policy Against Racial Classifications*, 69 CHI.-KENT L. REV. 1121, 1122 (1994) (questioning how the consideration of race as a factor in best interest determinations has survived strict scrutiny, whereas nearly every other race-based classification practice by a state (excluding affirmative action) does not pass the strict scrutiny test).

<sup>9</sup> See generally *Drummond v. Fulton County Dep't of Family & Children's Servs.*, 563 F.2d 1200, 1203–05 (5th Cir. 1977) (holding that placement of a mixed-race child with an adoptive family that matched his racial characteristics would be in the best interests of the child as opposed to being placed with a white foster family that had cared for the child and grown attached to him); *In re The Petition of R.M.G et al.*, 454 A.2d 776, 788, 794 (D.C. 1982) (explaining that although the racial factor was not argued correctly here, race can be a factor in determining the best interests of a child in adoptive proceedings).

<sup>10</sup> See, e.g., *Dansby v. Dansby*, 189 S.W.3d 473 (Ark. Ct. App. 2004). In *Dansby*, the court upheld the lower court's modification from joint custody of the parties' daughter to sole custody in favor of the father based on a change in circumstances. *Id.* at 480. Although the father objected to the fact that the mother was dating white men, the court claimed to base its decision on the mother's alleged drug use and promiscuity, despite the fact that the father had been arrested and had failed to promptly pay child support on numerous previous occasions. *Id.* at 479–80. *Parker v. Parker*, 986 S.W.2d 557, 558–63 (Tenn. 1999). *Parker* expressed that race should never be a factor in custody matters, and held that the trial court properly granted custody to the father based on non-racial factors, despite finding that the trial court erred in allowing racial testimony during proceedings.

<sup>11</sup> See *Reisman v. Tenn. Dep't of Human Servs.*, 843 F. Supp. 356, 364 (W.D. Tenn. 1993) (finding Tennessee's Human Services Department policy requiring biracial children to be placed with black and biracial adoptive families unconstitutional); *In re Gomez*, 424 S.W.2d 656, 659 (Tex. Civ. App. 1967) (holding a state statute prohibiting biracial adoptions as a violation of the Equal Protection Clause).

permissible and “race-matching preferences” do not violate the Equal Protection Clause of the Fourteenth Amendment.<sup>12</sup> Courts justify reliance on race by concluding that race is one of many acceptable best interest factors. Race, it has been held, can guide the court in determining which parent is better suited to expose the subject child to his or her ethnic heritage and to assist the subject child in developing his or her cultural pride.<sup>13</sup> However, this Note proposes that allowing race to be used as a best interests factor increases the risk of courts deciding custody proceedings on issues not relevant to the cases at hand, extending racial stereotypes, and ultimately, harming not only families, but the children with whose well-being those courts are entrusted to protect. Therefore, this Note suggests that the best interests standard should be modified to explicitly prohibit courts from considering race in custody determinations.

Part I of this Note explores the basis of the “best interests” standard and how courts have come to treat race as a factor in determining this standard. This part briefly introduces the need for and purpose of child custody proceedings. Next, this part explains that reaching decisions that promote the child’s best interests is the widely accepted general standard amongst state courts. Further, this part discusses the history of race as a factor in custody decisions, tracing the courts’ use of race in such proceedings from before the Supreme Court’s 1984 holding in *Palmore v. Sidoti*<sup>14</sup> up until this landmark decision. Finally, Part I explores the effect that *Palmore* had on subsequent child custody cases.

Part II discusses the inadequacies of the courts’ use of race as a best interests factor in custody proceedings and how such inadequacies may actually harm those whom they are meant to protect. This part presents the opposing side by exploring arguments *for* the consideration of race in best interests custody determinations, identifying the rationale behind various groups’ belief that children are better placed with parents and guardians of

<sup>12</sup> Zreczny, *supra* note 8, at 1121. See *McLaughlin v. Pemsley*, 693 F. Supp. 318, 319–20 (E.D. Pa. 1988). The Court in *Pemsley* analyzed the Equal Protection argument as applied to foster care placements. *Id.* “[T]he goal of making an adequate long-term foster care placement that provides for a foster child’s racial and cultural needs and that is consistent with the best interests of the child, is indisputably a compelling governmental interest for the purposes of the Equal Protection Clause.” *Id.* at 324. see also Kim Forde-Mazrui, *Black Identity and Child Placement: The Best Interests of Black and Biracial Children*, 92 MICH. L. REV. 925, 928 (1994). Forde-Mazrui notes that neither Congress nor the Supreme Court has forbidden the consideration of race in child placement. *Id.*

<sup>13</sup> See *Jones v. Jones*, 542 N.W.2d 119, 124 (S.D. 1996) (holding that in custody proceedings it is proper to take into consideration race as it relates to a child’s ethnic heritage and the parent’s ability to expose the child to it); see also *Davis v. Davis*, 658 N.Y.S.2d 548, 550 (N.Y. App. Div. 1997) (stating that although race is not a controlling factor in custody disputes, it must be weighed along with the other elements of family life).

<sup>14</sup> 466 U.S. 429 (1984).

their own race. This part then argues that the reasoning behind such a belief is flawed for three main reasons. Part II first suggests that permitting race to be used in determining a child's best interest can lead to an abuse of discretion by the courts because judges may base their decisions on personal biases, or may allow undue weight to be given to race. Next, this part suggests that allowing race to be considered under the best interests standard in custody proceedings assumes that a different race guardian will not be able to facilitate emotional growth in as healthy a manner as a guardian of the same race as the subject child. Yet, children raised by parents of races different from themselves are just as happy, well rounded, and emotionally developed as children raised by parents of their own race.<sup>15</sup> Finally, this part offers that race as a consideration in best interests custody determinations supposes that a child's best interests are better served by a same race guardian because this guardian would enable a child to develop a stronger cultural identity, thereby promoting racial stereotyping. However, the race of a parent does not affect a child's appreciation for or involvement in his or her culture.<sup>16</sup>

Part III suggests that the best interests standard be modified to explicitly exclude race as a possible consideration in custody proceedings and provides reasoning for this proposal. This part suggests that the elimination of race as a factor to consider in best interests custody decisions will likely reduce societal prejudices and racial biases. By placing children based upon reasons other than race, this Note submits, courts encourage relationships built on love and nurturing as opposed to shared physical characteristics, which, in turn, may create a more accepting and tolerant society. Additionally, this part proposes that by narrowing the best interests standard to eliminate any consideration of race in custody determinations, courts will be forced to instead focus on factors that are more relevant to a child's well being. If no weight may be given to race in custody proceedings, this Note suggests that judges will have to analyze more fully the parenting capabilities of each party in order to provide a

<sup>15</sup> Forde-Maznui, *supra* note 12, at 944 (noting that, regarding adoption practices, “[m]any empirical studies indicate that transracially placed Black children are as well adjusted as their inracially placed counterparts”); Angela T. McCormick, *Transracial Adoption: A Critical View of the Courts’ Present Standards*, 28 J. FAM. L. 303, n.116 (1994) (suggesting that transracially adopted children may be better prepared to operate and negotiate in the world around them).

<sup>16</sup> Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1209 (1991) (reporting that studies of minority children adopted by white families suggest that these children “developed strong senses of racial identity” as compared to minority children adopted and raised by minority families and minority children raised by their biological families); Forde-Maznui, *supra* note 12, at 945 (refuting the argument that same-race placement is required for a child to have a positive racial identity).

decision that will truly be in the subject child's best interest.

### I. A BACKGROUND: RACE AND THE 'BEST INTERESTS' STANDARD

Unfortunately, as a result of high divorce rates<sup>17</sup> and a growing number of children born to unmarried parents,<sup>18</sup> child custody proceedings are becoming increasingly prevalent in the United States.<sup>19</sup> In these cases, courts must determine which parent or guardian will retain the rights and duties that accompany taking custody of the child in question.<sup>20</sup> These rights and duties include providing for the "physical, moral, and mental well-being of the child" and imply that the guardian receiving custody has "immediate personal control of the child."<sup>21</sup>

#### A. Custody Proceedings and the Child's Best Interests

In determining which guardian will be granted custody of the subject child, state family courts have unanimously held that the deciding court "must weigh whether that decision will be in the best interests of the child,"<sup>22</sup> and a majority of states even statutorily require courts to consider the best interests of the child.<sup>23</sup> However, although the best interests test is

<sup>17</sup> Jeffrey G. Sherman, *Prenuptial Agreements: A New Reason to Revive an Old Rule*, 53 CLEV. ST. L. REV. 359, 373 (2005) (suggesting that around fifty-percent of all American marriages end in divorce); Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145, 194 (1998) (stating that approximately half the marriages in the United States will end in divorce).

<sup>18</sup> See R.A. Lenhardt, Elizabeth B. Cooper, Sheila R. Foster & Sonia K. Katyal, *Forty Years of Loving: Confronting Issues of Race, Sexuality, and the Family in the Twenty-First Century*, 76 FORDHAM L. REV. 2669, 2673 (2008) ("[A]lmost 40 percent of America's children are born to unmarried parents.") (quoting Stephanie Coontz, Op-Ed., *Taking Marriage Private*, N.Y. TIMES, Nov. 26, 2007, at A23); see also Rebecca Moulton, *Who's Your Daddy?: The Inherent Unfairness of the Material Presumption for Children of Unmarried Parents*, 47 FAM. CT. REV. 698, 704 (2009) (examining the increases in unmarried birth rates by various ethnic groups).

<sup>19</sup> See Robert B. Weinstock, Note, *Palmore v. Sidoti: Color-Blind Custody*, 34 AM. U.L. REV. 245, 248 (1984) (discussing several situations in which courts must determine rights and duties regarding child custody); see also Elizabeth Barker Brandt, *Concerns at the Margins of Supervised Access to Children*, 9 J. L. & FAM. STUD. 201, 207 (2007). ("The growth of intractable custody litigation has also been fueled by the legal context in which custody issues are decided.")

<sup>20</sup> Weinstock, *supra* note 19, at 248 (explaining that "[i]f a family dissolves as a result of death, divorce, or separation, courts must determine who will retain the various rights and duties regarding custody of the child in question."); see Kelley v. Kelley, 317 Ill. 104, 110 (1925) (stating that "the court granting a divorce shall have full and continuing jurisdiction" to make orders with respect to the care, custody, and support of the child in question).

<sup>21</sup> Weinstock, *supra* note 19, at 248.

<sup>22</sup> *Determining the Best Interests of the Child: Summary of State Laws*, CHILD WELFARE INFO. GATEWAY, Apr. 2008, at 1, available at [www.childwelfare.gov/systemwide/laws\\_policies/statutes/best\\_interest.cfm](http://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.cfm) [hereinafter *Summary of State Laws*]; see Weinstock, *supra* note 19, at 249 ("[C]ourts unanimously agree that the best interest and welfare of the child are paramount.")

<sup>23</sup> Weinstock, *supra* note 19, at 249 ("A majority of the states statutorily mandate that courts consider the 'best interests of the child' in custody proceedings."). See, e.g., N.Y. DOM. REL. LAW. §

so widely accepted, there exists no uniform definition of what constitutes the child's "best interests."<sup>24</sup> Instead, each state establishes its own factors that courts must evaluate when concluding which custodial guardian would better serve the child.<sup>25</sup> Factors to be considered when determining a child's best interests typically include: age and gender of the child; physical and mental health of the child and the guardians; lifestyle choices of the guardians; emotional connection between the child and the guardians; ability of the guardians to provide the child with necessities such as food, clothing, shelter, and medical care; child's connection to school, home, community, and places of worship; and preference of the child.<sup>26</sup>

While statutes in most states list specific factors that the court *must* consider in making best interests determinations, many state statutes allow the court to consider *any* factor it deems necessary in reaching its decision.<sup>27</sup> For example, Michigan state courts permit judges to include "any other factor considered by the court to be relevant to a particular child custody dispute" when determining the child's best interests,<sup>28</sup> and Virginia state courts allow the consideration of "other factors as the court deems necessary and proper to the determination."<sup>29</sup> As a result, many judges have free reign to, and often do, base their child custody decisions on "personal discretion and common sense."<sup>30</sup>

240 (McKinney 1977) (stating that the court *shall* enter orders for custody and support with regard to the best interests of the child).

<sup>24</sup> Weinstock, *supra* note 19, at 249 ("Despite the prevalence of the best interests test, there is no clear definition of what constitutes the 'child's best interests.'").

<sup>25</sup> See *id.* "Several state statutes suggest factors for courts to consider when determining custody."; see also Kathy T. Graham, *How the ALI Principles Help Eliminate Gender and Sexual Orientation Bias from Custody Determinations*, 8 DUKE J. GENDER L. & POL'Y 323, 324 (2001). "The Legislatures of many states have adopted criteria for the decision maker to consider in determining best interests."

<sup>26</sup> *Summary of State Laws*, *supra* note 22, at 3. Also to be considered in some states are the ways in which parents interact with each other during visitation and the possible existence of any form of abuse by a parent. Graham, *supra* note 25, at 324–25. The conduct, marital status, income, social environment, or lifestyle of a parent may also be considered in some states if these factors may adversely impact the child.

<sup>27</sup> See, e.g., *Summary of State Laws*, *supra* note 22, at 16 (listing Michigan's "best interests of the child" statute); see also N.D. CENT. CODE ANN. § 14-09-06.2(1) (2000) (stating that the child's best interests factors include "any other factors considered by the court to be relevant to a particular child custody dispute").

<sup>28</sup> MICH. COMP. LAWS ANN. § 722.23 (2000).

<sup>29</sup> *Id.* (citing VA. CODE ANN. § 20-124.3 (2005)).

<sup>30</sup> Weinstock, *supra* note 19, at 249. The best interests standard allows the judge to rule based on his or her personal idea of what is in the child's best interest, even though such a belief might not be accurate; consequently, this free reign can lead to judicial abuse because the judge may allow personal beliefs to influence his decision. See Graham, *supra* note 25, at 325. The broadness of the best interests standard makes it possible for judge's ethical and moral beliefs to influence his or her decision.

*B. The Courts' Use of Race as a Factor in Best Interests Custody Proceedings*

a. Pre-Palmore: Free Reign for the Courts

Although “[j]udicial consideration of race in a custody proceeding lacks any [state] statutory support,”<sup>31</sup> many courts have given significant weight to the race of a party seeking custody when making their decisions. Consider *In re B.*,<sup>32</sup> a 1977 New York case, in which a black child placed in the care of a white foster mother became the subject of a custody battle. The child’s birth parents, who had previously abandoned him upon becoming heavily involved with drugs but who claimed to have subsequently rehabilitated themselves, petitioned for custody of their son.<sup>33</sup> In holding that the child’s birth parents were to be awarded custody, the family court noted, “the concept of “[b]lack pride” is an important one . . . [and] this child’s self-image and acceptance of his [b]lack identity are crucial to his adjustment in life and his place in the world.”<sup>34</sup>

Courts have considered not only the race of parents or guardians seeking custody in determining a child’s best interests, but also the race of non-petitioning spouses and paramours of parties seeking custody, with whom the child in question would interact on a daily basis. For example, in the 1974 case of *White v. Appleton*,<sup>35</sup> where both mother and father were white, an Alabama Appellate Court upheld the lower court’s award of custody to the father upon the mother’s remarriage to a black man. The court suggested that placing the child in the home of a mother with whom the child had not spent much time and a man of a different race could be a “traumatic experience.”<sup>36</sup> Additionally, in *Russell v. Russell*,<sup>37</sup> decided in 1979, an Illinois Appellate Court noted, in upholding the lower court’s decision to award custody to the father, that the mother’s remarriage to a

<sup>31</sup> Weinstock, *supra* note 19, at 251.

<sup>32</sup> 391 N.Y.S.2d 812 (1977) (awarding custody to the natural parents while noting the importance of black pride as important to a child’s self-image and acceptance).

<sup>33</sup> *Id.* at 812. The birth mother in this case also sought custody of two other children she had abandoned, but who had been placed together in the foster care of a black family.

<sup>34</sup> *Id.* at 814.

<sup>35</sup> 304 So.2d 206 (Ala. Civ. App. 1974) (awarding custody to the father after the mother’s remarriage to a black man).

<sup>36</sup> *Id.* at 209.

<sup>37</sup> 399 N.E.2d 212 (Ill. App. Ct. 1979) (affirming a lower’s court decision of awarding custody to the father in part because the mother’s remarriage to a black man would create social problems for the child).

black man would create potential social problems for the subject child.<sup>38</sup>

Courts' justifications for custody decisions based upon race run from semi-plausible rationalizations to unabashed racism. Before *Palmore*, in those cases where adverse parties to custody cases were of the same race but one party had entered into a relationship with an individual of another race, courts cited societal prejudices as the basis for their best interests determinations, claiming that the prospective guardian's interracial marriage could have a negative effect on the subject child.<sup>39</sup> Courts additionally suggested, in cases where potential custodians were of different races, that a biracial or black child's emotional well-being would be better served by living with non-Caucasian guardians because such guardians could help the child develop his or her identity and assist in the child's connection to his or her heritage.<sup>40</sup> Shockingly, in the 1976 case of *Beazley v. Davis*,<sup>41</sup> before the Nevada Supreme Court overturned the order, the district court judge awarded custody to the black father after looking at photographs of the subject children and determining that they possessed 'Negroid' characteristics.<sup>42</sup>

#### b. An Attempt at Change: *Palmore v. Sidoti*

In 1984, after decades of race-based custody decisions, the United States Supreme Court finally addressed the issue head-on in the landmark case *Palmore v. Sidoti*.<sup>43</sup> *Palmore* involved a custody dispute between white parents from Florida.<sup>44</sup> Following their divorce, the mother was awarded custody and remained sole custodian for over a year until the father filed a petition seeking to modify the prior judgment, citing a change in circumstances – the mother's cohabitation with and subsequent marriage to a black man – as grounds for a modification of custody.<sup>45</sup> A Florida Circuit Court noted that the mother had “chosen for herself and for her child, a

<sup>38</sup> *Id.* at 214 (reasoning that since the mother's remarriage was interracial, the child could be “adversely affected by social pressures as he grew older. . .”).

<sup>39</sup> *See, e.g.,* *Weinstock*, *supra* note 19, at 252 (discussing that some jurisdictions have adopted the view that the potential custodian's interracial relationship could have harmful effects on a child); *see also* *White v. Appleton*, 304 So.2d 206, 209 (Ala. Civ. App. 1974) (stating that placing a child in a home with mother and a strange male of different race could be a traumatic experience for children).

<sup>40</sup> In the *Matter of B.*, 391 N.Y.S.2d 812 (1977) (recognizing that “the concept of ‘Black Pride’” is important and “the child's self-image and acceptance of his Black identity are crucial to his adjustment in life. . .”); *Blackwood*, *supra* note 8, at 219 (discussing the issues of identity and self worth among children as a result of imposing racial differences upon adoption).

<sup>41</sup> *Beazley v. Davis*, 545 P.2d 206 (Nev. 1976).

<sup>42</sup> *Id.* at 207.

<sup>43</sup> *Palmore v. Sidoti*, 466 U.S. 429 (1984).

<sup>44</sup> *Id.* at 430.

<sup>45</sup> *Id.* at 430.

lifestyle unacceptable to the father *and to society*,” and awarded custody to the father.<sup>46</sup> Without offering an opinion, the Second District Court of Appeals affirmed and the United States Supreme Court granted certiorari.<sup>47</sup>

The Supreme Court, while acknowledging the existence of social intolerance against children from racially mixed households, held that “[t]he effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody.”<sup>48</sup> Reversing the trial court’s ruling, the Supreme Court established that it is a violation of the Fourteenth Amendment’s Equal Protection Clause to make a custody determination *solely* on the basis of race and awarded custody again to the mother.<sup>49</sup>

### c. Post-Palmore: Still Wading in Murky Waters

*Palmore* was undoubtedly a step in the right direction, as the Court finally officially recognized that “[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”<sup>50</sup> However, this far from settled the matter because the holding in *Palmore* was limited to the facts in the case.<sup>51</sup> That is, race may not be used as the determining factor where a court must decide whether to remove a child from the home of a natural parent who, despite having engaged in a relationship with an individual of a different race, is an otherwise fit guardian and would provide the child with a healthy and supportive environment.<sup>52</sup>

As a result of the narrowness of *Palmore*, race as a factor in determining a child’s best interests continues to play an important role in many custody cases, even today. For example, *Palmore* failed to address cases in which natural parents, each of a different race, seek custody of their common child.<sup>53</sup> Similarly, no conclusion on race as a best interests

<sup>46</sup> *Id.* at 431 (citing R. at 84 (emphasis added)).

<sup>47</sup> *Id.*

<sup>48</sup> *Palmore*, 466 U.S. at 433.

<sup>49</sup> *Id.* at 432 (stating that the trial court was “entirely candid and made no effort to place its holding on any ground other than race”).

<sup>50</sup> *Id.* at 433.

<sup>51</sup> Weinstock, *supra* note 19, at 260 (finding that *Palmore* was limited to situations where the court is considering removing the child from the natural parent even though the parent is a fit guardian).

<sup>52</sup> *Id.* “[I]n a child custody proceeding between natural parents of the same race, the effects of racial prejudice resulting from the mother’s interracial relationship cannot justify removing a child from the custody of the natural and fit mother.”

<sup>53</sup> *Id.* at 261 (noting that the Court’s narrow decision did not address whether racial classifications are permissible in custody disputes involving contesting parties of different race).

factor was reached with regard to parties of a race different than the subject child seeking to gain custody of the child against the wishes of an adverse potential custodian of the same race as the child.<sup>54</sup> Consequently, many courts view *Palmore's* absence of language forbidding racial consideration (as opposed to racial determination) to mean that, so long as the court gives race the same weight as it would any other best interests factor, such may be considered.<sup>55</sup>

Concerning situations in which different race parents of biracial children are engaged in a custody battle, consider *In re Marriage of Gambla*,<sup>56</sup> the case on which this Note's opening hypothetical situation is based. Recently, in 2006, an Illinois trial court awarded custody to the subject biracial child's black mother instead of her white father, reasoning that the mother could provide the child "with a 'breadth of cultural knowledge' as to her African-American heritage."<sup>57</sup> The court further noted that the child would need to "learn to exist as a biracial woman in a society that is sometimes hostile to such individuals and that [the mother] would be better able to provide for [the child's] emotional needs in this respect."<sup>58</sup> Although the trial court found the parties to be equal on all other best interests factors that the state statute required it to consider, the court held that the factor of race tipped the scales in favor of the mother.<sup>59</sup> An Illinois Appellate Court affirmed, with one justice dissenting.<sup>60</sup> Unfortunately, as *Palmore* did not rule on whether the factor of race might be at least *considered* in deciding a child's best interests in custody decisions, the *Gambla* decision was denied certiorari by the Supreme Court.<sup>61</sup>

With regard to situations in which one guardian is of a different race than the subject child, and the contesting guardian is of the same race as the child, consider *Davis v. Berks County Children & Youth Servs.*<sup>62</sup> In *Davis*,

<sup>54</sup> *Id.* (mentioning that the Court's narrow decision did not address whether racial classifications can be used in a custody dispute involving contesting parties of different races and a child of the same race as one of the parties).

<sup>55</sup> See, e.g., *Brown v. Brown*, 621 N.W.2d 70, 83 (Neb. 2000) ("[A] child's racial identity is one factor among several that may be considered in making custody determinations."); see also *Ebirim v. Ebirim*, 620 N.W.2d 117, 121 (Neb. Ct. App. 2000) ("[R]ace is but one factor among several to be considered in custody determinations.").

<sup>56</sup> 853 N.E.2d 847 (Ill. App. Ct. 2d Dist. 2006).

<sup>57</sup> *Id.* at 868.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 871 (stating that although both parents were good parents, the evidence showed that the mother could "ever so slightly better contribute" to the child's overall well being).

<sup>60</sup> *Id.* at 871-72.

<sup>61</sup> *Gambla v. Woodson*, 128 S. Ct. 39 (2007).

<sup>62</sup> 465 A.2d 614 (Pa. 1983).

decided in 1983, Pennsylvania's Supreme Court ruled on an appeal from the trial court's award of custody of a biracial child<sup>63</sup> to a black couple over a white couple.<sup>64</sup> The white couple petitioning for custody developed a close bond with the subject child over the course of his life, cared him for frequently, and eventually took him in to live with them.<sup>65</sup> The black couple, on the other hand, had only been in temporary custody of the child upon the death of the child's mother.<sup>66</sup> The Pennsylvania Supreme Court not only permitted the consideration of race in determining custody in this case, but encouraged it, reasoning that "a child of one race living in an environment consisting totally or predominately of another race may face numerous psychological and social problems."<sup>67</sup> The court further noted that the award of custody to guardians who share the race of the child would help establish the child's personal and social identity.<sup>68</sup> Like *Gambla*, *Davis* was decided based upon courts' reasoning that a child's interests are better served when custody is awarded to a guardian more racially similar to the child because that guardian can more adequately promote the child's self-acceptance and emotional growth.<sup>69</sup> The court in *Davis*, like that in *Gambla*, made sure to focus on the development of the child in question and not merely the prevalence of societal prejudices against minorities.<sup>70</sup> Further, the court did not consider race to the exclusion of all other factors.<sup>71</sup> Therefore, although *Davis* was decided before *Palmore*, because *Palmore* forbid only custody decisions based solely upon the effects of racial prejudice,<sup>72</sup> it is likely that *Davis* would

<sup>63</sup> *Id.* at 617.

<sup>64</sup> *Id.* at 618. Custody was actually awarded to Berks County Children and Youth Services foster home agency, which "in the posture of this case, meant that physical custody would be with the [black couple]." *Id.*

<sup>65</sup> *Id.* at 617.

<sup>66</sup> *Id.* at 617-18.

<sup>67</sup> Weinstock, *supra* note 19, at 264-65 (quoting *Davis v. Berks County Children and Youth Servs.*, 465 A.2d 614, 623 (Pa. 1983)).

<sup>68</sup> Weinstock, *supra* note 19, at 265 (quoting *Davis*, 465 A.2d at 624) (suggesting that placing a child with a family of his or her own race would create a sense of personal and social identity within the child).

<sup>69</sup> *Davis*, 465 A.2d at 624 ("The major advantage of racial matching is, of course, providing an atmosphere in which to instill in the child a sense of personal and social identity.").

<sup>70</sup> *Id.* at 628. While acknowledging that racial prejudices do exist, the court instead focused their discussion on the fact that, "[i]n comparison with the environment at the [black couple's] residence, the situation with the [white couple] does not seem to be very conducive to the inculcation of a sense of racial identity in [the child]." *Id.* To buttress this opinion, the court cited the lack of blacks in schools in the white couple's all-white neighborhood and the child's lack of black identity. *Id.*

<sup>71</sup> *Id.* at 621. The court also considered the age of the parties petitioning for custody (the white couple were over the age of seventy-five whereas the black couple were under the age of fifty) as well as the well-founded policy that siblings be raised together (the subject child's two half-siblings were in the custody of the black couple). *Id.*

<sup>72</sup> Weinstock, *supra* note 19, at 260. "In *Palmore* the Court unequivocally, but narrowly, held that

survive the *Palmore* standard.<sup>73</sup>

Clearly, “[d]espite the United States Supreme Court’s rare foray into the arena of family law to prohibit the use of race as the *sole* factor to determine child custody [in *Palmore*], the Court declined to define the relationship between the best interests test and race.”<sup>74</sup> Consequently, the question remains open to interpretation and, as such, lower courts are left without clear direction on how to approach this issue.<sup>75</sup>

## II. CURRENT PROBLEMS:

### THE BEST INTERESTS STANDARD MUST BE MODIFIED TO EXCLUDE RACE AS A FACTOR BECAUSE PERMITTING RACE TO BE CONSIDERED IN CUSTODY DETERMINATIONS MAY DO MORE HARM THAN GOOD

It would be inaccurate to argue that race-based custody determinations always result in harm to the subject child. Of course there are numerous situations in which children thrive under the care of a guardian awarded custody by a court that considered race when making its decision. However, the use of race in best interests determinations can certainly negatively affect the subject children in custody proceedings. Indeed, the pros of eliminating race as a factor in the child’s best interests standard far outweigh the cons.<sup>76</sup> Therefore, the best interests standard should be modified so that race may never be a considered factor in custody proceedings.

While this Note proposes the elimination of race as a consideration in the best interests determinations of custody decisions, opposition to this proposal indeed exists. For example, the National Association of Black

in a child custody proceeding between natural parents of the same race, the effects of racial prejudice resulting from the mother’s interracial relationship cannot justify removing a child from the custody of the natural and fit mother.”

<sup>73</sup> *Id.* at 266. “The Pennsylvania Supreme Court’s holding in *Davis*, that race should be considered in adoption disputes between parties of different races, will probably survive the Supreme Court’s decision in *Palmore*.”

<sup>74</sup> Jo Beth Eubanks, *Transracial Adoption in Texas: Should the Best Interests Standard Be Color-Blind?*, 24 ST. MARY’S L. J. 1225, 1256 (1993) (emphasis added).

<sup>75</sup> *Id.* (criticizing the Supreme Court’s failure to provide definite guidance to lower courts); see generally Twila L. Perry, *Power, Possibility and Choice: The Racial Identity of Transracially Adopted Children*, 9 MICH. J. RACE & L. 215, 218 (2003) (reviewing HAWLEY FOGG-DAVIS, *The Ethics of Transracial Adoption*).

<sup>76</sup> See generally Andrew Morrison, *Transracial Adoption: The Pros and Cons and the Parents’ Perspective*, 20 HARV. BLACKLETTER L.J. 167, 203 (2004) (suggesting, after looking at – among other things – the psychological effect of black or biracial children living with white adoptive families, that the advantages of transracial adoption are greater than the disadvantages, as such adoption would likely help to reduce racism and create a healthier, more accepting society); see also Forde-Marzuri, *supra* note 12, at 951–53 (noting the potential advantages of black children living with white parents).

Social Workers (NABSW), according to a 1972 position paper, took a fervent stand against placing black children in white homes for any reason.<sup>77</sup> The paper stated:

[T]he nurturing of self identity is a prime function of the family. The incongruence of a white family performing this function for a Black child is easily recognized . . . .

. . . .

In our society, the developmental needs of Black children are significantly different from those of white children. Black children are taught, from an early age, highly sophisticated coping techniques to deal with racist practices perpetrated by individuals and institutions . . . . Only a Black family can transmit the emotional and sensitive subtleties of perception and reaction essential for a Black child's survival in a racist society . . . . We repudiate the fallacious and fantasied reasoning of some that whites adopting Black children will alter that basic character.<sup>78</sup>

As a result of such beliefs, the NABSW argues that black children should never be placed with white families purely because of the difference in race between child and guardian.<sup>79</sup> The NABSW also proposes that white parents should never be awarded custody of biracial children because "society and those around such children will treat them as [b]lack and, consequently, these children also need to identify positively as [b]lack and cope with racial prejudice."<sup>80</sup> Should courts accept these arguments, the NABSW suggests, not only will black and biracial children's best interests be served, but so will the interests of the black community as a whole.<sup>81</sup>

Just as the NABSW takes such a vehement stand in their belief that race should not only be considered but should be controlling in best interests

<sup>77</sup> See Forde-Mazrui, *supra* note 12, at 926 (quoting from NABSW's position paper, which expresses such opposition to interracial adoption); Asher D. Isaacs, *Interracial Adoption: Permanent Placement and Racial Identity -- An Adoptee's Perspective*, 14 NAT'L BLACK L.J. 126, 129 (1995) (summarizing NABSW's stance on the issue of interracial adoption).

<sup>78</sup> Forde-Mazrui, *supra* note 12, at 926.

<sup>79</sup> *Id.* at 926-27 ("The National Association of Black Social Workers has taken a vehement stand against the placement of Black children in white homes for any reason."); see Isaacs, *supra* note 77, at 129 ("Black children belong physically, psychologically and culturally in Black families in order that they receive the total sense of themselves and develop a sound projection of their future.").

<sup>80</sup> Forde-Mazrui, *supra* note 12, at 927.

<sup>81</sup> *Id.* "The association claims that, by raising Black children to affiliate with the dominant culture, transracial placement removes these children from Black culture and dislocates them from the Black community. In this way, the NABSW argues, transracial placement constitutes 'cultural genocide.'" Isaacs, *supra* note 77, at 129. "The NABSW opposes interracial adoption because it believes that such adoptions are against the best interests of Black people, in general, and Black children, in particular."

custody determinations, so too do those who argue that race should never be considered in custody proceedings.<sup>82</sup> This Note explores the latter view, demonstrating how a court's consideration of race when determining a child's placement is not beneficial to the petitioning parties or the child involved and should, therefore, be excluded from the best interests standard.

There are three main reasons why the best interests standard should be modified to prohibit court's from considering race in child custody proceedings. First, this Note suggests that allowing courts to consider race under the best interests standard in custody cases can lead to an abuse of discretion by the presiding judge. If judges are permitted to consider race, they may base their decisions on personal biases or allow undue weight to be given to race.<sup>83</sup> Second, this Note proposes that permitting courts to consider race in determining a child's best interests assumes that a different race guardian will not be able to facilitate emotional growth in as healthy a manner as a same race guardian. However, this Note contends that just because a guardian is of the same race as the subject child, it does not follow that such a guardian will be better equipped to assist that child in developing emotionally. This contention is supported by findings that children living with custodial parents of a different race are just as fulfilled, self-assured and content as children raised by parents of their own race.<sup>84</sup> Finally, this Note posits that permitting race to be considered in best interests determinations supposes that same-race guardians would enable a child to develop a stronger cultural identity than different race guardians, thereby promoting racial stereotypes. However, research suggests that children raised by parents of a race different than their own may just as easily develop a healthy sense of cultural identity as those raised by guardians whose race matches their own.<sup>85</sup> For all of these reasons, this

<sup>82</sup> See, e.g., Carol R. Goforth, "What is She?" *How Race Matters and Why it Shouldn't*, 46 DEPAUL L. REV. 1, 108 (1996) (opposing racial classifications by government agencies); L. Darnell Weeden, *Creating Race-Neutral Diversity in Federal Procurement in a Post-Adarand World*, 23 WHITTIER L. REV. 951, 961-62 (2002) (arguing that governments cannot fairly take race into account and, therefore, it should not be considered in the affirmative action decisions of the government).

<sup>83</sup> Gayle Pollack, *The Role of Race in Child Custody Decisions Between Natural Parents Over Biracial Children*, 23 N.Y.U. REV. L. & SOC. CHANGE 603, 612 (1997). "The lack of structure over the judicial consideration of race in custody cases allows for judges' personal or unconscious biases to play a role in their decision-making."; cf. Weeden, *supra* note 82, at 961. "[R]acism in our society is so prevalent that governmental institutions simply cannot be trusted to judge people fairly when race is a factor."

<sup>84</sup> See Margaret Howard, *Transracial Adoption: Analysis of the Best Interests Standard*, 59 NOTRE DAME L. REV. 503, 536 (1984) (reviewing the findings of several interracial adoption studies); see also Morrison, *supra* note 76, at 191-93 (summarizing the arguments and findings that demonstrate interracial adoption benefits the children).

<sup>85</sup> See Bartholet, *supra* note 16, at 1224-25 ("[A Feigelman and Silverman study] show[ed] that

Note concludes, the best interests standard should be tailored to prohibit the consideration of race in custody determinations.

*A. Race as a Best Interests Factor Can Lead to Abuses of Judicial Discretion*

The best interests standard should be modified to proscribe race as a permissible factor in custody decisions because permitting race to enter into a judge's determination also permits an abuse of discretion by the courts. Although the broad nature of the best interests standard provides a way in which courts may consider any factor that will affect the child's well being, it also leaves much to the presiding judges' discretion.<sup>86</sup> For this reason, "the subjective interpretations and applications of the 'needs' of the child . . . are subject to very different interpretations"<sup>87</sup> and may allow judges to consider factors, such as race, which may not truly affect a child's welfare. Permitting courts to consider race in determining a child's best interests is, in essence, permitting judges to contemplate racial prejudices and personal biases when making decisions, even if such are unintentionally considered.<sup>88</sup> While it is reasonable to assume that these stereotypes often subconsciously influence a judge's determination, cases have been decided in which the court did little or nothing to hide the weight given to race.<sup>89</sup> Even where courts do not blatantly rely on race, however,

black children raised in white homes are comfortable with their blackness and also uniquely comfortable in dealing with whites."); Richard P. Barth et al., *Predicting Adoption Disruption*, 33 SOC. WORK 227, 229 (1988) (finding that racial differences between parent and adopted child is not related to adoption disruption).

<sup>86</sup> See Forde-Mazrui, *supra* note 12, at 939 (describing the best interests standard as "subjective" and "discretionary" in nature); Howard, *supra* note 84, at 503 (stating that "the [best interests] test is so general and vague that it provides no standard at all, and thus no guidance for decision-making."). See generally *Reisman v. Tenn. Dep't of Human Servs.*, 843 F. Supp. 356, 364 (W.D. Tenn. 1993) (noting that best interests adoption placement decisions of black or mixed-race children are subjective).

<sup>87</sup> *Reisman*, 843 F. Supp. at 364. In *Reisman*, the white foster parents of a biracial baby girl brought suit on behalf of the baby and all others similarly situated against the Tennessee Department of Human Services, claiming the Department's longstanding policy of placing children of mixed heritage with either black or bi-racial families infringed upon the children's constitutional rights. *Id.* at 357-58. The court held that the Department's policy "violate[d] the equal protection rights of the bi-racial children in the class involved in this case." *Id.* at 364.

<sup>88</sup> See Forde-Mazrui, *supra* note 12, at 939 ("By leaving the use of race and its relative weight to the discretion of the court, the best-interests standard allows the judge's own personal and cultural biases to influence her decision."); see also Graham, *supra* note 25, at 325 ("A decisionmaker's own moral and ethical beliefs will likely influence this decision, even when the decisionmaker believes that they do not."); Rashmi Goel, *From Tainted to Sainted: The View of Interracial Relations as Cultural Evangelism*, 2007 WIS. L. REV. 489, 521 (2007) ("[R]ace inadvertently informs judicial decisions, even if judges attempt to be colorblind in their decisions. Judges have preconceived 'value systems, cultural biases, and stereotypical beliefs' that can influence their judgment, particularly if judges are not vigilant in their self-awareness of possible biases they harbor.").

<sup>89</sup> See generally Forde-Mazrui, *supra* note 12, at 940 (citing *Drummond v. Fulton County Dep't of Family & Children's Servs.*, 563 F.2d 1200 (5th Cir. 1977)) (affirming the decision of a lower court to

such a factor may still play a prominent role in custody decisions. Where, as now, the consideration of race is permitted so long as it is not determinative, a court may attempt to downplay its reliance on race and instead focus on other factors to justify a custody decision. Indeed, although courts, in their holdings, claim that race may not be the determinative factor in deciding a child's best interests, undue weight is often given to race.<sup>90</sup>

With the Supreme Court's decision in *Palmore*, "the use of race as a *dispositive* factor seems to have fallen by the wayside. Instead, it remains one of many factors for courts to consider when weighing the child's best interests."<sup>91</sup> However, numerous commentators have suggested that the "explicit race test has merely been hidden within the 'best interests of the child' test."<sup>92</sup> Such practices can have adverse effects because, although courts recognize that race may not be weighed "to the exclusion of all other factors,"<sup>93</sup> it may be difficult for appellate courts, who receive appeals from custody decisions, to determine whether race was indeed the unspoken determinative factor in the lower court's holding.<sup>94</sup> "Consequently, an appellate court may be reluctant to overturn a trial court's custody decree on mere speculation that race played a predominant role in the trial court's custody determination."<sup>95</sup> Instead, the appellate court might opt to justify the lower court's decision by highlighting non-racial factors to suggest that the guardian being denied custody is unfit or unstable and thereby rationalizing the lower court's holding.<sup>96</sup> Further, it is impossible to get a

allow removal of a black child from the home of his white foster parents on the basis of race in order to "avoid the potentially tragic possibility of placing a child in a home with parents who will not be able to cope with the child's problems"); Weinstock, *supra* note 19, at 261–62 (stating that race is an important consideration in multiracial adoption disputes and therefore should be permissible).

<sup>90</sup> See Forde-Mazrui, *supra* note 12, at 939 (finding that although courts that consider race in child placement proceedings typically conclude that race may only be one of many factors, excessive weight is often given to race); see also Graham, *supra* note 25, at 325 (suggesting that although a judge may state that his or her decision was based upon the appropriate facts and factors, the broadness of the standard allows personal biases to sometimes play the larger role than those acceptable factors).

<sup>91</sup> Goel, *supra* note 88, at 521 (emphasis added).

<sup>92</sup> *Id.* "[T]he best interests test does not specify the relevance of race. Thus, judges have ample opportunity to overlook, under-consider, or affirmatively hide the role of race in their custody decisions." *Id.* (quoting Pollack, *supra* note 83, at 611–12).

<sup>93</sup> Weinstock, *supra* note 19, at 253.

<sup>94</sup> See *id.* (discussing the difficult task that appellate courts have in assessing "the weight that lower courts accorded the interracial relationship"); see also Timothy P. Glynn, Note, *The Role of Race in Adoption Proceedings: A Constitutional Critique of the Minnesota Preference States*, 77 MINN. L. REV. 925, 939–40 (1993) (highlighting the broad discretion given to judges to consider race and the lack of a consensus of how trial judges should weigh race in adoption proceedings).

<sup>95</sup> Weinstock, *supra* note 19, at 253.

<sup>96</sup> *Id.* "Appellate courts have avoided determining the weight that the trial court gave racial factors by emphasizing other nonracial factors and deferring to the lower court's discretion."

true idea of how many cases are determined strictly based on race; there likely have been numerous cases decided in which race was given significantly more weight than any other factor, but from which the parties involved did not appeal.<sup>97</sup>

Thus, the best interests standard should be modified to exclude the consideration of race in custody determinations. By leaving room for judges' own personal prejudices to enter into the decision-making process and by allowing courts to downplay the weight given to race by using other factors to point to a guardian's unfitness, the use of race in child custody best interests decisions can lead to an abuse of discretion by the presiding court.

*B. Race as a Best Interests Factor Assumes that Same Race Placement Leads to Greater Emotional Development of the Subject Child*<sup>98</sup>

The best interests standard should be modified to eliminate race as a factor in custody determinations, as it does not follow that because a guardian is of the same race as the subject child, such a guardian will be able to facilitate emotional growth in a more beneficial manner than a different race guardian. Proponents of the inclusion of race as a factor in best interests determinations claim that children of a minority race will be confronted with specific societal prejudices and discrimination, and guardians of a minority race will be better equipped to help these children respond to the pain caused by such treatment than non-minority guardians.<sup>99</sup> Therefore, permitting race to be considered as a best interests factor assumes that awarding custody of the subject child to a same race

<sup>97</sup> See Forde-Mazrui, *supra* note 12, at 942 (discussing how "there many have been countless cases in which race overwhelmingly determined the outcome"); see also *Potter v. Potter* 127 N.W.2d 320, 329 (1964) (affirming the trial courts' decision finding that no evidence of race had been considered when a divorced women remarried a black man and was not granted custody of her child).

<sup>98</sup> See *Palmore v. Sidoti*, 466 U.S. 429, 434 (1984) (holding that the white natural parents vying for custody of a white child and the societal racial prejudices that resulted from the mother's interracial relationship could not be considered in custody determinations); see also *Zreczny*, *supra* note 8, at 1130-31 (noting that in custody disputes between same-race guardians brought about because one parent engaged in an interracial relationship, courts have stated that the parent's interracial relationship is irrelevant); Pollack, *supra* note 83, at 346 (finding that "[t]he implications of *Palmore* for the context of biracial children . . . are unclear.").

<sup>99</sup> See *Reisman v. Tenn. Dep't of Human Servs.*, 843 F. Supp. 356, 360 (W.D. Tenn. 1993) (stating that in transracial adoption proceedings "the preference for a black family over white, all other things being equal, is based upon the belief that the bi-racial child will encounter prejudices as a person of mixed race and that their black parents are in a position to help them respond to that pain and adjust to it."); see also Forde-Mazrui, *supra* note 12, at 926 (discussing the National Association of Black Social Workers statement in a 1972 position paper, that "Black children in white homes are cut off from the healthy development of themselves as Black people, which development is the normal expectation and only true humanistic goal").

guardian will result in a healthier, more emotionally developed child. However, children raised by different race guardians are just as happy, well rounded, and emotionally developed as those children who are raised by parents of their own race.<sup>100</sup> Indeed, children raised by different race custodians “‘grow up healthy, comfortable in both communities.’ ‘They are people who understand their own identities and are comfortable with them.’”<sup>101</sup>

Admittedly, as noted in *Reisman v. Tennessee Dep’t of Human Servs.*, decided in 1993, supporters of race-matching validly argue that “‘typically black Americans have experienced [things like prejudice and discrimination] day to day throughout their lives and have some advantages over white Americans who may have not experienced those same confrontations and confusion.’”<sup>102</sup> However, the ability of different race guardians to assist the subject child in developing emotionally despite this inexperience becomes evident upon review of several studies of minority children adopted by families of a race different from themselves. Although these studies deal with children involved in adoption practices (and not specifically in custody proceedings), they are useful for the purposes of this Note because they examine the psychological and emotional effects that children living with guardians of a race different than their own generally experience.

Adoption proceedings (including transracial adoptions) are similar to child custody proceedings in that both abide by the best interests standard and are governed by state statutes that do not explicitly include race as a factor to be considered.<sup>103</sup> These studies suggest that, in general, transracially adopted children (black or biracial children adopted by white families) develop well emotionally.<sup>104</sup> For example, empirical studies

<sup>100</sup> See *Reisman*, 843 F. Supp. at 361 (citing R. at 1:32–33) (describing that Dr. Rita Simon, who completed a study researching the affects of transracial adoption, found that being raised by white families does not have an adverse affect on non-white children); see also *Edel v. Edel*, 97 Mich. App. 266, 272 (1980) (noting that “there has been a marked increase in the United States in recent years of interracial marriages and trans-racial adoptions, and sociological studies establish that children raised in a home consisting of a father and mother who are of different races do not suffer from this circumstance.”).

<sup>101</sup> *Reisman*, 843 F. Supp. at 361 (citing R. at 1:39).

<sup>102</sup> *Id.* at 360 (citing R. at 1:211).

<sup>103</sup> See, e.g., NY DOM. REL. § 114 (2009) (articulating the best interests standard and making no mention of race as a factor to be considered); see also Howard, *supra* note 84, at 516 (noting that “[a]doption is governed by the best interests principle, and most adoption statutes make no mention of race.”).

<sup>104</sup> See, e.g., Lucille J. Grow & Deborah Shapiro, *Black Children—White Parents: A Study of Transracial Adoption*, SOC. WORK, 412 (1975) (“A study was made of black or partly black children . . . who had been in the homes of their white adoptive parents for at least three years . . . and the rate of success was 77 percent.”; see also Howard, *supra* note 84, at 536 (“The studies indicate that

conducted by a “diverse group of researchers that included blacks and whites, critics and supporters of transracial adoption,” present “an overwhelming endorsement of transracial adoption.”<sup>105</sup> One such study found that a child’s race contributed to familial problems in only thirteen-percent of families studied.<sup>106</sup> Another found that being raised by non-white families does not have a negative effect on adopted non-white children.<sup>107</sup>

Not only does the consideration of race in best interests determinations fail to enhance the child’s well being, but race as a best interests factor could even harm the subject child. Consider *McLaughlin v. Pernsley*,<sup>108</sup> in which a two and one-half year-old black child, Raymond, suffered deep clinical depression after an adoption agency removed him from his white foster parents with whom he had lived for two years and transferred him to a black foster family.<sup>109</sup> As evidenced by Raymond’s severe emotional upset due to removal from his white foster parents in *Pernsley*, this Note suggests that a child’s interests are not served simply because a parent or guardian is of a certain race. Therefore, because different race parents are just as capable of facilitating emotional growth within their custodial child as same race guardians, the best interests standard should be tailored to explicitly exclude the consideration of race in custody determinations.

transracially adopted children, generally speaking, experience good emotional development.”).

<sup>105</sup> Barthelet, *supra* note 16, at 1209.

<sup>106</sup> See, e.g., Grow & Shapiro, *supra* note 104, at 412 (finding that the study revealed a significantly low number of children were negatively affected by transracial adoption); see also Howard, *supra* note 84, at 536 (noting that two caveats existed which may make Grow and Shapiro’s number even lower: first, the problems noted in children studied may have resulted from “emotional scars” caused by “longer periods of time in foster care and . . . more frequent moves,” and may not be the result of transracial placement, and second, the noted problems in the subject children may be the result of societal prejudices and stereotypes, and not the transracial placement).

<sup>107</sup> *Reisman*, 843 F. Supp. at 361. This particular study, conducted by Dr. Simon, spanned twenty years and involved 204 groups of white parents who had adopted at least one non-white child. *Id.* Dr. Simon conducted interviews of all children involved when they were between the ages of four and seven, and tracked each family and child as much as possible in subsequent years. *Id.* In her expert testimony as a witness in the *Reisman* case, Dr. Simon “opined that the race of an adoptive parent should not be a factor in the adoption placement.” *Id.*; Anjana Bahl, *Color-Coordinated Families: Race Matching in Adoption in the United States and Britain*, 28 LOY. U. CHI. L.J. 41, 53 (1996). “[S]everal empirical studies have confirmed the success of transracial adoptions, concluding that the children adjust to their new family as well as those placed with a same-race family.”

<sup>108</sup> 693 F. Supp. 318 (E.D. Pa. 1988). The court in this case granted a preliminary injunction submitted by the McLaughlins, the white foster parents, to have Raymond returned to them. *Id.* A number of medical experts testified as to Raymond’s condition, all concluding that returning Raymond to the McLaughlins would be in Raymond’s best interests and would ameliorate his depression. *Id.*

<sup>109</sup> Forde-Mazrui, *supra* note 12, at 940.

*C. Race as a Best Interests Factor Supposes that Same Race Placement Provides the Subject Child with a Stronger Cultural Identity and Thereby Promotes Racial Stereotypes*

The best interests standard should be modified to eliminate race as a factor in custody determinations because a guardian's race does not automatically affect a child's development of cultural identity. Advocates of race as a best interests factor contend that minority children placed with non-minority guardians will "lose their [cultural] identity . . . and suffer adjustment problems as a result. They argue that white parents, no matter how hard they try, simply cannot provide an environment in which the child can retain or develop his or her [cultural] identity."<sup>110</sup> Therefore, permitting the use of race as a best interests factor assumes that same race guardians are better suited to aid a child in developing a distinct cultural identity. However, children of a minority race who are raised by white parents may just as easily develop a unique sense of cultural identity as those children who are raised by mixed or minority race parents.<sup>111</sup> For example, a study performed over the course of twenty years of 204 white parents who had adopted at least one non-white child revealed that "children did not have problems with racial identity as a result of their placement in a home of another race."<sup>112</sup> Indeed, the majority of adopted children living in interracial families enjoy a strong sense of self as well as cultural heritage.<sup>113</sup> It is, therefore, logical to assume that the race of a guardian seeking custody has no significant effect on the ability of that guardian to develop within his or her child a distinct sense of self and appreciation for his or her child's culture.

Concededly, not all non-minority guardians could successfully promote

<sup>110</sup> Howard, *supra* note 84, at 538 (discussing black and Indian children raised in white households). See Forde-Mazrui, *supra* note 12, at 926 (noting that "[The NABSW] argues that a black child needs to be raised by black parents in order to develop a positive racial identity.").

<sup>111</sup> See generally Jehna Irene Hanan, Comment, *The Best Interest of the Child: Eliminating Discrimination in the Screening of Adoptive Parents*, 27 GOLDEN GATE U.L. REV. 167, 196 (1997). "[M]ost adopted children in interracial families have a sense of identity and cultural heritage." Barholet, *supra* note 16, at 1209. "With astounding uniformity . . . research shows transracial adoption working well from the viewpoint of the children and the adoptive families involved. The children are doing well in terms of such factors as achievement, adjustment, and self-esteem."

<sup>112</sup> *Reisman*, 843 F. Supp. at 361.

<sup>113</sup> Hanan, *supra* note 111, at 196 ("Studies show that seventy-five percent of interracially adopted children adjust well in their adoptive families and have the same levels of self-esteem as other children."); see generally Arnold R. Silverman, *Outcomes of Transracial Adoption*, 3 THE FUTURE OF CHILDREN – ADOPTION 104, 104 (Richard E. Behrman, M.D., ed., 1993) ("Most transracial adoptees have a sense of identity with their racial heritage.").

the development of strong cultural identity in minority children, as “[i]t may be difficult, if not impossible, for white parents to raise their children in a culture foreign to their own.”<sup>114</sup> For this reason, race-matching advocates, like the NABSW, promote best interests decisions based upon race to the exclusion of all other factors.<sup>115</sup> However, many white parents and guardians have successfully instilled in their black or biracial children significant cultural pride,<sup>116</sup> indicating that, absent a few exceptions, the race of a custodial guardian is irrelevant and the desire of a guardian to encourage such pride in the child is truly important. “The strength of this sense of identity depends on the . . . parents’ efforts to foster it,”<sup>117</sup> meaning that if a parent desires to encourage such development, a child can effectively acquire cultural appreciation and identification. This may be done through various means, such as providing the child with informational materials regarding the child’s culture, familiarizing the child with individuals similar to the child’s ethnicity, and surrounding the child with a non-judgmental and accepting environment.<sup>118</sup>

Further support for the elimination of race as a best interests factor in custody determinations is the fact that “not all black families identify with black culture, nor would they provide such a cultural setting for their children.”<sup>119</sup> Presuming that minority children will develop stronger cultural identities with minority parents than with white parents “buys into and perpetuates racial stereotypes, a notion which inevitably works against those who are stereotyped.”<sup>120</sup> Therefore, to suppose that children are better served with parents of their own race is to enforce the belief in those children that they will only develop emotionally and culturally if they are cared for by parents with whom they resemble physically. This Note

<sup>114</sup> Forde-Mazrui, *supra* note 12, at 948.

<sup>115</sup> *Id.*; see Howard, *supra* note 84, at 538 (noting the position of transracial adoption opponents that white parents cannot properly foster ethnic identity).

<sup>116</sup> See Hanan, *supra* note 111, at 200 (observing that “white parents are as able as any other parents to give their children a positive sense of themselves racially and individually.”). See generally Bartholet, *supra* note 16, at 1209 (stating that studies regarding transracial adoption conclude that non-white children placed with white families “developed strong senses of racial identity”).

<sup>117</sup> Hanan, *supra* note 111, at 196.

<sup>118</sup> *Id.* at 196–97. Consider *Reisman v. Tenn. Dep’t of Human Servs.*, in which a witness – a Caucasian woman who had adopted two biracial girls – testifying for the plaintiffs, explained that to accommodate the biracial heritage of her biracial daughters, she and her husband moved from one suburban community to another which was more integrated, both residentially and from a public school standpoint. 843 F. Supp. 356, 362 (W.D. Tenn. 1993). The same witness testified that she and her family meet monthly for potluck dinners with a group of interracial families. *Id.*

<sup>119</sup> Forde-Mazrui, *supra* note 12, at 948. See Goforth, *supra* note 82, at 38 (noting that “Black parents will not always rear their children in accordance with the NABSW’s ideas of what constitutes appropriate Black culture”).

<sup>120</sup> Goforth, *supra* note 82, at 38.

proposes that instilling this belief in a child will undoubtedly affect that child down the road by creating the assumption that individuals of his or her own race are the only individuals who truly understand him or her. Such a belief furthers the racial prejudices and stereotypes that have become all too common in our society.

Assuming that a Caucasian parent would not be able to aid a black or biracial child in developing a unique cultural identity is equivalent to assuming that a male parent would not be able to help a female child develop a secure sense of self and identification with the female gender. Both assumptions are baseless; there is no valid reason to presume that a parent – simply because of his or her exterior appearance – would lack the ability to facilitate the development of a healthy identity within his or her child. Thus, the best interests standard should be tailored to explicitly exclude race as a factor in custody proceedings.

### III. THE PROPOSED GOAL: A COLORBLIND COURT

As discussed above, the use of race as a factor in determining the best interests of a child in custody proceedings is more detrimental than beneficial. Not only does the consideration of race in best interests determinations negatively affect the subject child and the guardians seeking custody of the subject child, but such consideration also harms society by reinforcing societal prejudices and stereotypes. For these reasons, the best interests standard should be modified to unambiguously prohibit the consideration of race in child custody decisions. Should courts decide to completely dispel race as a factor in children's best interests determinations, this Note suggests, the legal system, families dealing with custody issues, and society as a whole will reap the benefits. Barring race as a best interests consideration would limit racial intolerance and discrimination.<sup>121</sup> Additionally, courts would be forced to examine other, much more pertinent factors when making their determinations regarding child custody – a situation that would ultimately lead to a better life for the child at hand. Thus, courts, when making best interests determinations in custody decisions, should never consider race.

<sup>121</sup> See Barholet, *supra* note 16, at 1248 (“[T]ransracial adoptive families constitute an interesting model of how we might better learn to live with one another in this society. These families can work only if there is appreciation of racial difference, and love that transcends such difference. And the evidence indicates that these families *do* work.”); Forde-Mazrui, *supra* note 12, at 965 (“A transracially placed child . . . is in the best position to see the commonality between Black and white people and the irrationality of racial barriers to communication, respect, and understanding.”).

*A. Modifying the Best Interests Standard by Eliminating the Consideration of Race May Reduce Societal Prejudices and Biases*

Amending the best interests standard by prohibiting the use of race as a factor in custody proceedings may help to limit racial prejudices and stereotypes.<sup>122</sup> Surely, as the *Palmore* court noted, “[i]t would ignore reality to suggest that racial and ethnic prejudices do not exist.”<sup>123</sup> This does not mean, however, that courts should allow such societal views to factor into their determinations and permit these prejudices to persist. Instead, prohibiting the consideration of race in best interests determinations may help to “bridge the gap between black and white people and may reduce racial tension and the discriminatory obstacles to opportunities that [minorities] continue to encounter in American society.”<sup>124</sup> Recall *McLaughlin v. Pernsley*,<sup>125</sup> in which a young black boy experienced severe depression when the family court removed him from the white family with whom he had been living and placed him with a family who shared his race. As Judge Hannum stated in *Pernsley*, “Deciding [the subject child]’s placement not on the basis of his race, but on the quality of his relationships [with the contesting parties], will advance the strong public interest in overcoming racial discrimination and will promote the goal that citizens be treated according to their individual human qualities.”<sup>126</sup>

Not only would society benefit from the elimination of race as a best interests factor, but the children involved in custody proceedings would benefit as well. As the court noted in *In re Kramer*, a case decided in Iowa in 1980, “[i]f . . . children are raised in a happy and stable home, they will be able to cope with prejudice and hopefully learn that people are unique individuals who should be judged as such.”<sup>127</sup> Not only could transracial placement teach children to be less race-conscious,<sup>128</sup> but it could also

<sup>122</sup> Forde-Mazrui, *supra* note 12, at 965 (noting that awarding custody to a parent of a different race, if the parent meets the best interests standard based on factors other than race, may “reduce racism by increasing understanding through integration”). Howard, *supra* note 84, at 540 (explaining a study that found that “white and non-white children raised in mixed-race families were less likely to have pro-white attitudes or to associate ‘white’ with positive and desirable characteristics than were both white and non-white children generally”).

<sup>123</sup> *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

<sup>124</sup> Forde-Mazrui, *supra* note 12, at 965.

<sup>125</sup> 693 F. Supp. 318, 327 (E.D. Pa. 1988).

<sup>126</sup> *Race Barred in Placing a Child*, N.Y. TIMES, Aug. 25, 1988, available at <http://www.nytimes.com/1988/08/25/garden/race-barred-in-placing-a-child.html>.

<sup>127</sup> 297 N.W.2d 359, 361–62 (Iowa 1980) (quoting *Commonwealth ex rel. Lucas v. Kreisher*, 450 Pa. 352, 356 (1973)).

<sup>128</sup> See Forde-Mazrui, *supra* note 12, at 953–54 (stating that “white parents, by deemphasizing

enable a child to better cope with racism, as a non-minority parent's denial of a minority race's "inferiority may be more believable because it is less self-serving . . . [and] will appear to be solely to support and show love for this child."<sup>129</sup>

Therefore, should courts heed Judge Hannum's words and modify the best interests standard by eliminating race as a factor in custody cases, society as a whole may improve as racial minorities encounter fewer racial prejudices and experience less discrimination. Quite eloquently stated by Elizabeth Bartholet, a Harvard Law School professor,<sup>130</sup> transracial placement advocate,<sup>131</sup> and mother of two adopted boys from Peru:<sup>132</sup>

[O]ne can recognize the importance of racial and cultural difference without subscribing to separatism. One can celebrate a child's racial identity without insisting that the child born with a particular racial make-up must live within a prescribed racial community. One can recognize that there are an endless variety of ways individual members of various racial groups choose to define their identities and to define themselves in relationship to racial and other groups. One can believe that people are fully capable of loving those who are not biological and racial likes, but are 'other,' and that it is important that more learn to do so. One can see the elimination of racial hostilities as more important than the promotion of cultural difference.<sup>133</sup>

*B. Modifying the Best Interests Standard by Eliminating the Consideration of Race May Compel Courts to Consider Relevant Factors*

Forcing courts to reject race as a factor in best interests determinations may help them focus on factors which legitimately affect a child's well being. It is clear that a judge's personal "unconscious and uncountered racism in custody determinations can skew placements so that race becomes determinative and other factors relevant to the child's best interests remain unexplored."<sup>134</sup> Further, as previously noted, even if courts obey *Palmore's* holding and do not consider race to the exclusion of other

race, may enable a Black child to cope better with racial attacks because the child may view the attacks less personally."); see also Dov Fox, Note, *Racial Classification in Assisted Reproduction*, 118 YALE L.J. 1844, 1892 n.236 (2009) (citing research and studies showing benefits to children of transracial adoption).

<sup>129</sup> *Id.* at 954.

<sup>130</sup> Bartholet, *supra* note 16, at 1163.

<sup>131</sup> *Id.* at 1248.

<sup>132</sup> *Id.* at 1166-68.

<sup>133</sup> *Id.* at 1247-48.

<sup>134</sup> Pollack, *supra* note 83, at 615.

factors, race may still end up being determinative. Surely, there is not any “analytic substance to the distinction between using race as a ‘sole’ factor and using it to ‘tip scales’ that would otherwise be balanced differently.”<sup>135</sup> Therefore, in a significant number of custody cases where race is considered, other relevant factors are not significantly taken into account. This Note suggests that, should judges consider these other factors, different determinations might be reached.

As noted above, by considering race, a court assumes that same-race parents would be better equipped to place at ease a child who is confronted with racial prejudices. In addition to reasons already discussed, this assumption is faulty because while parents should aim to “provide the love and nurturing to help overcome the hurt that society might impose upon a biracial person,”<sup>136</sup> a prerequisite to providing such comfort to a child in need is surely not a certain complexion or physical appearance. This Note offers that if a parent or guardian is devoted and caring, and can provide for and meet the needs of the subject child, that child’s best interests will undoubtedly be served. Therefore, by tailoring the best interests standard to proscribe the consideration of race in custody determinations, judges may instead focus on those factors which are truly telling of a potential guardian’s capabilities of providing for the child’s interests.

#### CONCLUSION

While racial discrimination undeniably exists in America today, it important to recognize the significant advances that have been made through the destruction of various hurdles that have previously prevented minorities from achieving the same goals as their non-minority counterparts. Certainly, as Barack Obama prepares to become our forty-fourth President,<sup>137</sup> so too must we prepare to continue charging ahead, refusing to focus on color, and instead opting to focus on the person behind that color. It only follows, then, that state courts keep up, deciding cases based upon relevant facts and not upon personal or societal biases. By modifying the best interests standard to eliminate the consideration of race as a best interests factor in custody determinations, as this Note suggests, judges will be forced to concentrate instead on those factors that will truly

<sup>135</sup> David D. Meyer, *Lecture: Paltmore Comes of Age: The Place of Race in the Placement of Children*, 18 U. FLA. J.L. & PUB. POL’Y 183, 194 (2007).

<sup>136</sup> *Reisman v. State Dep’t of Human Servs.*, 843 F. Supp. 356, 364 (W.D. Tenn. 1998).

<sup>137</sup> *See, e.g.*, Nagourmey, *supra* note 5 (reporting on Barack Obama winning the 2008 election to become the 44th president of the United States).

serve the subject child's best interest. Further, in doing so, as this Note points out, decisions made without any consideration of race may help to reduce societal prejudices and discrimination. Elimination of race as a factor in custody proceedings will not only help society, but will also better serve the subject child's best interests – the true goal of the family court in custody cases.

